



Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 510

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

# **Leave to Appeal Decision**

**Applicant:** M. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated October 20, 2022  
(GE-22-1528)

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**Tribunal member:** Melanie Petrunia

**Decision date:** April 25, 2023

**File number:** AD-22-777

## **Decision**

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

## **Overview**

[2] The Applicant, M. M. (Claimant), was suspended from his job because he did not comply with his employer's COVID-19 vaccination policy. He applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's suspension was misconduct. It decided that the Claimant was disentitled from receiving benefits. The Commission also decided that the Claimant was not available for work during the period that he was suspended.

[4] The Claimant appealed the Commission's decision on both issues to the Tribunal's General Division. The General Division allowed his appeal on the issue of availability for work but dismissed the appeal on the issue of misconduct. It found that the Claimant was suspended from his job because of misconduct and he is not entitled to receive EI benefits during his suspension.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to move forward.

[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.

## **Issue**

[7] Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

## 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:

- 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 his case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.<sup>5</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.

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

– **The General Division decision**

[12] The Claimant's employer introduced a policy requiring all employees to be vaccinated against COVID-19. The Claimant requested an exemption from the policy for religious reasons but his employer refused.<sup>6</sup> The Claimant did not provide proof of vaccination by the deadline imposed by the employer and he was placed on an unpaid leave of absence.<sup>7</sup>

[13] The General Division found that the unpaid leave of absence was equivalent to a suspension.<sup>8</sup> It decided that the reason for the suspension was the Claimant's failure to follow his employer's vaccination policy.<sup>9</sup>

[14] The General Division found that this reason amounts to misconduct under the law. It relied on the fact that the Claimant knew about the mandatory vaccination policy and what was required to comply. It found that the Claimant knew that his exemption request was denied and knew the deadline for complying.<sup>10</sup>

[15] The General Division found that the Claimant was aware that he could not keep working if he did not comply with the policy. It decided that he deliberately chose not to comply, after learning that his exemption request was denied. The General Division found that the Claimant's actions were the cause of his suspension and amounted to misconduct.<sup>11</sup>

– **No arguable case that the General Division made an error of fact**

[16] The Claimant argues that the General Division based its decision on an important error of fact when it found that a section of the *Digest of Benefit Entitlement Principles* (Digest) he cited is not applicable. The Claimant argues that this was an error and that

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<sup>6</sup> General Division decision at para 32.

<sup>7</sup> General Division decision at para 32.

<sup>8</sup> General Division decision at para 16.

<sup>9</sup> General Division decision at para 23.

<sup>10</sup> General Division decision at para 32.

<sup>11</sup> General Division decision at para 33.

section 6.6.2 of the Digest clearly indicates that he was laid off and should be entitled to EI.

[17] The General Division accurately explained that the Digest alone is not law. The section of the Digest referred to by the Claimant may appear to him to be relevant, but it does not address situations where the Claimant's conduct leads to the suspension. This is why the General Division stated that it must apply the legislation, regulations and case law applicable to a misconduct analysis.

[18] I find that there is no arguable case that the General Division made a factual or a legal error when it made this determination. The Claimant argues that the General Division's error was in casually dismissing the Digest, which it did not do. The General Division acknowledged the Claimant's arguments concerning the Digest and explained why it disagreed.

– **No arguable case that the General Division made an error of law**

[19] The Claimant's submissions in his application for leave to appeal largely repeat his written submissions before the General Division. He takes issue with the General Division's finding that the conduct of the employer is not relevant to the question of misconduct.

[20] The Claimant states that he explained in his submissions why a Federal Court decision relied on by the General Division was not relevant to his case and expected the Tribunal to dismiss it.<sup>12</sup> When he received the decision, he realized he did not fully explain why it was not relevant. The Claimant's arguments primarily focus on why this case does not apply to him.

[21] The Claimant relies on another decision from the Tribunal's General Division and says that this decision shows that the Tribunal can look at the conduct of the

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<sup>12</sup> The Claimant is referring to *Paradis v Canada (Attorney General)*, 2016 FCA 1282.

employer.<sup>13</sup> He says his employer's conduct in denying his religious accommodation request should have been taken into consideration.

[22] The Claimant states that there are many parallels with this General Division decision, including that fact that he was placed on unpaid leave prior to a proper assessment of his religious accommodation request. He says that he is fully compliant with the employer's vaccination policy because he requested an exemption.

[23] The Claimant argues that the General Division's statement that can only consider the Claimant's conduct is incorrect. He reiterates the arguments he made before the General Division that the employer's policy was unreasonable, and says that this should have been taken into consideration.

[24] There is no arguable case that the General Division made an error of law when it found that conduct of the employer or the reasonableness of the policy is not relevant to the issue of whether or not there was misconduct.

[25] The General Division relied on case law from the Federal Court, which it is bound to follow. The General Division does not have to follow other decisions from the General Division. The case law cited by the General Division does support its findings that the conduct of the employer is not relevant.

[26] A recent decision of the Federal Court also confirmed that the Tribunal cannot consider the conduct of the employer.<sup>14</sup> In that case, the Court agreed that an employee who made a deliberate decision not to follow his employer's vaccination policy had lost his job due to misconduct. That claimant could pursue his claims that he was wrongfully dismissed or his human rights were violated in other forums.

[27] The Claimant is restating the same arguments that he made at the General Division. These arguments were considered and addressed by the General Division.

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<sup>13</sup> See *R. G. v Canada Employment Insurance Commission*, 2018 SST 1356

<sup>14</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

[28] Aside from the Claimant's arguments, I have also considered the 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.

[29] 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**

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

Melanie Petrunia  
Member, Appeal Division