



Citation: *TL v Canada Employment Insurance Commission*, 2023 SST 535

**Social Security Tribunal of Canada  
Appeal Division**

**Leave to Appeal Decision**

**Applicant:** T. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 14, 2023  
(GE-22-3503)

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**Tribunal member:** Melanie Petrunia

**Decision date:** April 25, 2023

**File number:** AD-23-248

## **Decision**

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

## **Overview**

[2] The Applicant, T. L. (Claimant), was placed on an unpaid leave of absence from her job 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 Claimant took a voluntary leave of absence without just cause. It also decided that the Claimant was not available for work during the period she was on leave. It found that the Claimant was disentitled 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 had not proven that she was available for work.

[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.

[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 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>

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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 General Division found that the Claimant did not have a choice whether to take an unpaid leave of absence from her job and that she was suspended by her employer.<sup>6</sup> It found that the reason she was suspended was because she did not comply with her employer's vaccination policy. The Claimant returned to work once she met the vaccination requirement in the policy.<sup>7</sup>

[13] The General Division found that this reason for the Claimant's suspension is considered misconduct. It summarized the key legal principles from the relevant case law.<sup>8</sup> It found that the Commission had proven that there was misconduct for the following reasons:

- The vaccination policy required that employees provide proof of their vaccination status;
- The Claimant knew about the policy and what expected of her under the policy; and
- The Claimant knew or should have known what the consequences were of not complying with the policy.<sup>9</sup>

[14] The General Division also considered that the Claimant had requested an exemption from the policy but it was denied by the employer.<sup>10</sup>

[15] The General Division then considered whether the Claimant had proven that she was available for work. It considered the three factors that a claimant has to prove to show that they are capable of and available for work but unable to find a suitable job:

- a) A desire to return to work as soon as a suitable job is available;

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<sup>6</sup> General Division decision at para 10.

<sup>7</sup> General Division decision at para 11.

<sup>8</sup> General Division decision at paras 22 to 34.

<sup>9</sup> General Division decision at para 59.

<sup>10</sup> General Division decision at para 44.

- b) Making efforts to find a suitable job; and
- c) Not setting personal conditions that unduly limit the chances of returning to work.<sup>11</sup>

[16] The General Division also looked at whether the Claimant was making reasonable and customary effort to find a suitable job. It considered the Claimant's testimony found that her efforts to find work were reasonable and customary.<sup>12</sup>

[17] The General Division found that the Claimant wanted to go back to work as soon as a suitable job was available and that she made enough efforts to find a suitable job.<sup>13</sup>

[18] However, the General Division decided that the Claimant set personal conditions that unduly limited her chances of going back to work. The Claimant was not vaccinated against COVID-19 and was only able to apply to jobs that did not have vaccination as a requirement.<sup>14</sup>

[19] The Claimant did not want to be vaccinated. The General Division took this into consideration and found that a good personal reason for imposing a condition is not sufficient. It cited case law from the Federal Court of Appeal and found that the Claimant's choice not to be vaccinated was a personal condition that she imposed which unduly limited her chances of returning to work.<sup>15</sup>

– **No arguable case that the General Division didn't follow procedural fairness**

[20] The Claimant argues that the General Division didn't follow procedural fairness because the Tribunal is supposed to be focused on promoting access to justice and its members have to be fair in decisions.

[21] There is no arguable case that the General Division did not follow procedural fairness. I have listened to the hearing before the General Division. The hearing was

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<sup>11</sup> General Division decision at para 72.

<sup>12</sup> General Division decision at para 71.

<sup>13</sup> General Division decision at paras 76 and 77.

<sup>14</sup> General Division decision at para 85.

<sup>15</sup> General Division decision at paras 86 to 88..

initially to be held by videoconference but the Claimant's video was not working. The General Division member confirmed that the Claimant was comfortable proceeding by teleconference.<sup>16</sup>

[22] The Claimant had an opportunity to fully present her case. I see no evidence that the hearing before the General Division was procedurally unfair.

– **No arguable case that the General Division based its decision on an important factual error**

[23] The Claimant argues that her employer never attempted to meet with her or her union. She says that she requirement to accept an invasive and medical treatment in order to maintain employment goes beyond simple safety protocols. She argues that the vaccine mandates failed and that there was an increase in positive cases among staff at her workplace when the vaccine policy was in place.

[24] I find that these arguments do not give rise to an arguable case that the General Division made any factual errors. The General Division thoroughly reviewed all of the evidence and the testimony of the Claimant. It supported its findings with reference to the evidence. The Claimant is raising her concerns about the vaccine, which she raised before the General Division, but hasn't pointed to any factual errors on the part of the General Division.

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

[25] The Claimant argues that the employer imposed a new condition of employment without the agreement of her union. She says that there were no vaccination requirements in her employment contract or collective agreement. There is no requirement under any provincial or federal legislation that makes vaccination mandatory.

[26] The Claimant made these arguments at the General Division and they were considered in its decision. The General Division found that the employer has a right to

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<sup>16</sup> Recording of hearing before the General Division at 7:00

manage its daily operations.<sup>17</sup> When the employer implemented the vaccine policy, it became a condition of the Claimant's employment. The General Division relied on a decision of the Federal Court of Appeal which supports this finding.<sup>18</sup>

[27] In a recent Federal Court decision, a claimant also argued that it is not misconduct not to abide by a policy introduced without the employee's consent. That claimant argued that his original employment contract did not include any vaccination requirements.<sup>19</sup>

[28] The Court accepted that the employer can introduce a policy requiring vaccination even if it was not part of the original employment agreement. The Court found that the General Division had reasonably determined that the claimant's non-compliance with the policy constituted misconduct.

[29] The General Division did not err in law when it found that the employer could introduce the policy and that it became a condition of the Claimant's employment.

[30] Aside from the Claimant's arguments, I have also considered the ground of appeal. The Claimant has not pointed to any errors of jurisdiction and there is no arguable case that the General Division made such an error.

[31] 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**

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

Melanie Petrunia  
Member, Appeal Division

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<sup>17</sup> General Division decision at para 43.

<sup>18</sup> See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

<sup>19</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102.