



Citation: *RC v Canada Employment Insurance Commission*, 2023 SST 496

**Social Security Tribunal of Canada  
Appeal Division**

**Leave to Appeal Decision**

**Applicant:** R. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated December 9, 2022  
(GE-22-2516)

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**Tribunal member:** Melanie Petrunia

**Decision date:** April 24, 2023

**File number:** AD-23-52

## **Decision**

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

## **Overview**

[2] The Applicant, R. C. (Claimant), was dismissed 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 dismissal was misconduct. It decided that the Claimant was disqualified from receiving benefits. The Claimant requested 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 dismissed from his job because of misconduct and he 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, 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 vaccination against COVID-19. The Claimant did not want to be vaccinated for religious reasons. The policy did not set out an exemption for religious reasons, but the employer said that the Claimant could request an exemption from the Provincial Health Office (PHO).

[13] The Claimant requested an exemption from the PHO but did not receive a response before the deadline in the policy to be vaccinated. The Claimant did not get vaccinated by the deadline and was dismissed by his employer.

[14] The General Division found that the reason the Claimant was dismissed was because he did not comply with the employer's vaccination policy.<sup>6</sup> It then considered whether this amounts to misconduct under the law.

[15] The General Division set out the relevant case law from the Federal Court and the Federal Court concerning questions of misconduct.<sup>7</sup> It found that the Commission had proven that there was misconduct because the Claimant was aware of the employer's policy and what was required of him under that policy. The Claimant knew that he was not exempted from the policy and was aware of the consequences of not complying by the deadline.<sup>8</sup>

[16] The General Division considered the Claimant's arguments when it found that there was misconduct. The Claimant argued that the vaccination policy was not part of his employment contract when he was hired. He said that the policy violated his human rights, and his employer did not consider his exemption request for religious reasons.<sup>9</sup>

[17] The General Division found that the policy became an express condition of the Claimant's employment once it was implemented.<sup>10</sup> It stated that the reasonableness of the policy is not for the Tribunal to consider, and that the Claimant can pursue his

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<sup>6</sup> General Division decision at para 12.

<sup>7</sup> General Division decision at paras 15 to 22.

<sup>8</sup> General Division decision at para 38.

<sup>9</sup> General Division decision at para 25.

<sup>10</sup> General Division decision at para 30.

arguments that the employer violated his rights in other forums.<sup>11</sup> It found that those issues are not within the Tribunal's jurisdiction.

– **No arguable case that the General Division erred**

[18] In his application for leave to appeal, the Claimant did not specify which error he believes the General Division made. He argues that there was a failure to accommodate his religious beliefs. This argument does not give rise to arguable case that the General Division made any reviewable errors.

[19] The General Division properly stated the law concerning misconduct. It found that the Claimant was dismissed because he did not comply with his employer's vaccination policy. It found that he was aware of the policy and the consequences of not complying.

[20] The General Division considered all relevant facts and found that the Commission had proven that the Claimant was dismissed from his job because of misconduct.

[21] The General Division summarized case law from the Federal Court and the Federal Court of Appeal that clearly state that the focus in misconduct cases is on what the employee did or did not do.<sup>12</sup> The failure of the employer to accommodate an employee is not relevant to the determination of whether or not there was misconduct. These arguments can be made before other courts of tribunals.

[22] A recent decision of the Federal Court also confirmed that the Tribunal cannot consider the conduct of the employer.<sup>13</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.

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<sup>11</sup> General Division decision at paras 31 to 37.

<sup>12</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185, *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

<sup>13</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

[23] There is no arguable case that the General division failed to accommodate the Claimant's religious beliefs or failed to take the employer's failure to accommodate into consideration.

[24] Aside from the Claimant's argument, I have also considered the 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 and there is no arguable case that the General Division based its decision on an important mistake about the facts.

[25] 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**

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

Melanie Petrunia  
Member, Appeal Division