



Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1231

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** A. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated September 8, 2022  
(GE-22-1572)

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**Tribunal member:** Melanie Petrunia

**Decision date:** November 9, 2022

**File number:** AD-22-692

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant, A. M. (Claimant), was dismissed from her job as a registered nurse because she did not comply with the employer's COVID-19 vaccination policy. She applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's dismissal was misconduct. It disqualified the Claimant from receiving benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant lost her job because of misconduct and she is disqualified from receiving EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues the General Division based its decision on important errors of fact.

[6] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

## Issues

[7] The issues are:

- a) Is there an arguable case that the General Division based its decision on an important error of fact when it found the Claimant did not provide documents to prove a religious exemption?

- b) Is there an arguable case that the General Division based its decision on an important error of fact by failing to consider that the employer's mandate was a violation of human rights?
- c) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

## Analysis

[8] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?<sup>1</sup>

[9] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the Department of Employment and Social Development Act (DESD Act).<sup>2</sup>

[10] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;<sup>3</sup> or
- d) made an error in law.<sup>4</sup>

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<sup>1</sup> This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

<sup>2</sup> DESD Act, s 58(2).

<sup>3</sup> The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

<sup>4</sup> This paraphrases the grounds of appeal.

[11] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.<sup>5</sup>

## **Background**

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19. The Claimant submitted a request for an exemption from the policy based on religious beliefs. This request was denied. The employer dismissed the Claimant for failing to comply with the policy.

[13] The Commission decided that the reason for the Claimant's dismissal was misconduct. It decided that she was disqualified from receiving EI benefits. The Claimant appealed this decision to the Tribunal's General Division. She argued that the employer violated her human rights and should have granted her an exemption based on her religious beliefs.

[14] The General Division dismissed the Claimant's appeal. It found that the Claimant was aware that failing to comply with the employer's policy could lead to her dismissal. It found that the employer did not grant her an exemption and therefore she was required to comply with the vaccination policy.<sup>6</sup>

[15] The General Division also considered the Claimant's arguments that the employer violated her human rights. It found that that it was not within its jurisdiction to decide whether the employer's policy was fair or reasonable.<sup>7</sup> The General Division found that the only issue it had to decide was whether the Claimant lost her job because of misconduct.<sup>8</sup>

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<sup>5</sup> *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

<sup>6</sup> General Division decision at para 19.

<sup>7</sup> General Division decision at para 20.

<sup>8</sup> General Division decision at para 21.

## **There is no arguable case that the General Division decision made an error of fact**

[16] The Claimant argues that the General Division made an important errors of fact. She says that she provided documents from religious leaders which were discussed at the hearing and ignored by the General Division. She also argues that the General Division erred because the employer's mandate was a violation of human rights.

[17] In its decision, the General Division found that the Commission had proven there was misconduct.<sup>9</sup> In considering the Claimant's argument that the employer should have granted her a religious exemption, the General Division stated:

I agree with the Commission that the Claimant did not provide a document from a religious leader at her church staying she was advised not to receive any of the Covid-19 vaccines for a religious reason.<sup>10</sup>

[18] The Claimant says that this statement by the General Division is wrong. She argues that she did provide documents and that they were discussed at the hearing before the General Division. The Claimant says that the General Division ignored the documents and the answers she gave about them. The Claimant says that she provided documents from the Liberty Coalition Canada and Christ's Forgiveness Ministries.<sup>11</sup>

[19] I have listened to the hearing before the General Division. The General Division asked the Claimant about her request for an exemption, which she confirmed that she submitted in writing.<sup>12</sup> The Claimant said that she received a formal response from the employer denying the request because it did not meet the criteria. She said that submitted more documentation and the request was still denied.<sup>13</sup>

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<sup>9</sup> General Division decision at para 19.

<sup>10</sup> General Division decision at para 19.

<sup>11</sup> AD1-5

<sup>12</sup> Recording of General Division hearing at 14:50.

<sup>13</sup> Recording of General Division hearing at 16:00 to 16:30.

[20] The Claimant told the General Division that she feels strongly about her religious beliefs.<sup>14</sup> She explained her reasons why she did not feel she could get the vaccine. She said that she does not understand why her request for an exemption was denied.<sup>15</sup>

[21] The General Division explained the Commission's position that she provided documents to support her views but did not provide a document from a religious leader at her church stating that she was advised not to get the vaccine.<sup>16</sup> The Claimant stated that she did provide a letter from the Christian Forgiveness Ministries.<sup>17</sup>

[22] In its decision, the General Division does not discuss these documents. The Claimant had provided to Service Canada all of the documents that she gave to the employer and they are part of the record.<sup>18</sup>

[23] There is no document in the record before the General Division from a religious leader at her church stating she was advised not to receive any of the Covid-19 vaccines for a religious reason. I find that there is no arguable case that the General Division based its decision on an important error of fact.

[24] The decision of the General Division also goes on to state that the employer did not allow the Claimant's request for a religious exemption.<sup>19</sup> The Claimant agreed that this was the case. There is no arguable case that the General Division made an important error of fact in this finding. The Claimant was aware that her exemption request was denied and knew that failing to comply with the vaccination policy could lead to her dismissal.

[25] The Claimant argues that she was not asking the General Division for compassion. She says that there was no just cause for discrimination. She says that she told the General Division at the hearing that an Ontario arbitrator found that an

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<sup>14</sup> Recording of General Division hearing at 29:00.

<sup>15</sup> Recording of General Division hearing at 29:45.

<sup>16</sup> Recording of General Division hearing at 32:00.

<sup>17</sup> Recording of General Division hearing at 33:00.

<sup>18</sup> See GD3-20 and GD3-27 to GD3-45.

<sup>19</sup> General Division decision at para 19.

employee was discriminated against when an employer denied an exemption request based on the sincere beliefs of the employee.<sup>20</sup>

[26] The General Division considered the Claimant's arguments that the employer violated her human rights. It found that it is not within the jurisdiction of the Tribunal to decide whether the employer's policy was fair or reasonable. The General Division noted that there are other venues for the Claimant to pursue these arguments.<sup>21</sup>

[27] The General Division cited a decision of the Federal Court.<sup>22</sup> This decision states that the conduct of the employer is not relevant to the issue of misconduct.<sup>23</sup> There is no arguable case that the General Division based its decision on an important error of fact by not deciding whether the employer's policy was fair or reasonable.

[28] The Claimant stated in her application for leave to appeal that this was an important error of fact. I have also considered whether the General Division may have made an error of jurisdiction or law by not deciding whether the Claimant's rights were violated by the employer's policy, or whether there was just cause for her dismissal.

[29] Both the Federal Court and Federal Court of Appeal have said that the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and these issues can be dealt with in other forums.<sup>24</sup>

[30] I find that there is no arguable case that the General Division misinterpreted or misapplied the law, or that it made an error of jurisdiction.

[31] There is no arguable case that the General Division based its decision on an important error of fact when it found the Claimant did not provide documents to prove a

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<sup>20</sup> AD1-5

<sup>21</sup> General Division decision at para 19.

<sup>22</sup> General Division decision at footnote 7 references *Paradis v Canada (Attorney General)*, 2016 FC 1281 (*Paradis*).

<sup>23</sup> See *Paradis* at para 31.

<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

religious exemption. There is also no arguable case that the General Division erred by failing to consider whether the employer's mandate violated the Claimant's human rights.

[32] Aside from the Claimant's arguments, I have also considered other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any errors of law.

[33] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

## **Conclusion**

[34] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia  
Member, Appeal Division