



Citation: *LC v Canada Employment Insurance Commission*, 2023 SST 163

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

# **Leave to Appeal Decision**

**Applicant:** L. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated October 31, 2022  
(GE-22-1789)

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**Tribunal member:** Melanie Petrunia

**Decision date:** February 15, 2023

**File number:** AD-22-930

## **Decision**

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

## **Overview**

[2] The Applicant, L. C. (Claimant), was suspended from her job at a long-term care home 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 disentitled the Claimant from receiving benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was suspended from her job because of misconduct and she is disentitled 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 by failing to consider whether the Claimant had valid reasons for not complying with the policy?
- b) 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

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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.

d) made an error in law.<sup>4</sup>

[11] Before the Claimant can move on to the next stage of the appeal, I must 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>

**There is no arguable case that the General Division based its decision on an important mistake about the facts**

[12] In her request for leave to appeal, the Claimant argues that the General Division based its decision on an important mistake about the facts.

[13] The Claimant says that she did not choose to not get vaccinated out of defiance. She says that she chose to wait until she had all the proper information about the safety of the vaccine. The Claimant argues that she asked her employer for more information and requested accommodations, which were denied.<sup>6</sup>

[14] The Claimant argues that her employer was aware that she was not being defiant when she did not comply with the policy. She outlines that she asked her employer many times to answer questions about the safety of the vaccine. These requests went unanswered. Therefore, the Claimant says that she had a valid reason for not getting vaccinated and the General Division did not take these facts into consideration.<sup>7</sup>

[15] The Claimant's Notice of Appeal at the General Division stated that she didn't get vaccinated due to anxiety.<sup>8</sup> At the hearing before the General Division, the Claimant did not raise the arguments that she is making now. In her request for leave to appeal, the Claimant refers to emails that were not part of the record before the General Division.

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

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

<sup>6</sup> AD1-8

<sup>7</sup> AD1-8

<sup>8</sup> GD2-4

[16] The Claimant is arguing that the General Division failed to consider these facts, but she did not raise them. There is no arguable case that the General Division failed to consider facts that the Claimant did not rely on at that stage of her appeal.

[17] The General Division considered the reasons for the Claimant's unpaid leave. It found that she was placed on an unpaid leave of absence because she did not comply with the employer's Covid 19 vaccination policy.<sup>9</sup> This policy required all employees to be vaccinated by November 30, 2021 or be placed on an unpaid administrative leave.<sup>10</sup>

[18] The General Division found that the Commission had proven that there was misconduct. It found that the Claimant was aware of the policy and had enough time to comply.<sup>11</sup> The General Division also found that the Claimant was aware that she could be placed on unpaid leave for failing to comply.<sup>12</sup>

[19] The General Division found that the Claimant's decision not to comply was wilful, because she made a conscious and deliberate decision not to comply for personal reasons.<sup>13</sup> The Claimant confirmed at the hearing that she did not request an exemption.<sup>14</sup>

[20] The Claimant explains in her request for leave to appeal that she had reasons to refuse the vaccine. However, there is no arguable case that the General Division based its decision on an important mistake about the facts when it found that her conduct was wilful.

[21] The General Division notes that case law says conduct that is conscious, deliberate or intentional, is wilful.<sup>15</sup> It is not necessary for the Claimant to have refused the vaccine out of defiance. She was aware of the consequences of not complying with the employer's policy and made a conscious decision not to comply.

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<sup>9</sup> General Division decision at para 11.

<sup>10</sup> General Division decision at para 21.

<sup>11</sup> General Division decision at para 24.

<sup>12</sup> General Division decision at para 27.

<sup>13</sup> General Division decision at para 25.

<sup>14</sup> General Division decision at para 25.

<sup>15</sup> General Division decision at para 14.

[22] There is no arguable case that the General Division based this decision on an important error of fact. The General Division took into consideration that the Claimant did not have wrongful intent, but properly found that her actions were still misconduct.

[23] The General Division found that it had to focus on the Claimant's actions when considering whether there was misconduct.<sup>16</sup> It found that the Claimant was placed on a leave of absence because she failed to comply with the employer's vaccination policy. It also found that the Claimant was aware that failing to comply with the employer's policy could lead to her dismissal.

[24] Both the Federal Court and Federal Court of Appeal have said that it is not the employer's conduct that is in issue when considering misconduct.<sup>17</sup> The General Division properly found that the only issue it had to decide was whether the Claimant was placed on an unpaid leave because of misconduct.<sup>18</sup> Whether the employer failed to answer the Claimant's safety questions is not relevant to this determination.

[25] I find that there is no arguable case that the General Division based its decision on an important mistake about the facts of the case. The General Division considered all relevant facts when deciding that the Claimant was placed on a leave of absence due to her own misconduct.

[26] 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 or an error of law.

[27] 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.

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<sup>16</sup> General Division decision at para 17.

<sup>17</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>18</sup> General Division decision at para 17.

## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division