



Citation: *RA v Canada Employment Insurance Commission*, 2023 SST 310

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

# **Leave to Appeal Decision**

**Applicant:** R. A.  
**Representative:** J. K.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated November 23, 2022  
(GE-22-2664)

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**Tribunal member:** Melanie Petrunia  
**Decision date:** March 18, 2023  
**File number:** AD-22-970

## Decision

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

## Overview

[2] The Applicant, R. A. (Claimant), was dismissed from her job. Her employer introduced a mandatory COVID-19 vaccination policy. She requested an exemption for religious reasons which was denied. The employer later dismissed the Claimant for failing to comply with the policy.

[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 employment insurance (EI) benefits. The Claimant made a request for reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Claimant lost her job because she did not comply with the employer's vaccination policy. It found that her actions were intentional and she should have known that she could be let go.

[5] The Claimant now wants to appeal the General Division decision to the Appeal Division, but she needs permission for her appeal to move forward. She argues that the General Division made errors of law and 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 error of fact when it determined that the Claimant was terminated for failing to comply with the policy?
- b) Is there an arguable case that the General Division based its decision on an error of fact by stating that the Claimant believed all exemption requests would be approved?
- c) Is there an arguable case that the General Division made an error of law when it found that the Claimant knew or should have know she could be dismissed?
- d) Is there an arguable case that the General Division made an error of law by failing to consider whether the Claimant breached an express or implied duty arising from her employment contract?

## I am not giving the Claimant permission to appeal

[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:

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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).

- 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>

[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>

### **The General Division did not base its decision on factual errors**

[12] The Claimant argues that the General Division made a factual error when it found that she lost her job because she failed to comply with her employer's mandatory COVID-19 vaccination policy.<sup>6</sup>

[13] The Claimant says that the General Division made another error of fact when it found that the Claimant believed that her employer would automatically approve all exemption requests. She argues that she believed that her employer would follow the law and abide by its duty to accommodate.<sup>7</sup>

[14] The Claimant argues that her employer denied her request for accommodation without reasons and dismissed her. She says that the General Division failed to

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<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.

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

<sup>6</sup> AD1-11

<sup>7</sup> AD1-11

consider this and instead found that she was dismissed because she did not comply with the vaccination policy. She says that she complied with the policy by submitting a bona fide request for accommodation.

[15] The General Division found that the reason for the Claimant's dismissal was her failure to comply with the employer's mandatory vaccination policy.<sup>8</sup> It acknowledged that the Claimant disagreed and argued that she was dismissed because her employer denied her request for a religious exemption.<sup>9</sup>

[16] The General Division relied on the termination letter in the file which clearly states that the Claimant was let go for not complying with the policy. It found that there was no evidence to support the Claimant's position that she was terminated because the employer denied her religious exemption request.<sup>10</sup>

[17] There is no arguable case that the General Division based its decision on an important error of fact when it made this determination. It weighed the Claimant's position against the documentary evidence in the file, specifically the termination letter.

[18] The Claimant argues that the General Division ignored that her request for accommodation was denied without reasons. The record before the General Division included a letter from the employer providing reasons for its decision not to grant her request for a religious exemption.<sup>11</sup>

[19] In the letter denying her request for a religious exemption, the Claimant was told that she was required to be fully vaccinated as per the policy. She was terminated approximately three weeks later, and the letter indicated that the reason was her failure to comply with the policy.

[20] I find that the General Division's finding that the Claimant was terminated for failing to comply with the employer's vaccination policy is supported by the evidence.

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

<sup>9</sup> General Division decision at para 10.

<sup>10</sup> General Division decision at para 13.

<sup>11</sup> See letter dated October 22, 2021 at GD3-62.

There is no arguable case that the General Division failed to consider that her request for a religious exemption was denied without explanation, and this was the reason for her dismissal.

[21] The Claimant also argues that the General Division made a factual error when it found that the Claimant believed that the employer would grant all exemption requests. The Claimant says that there was no evidence before the General Division that she believed this. She argues that she believed that her employer would follow the law.

[22] I have listened to the recording of the hearing before the General Division. The Claimant testified about her conversations with her employer about her religious beliefs. She also spoke about the atmosphere at her work when the policy was first introduced. The Claimant stated, “they were assuring us that if you had a religious reason you were ok.”<sup>12</sup>

[23] In its decision, the General Division summarized the Claimant’s testimony.<sup>13</sup> It notes that the Claimant stated that she complied with the employer’s policy by submitting a request for a religious exemption.<sup>14</sup> The decision also states that the Claimant testified that she expected her request to be approved because the employer assured employees that their requests would be approved.<sup>15</sup>

[24] After summarizing the evidence, the General Division sets out its reasons for finding that there was misconduct. It found that the Claimant knew about the vaccination policy and what she had to do to comply with it.<sup>16</sup> It found that her actions were intentional because she made a conscious decision not to comply after her religious exemption was refused.<sup>17</sup>

[25] The General Division acknowledges that the Claimant believed all exemption requests would be approved. It found that there was no evidence of this and noted that

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<sup>12</sup> Recording of the hearing before the General Division at 38:30.

<sup>13</sup> General Division decision at paras 29 to 38.

<sup>14</sup> General Division decision at para 29.

<sup>15</sup> General Division decision at para 31.

<sup>16</sup> General Division decision at para 40.

<sup>17</sup> General Division decision at para 41.

the policy indicates that the employer would investigate requests for exemption before making a determination.<sup>18</sup>

[26] The General Division goes on to acknowledge the Claimant's argument that she believed her request would be approved based on the proof that she provided. It found that this was not relevant as it had to focus on the actions of the Claimant and whether she knew her actions could lead to her dismissal.<sup>19</sup>

[27] The General Division found that the Claimant knew or should have known that she could be let go if she did not comply with the policy after her exemption request was denied. It recognized that the Claimant didn't think that she would be terminated but found that the evidence shows that she should have known.<sup>20</sup>

[28] I find that there is no arguable case that the General Division erred by stating that the Claimant believed that all exemption requests would be approved. This statement follows a summary of the Claimant's evidence and is not inconsistent with the Claimant's testimony.

[29] Any erroneous findings of fact which the General Division may have made must have been made in a perverse or capricious manner or without regard for the material before it. I don't find that this amounts to an error of fact, and if it were, there is no arguable case that it was material to the decision of the General Division.

### **The General Division did not err in law**

[30] The Claimant argues that the General Division made two errors of law in its decision.

[31] First, she says that the General Division did not correctly identify the reason for her dismissal and then erred in finding that she knew or should have known that her conduct could get in the way of carrying out her duties to her employer. The Claimant

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<sup>18</sup> General Division decision at para 43.

<sup>19</sup> General Division decision at para 46.

<sup>20</sup> General Division decision at para 60.

argues that the conduct in question is her request for a human rights accommodation which was unreasonably denied.<sup>21</sup>

[32] The Claimant argues that she could not reasonably have known that she could be dismissed because she did comply with the policy by requesting an exemption based on her religious beliefs.

[33] As explained above, I have found that the General Division did not make a factual error when it decided that the Claimant was dismissed for failing to comply with the employer's vaccination policy. The General Division explained its reasons for finding that the Claimant should have known she could be dismissed if she failed to comply with the policy after her exemption request was denied.

[34] In her application for leave to appeal, the Claimant relies on the analysis in two other decisions of the General Division.<sup>22</sup> She argues that the General Division would have come to the same conclusion as in those cases if it had performed a proper analysis and determined that the Claimant was dismissed because her request for a religious exemption was denied.

[35] The General Division addressed these decisions in its analysis. It found that the facts in those cases were different and distinguished each of them. The General Division found that it was not bound by these decisions and explained why it did not give them much weight.<sup>23</sup>

[36] There is no arguable case that the General Division erred in law by misidentifying the conduct at issue in its analysis of whether the Claimant knew or should have known that she could be dismissed.

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<sup>21</sup> AD1-12

<sup>22</sup> AD1-13 citing *DL v. Canada Employment Insurance Commission*, 2022 SST 281 and *ZZ v. Canada Employment Insurance Commission*, 2022 SST 597.

<sup>23</sup> General Division decision at para 52.



[37] The Claimant argues that the General Division also erred in law by failing to consider whether the Claimant breached an express or implied duty arising out of her employment contract.

[38] In the Claimant's submissions before the General Division, her representative stated that the test for misconduct is whether the conduct is wilful and whether a claimant knew or ought to have known that their conduct could result in dismissal.<sup>24</sup>

[39] The Claimant's submissions focused on the issue of her conduct. It was not argued before the General Division that there was no express term in her collective agreement authorizing mandatory vaccination. The Claimant relies on a decision of the General Division issued after the decision in this matter.<sup>25</sup> She argues that the employer is not permitted at law to unilaterally impose a new essential condition of employment.

[40] In the case that the Claimant relies on, evidence was provided that the collective agreement included specific provisions regarding vaccination. Here, no evidence was led with respect to the Claimant's collective agreement and the argument that she now relies on was not raised.

[41] The General Division properly set out the law regarding misconduct. It did not err by not specifically addressing an argument that was not raised. The Claimant's representative correctly stated in his submissions before the General Division that it is not the Tribunal's job to determine if the collective agreement has been violated.<sup>26</sup>

[42] The General Division accurately summarized the law concerning misconduct.<sup>27</sup> It went on to correctly find that it does not have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.<sup>28</sup> It is well-established that

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<sup>24</sup> Recording of the hearing before the General Division at 1:19:00 to 1:19:40.

<sup>25</sup> *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

<sup>26</sup> Recording of the hearing before the General Division at 1:20:00.

<sup>27</sup> General Division decision at paras 15 to 25.

<sup>28</sup> General Division decision at pars 26 and 49.

a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.<sup>29</sup>

[43] Whether the employer's policy was fair or violated the Claimant's employment contract or human rights are matters for other forums. Where EI benefits are at issue, the only questions that matter are whether the Claimant breached her employer's policy and, if so, whether that breach was deliberate and foreseeably likely to result in dismissal.

[44] The General Division found that the test for misconduct was made out in the Claimant's case. Its findings are supported by the evidence and it correctly applied the law.

[45] I find that there is no arguable case that the General Division made errors of law or based its decision on any factual errors. Aside from the Claimant's arguments, I have also considered the other ground of appeal. The Claimant has not pointed to any procedural unfairness or errors of jurisdiction and I have not identified any such errors.

[46] 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**

[47] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia  
Member, Appeal Division

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<sup>29</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.