



Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 545

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

# **Leave to Appeal Decision**

**Applicant:** A. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 14, 2023  
(GE-22-3524)

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**Tribunal member:** Melanie Petrunia

**Decision date:** May 2, 2023

**File number:** AD-23-252

## **Decision**

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

## **Overview**

[2] The Applicant, A. K. (Claimant), was placed on an unpaid leave of absence from his job because he didn't 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 Claimant was suspended for misconduct and 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 his job because he did not comply with the employer's vaccination policy. It decided that this reason amount to misconduct and he 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, 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.

## **Issues**

[7] The issues are:

- a) Is there an arguable case that the General Division erred in law in its interpretation of misconduct?

- b) Is there an arguable case that the General Division made an error of jurisdiction by not ruling on the fairness of the policy or whether the employer failed to accommodate the Claimant?
- c) Does the Claimant raise any other 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>

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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.

[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>

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

[12] The Claimant argues that the General Division's decision was not in line with case law, was arbitrary and was used to advance a political agenda. He says that the case law shows that the bar for finding misconduct is high. In cases where misconduct was found the employee's misconduct was frequent or involved illegal activities. He argues that the conduct must constitute a breach of the employment agreement.<sup>6</sup>

[13] The Claimant refers to case law and argues that not every incident of misconduct is cause for dismissal. He says that refusing to get a vaccine is not illegal activity and does not amount to wilful misconduct.<sup>7</sup>

[14] I find that the Claimant's arguments do not have a reasonable chance of success. The General Division accurately set out the key principles concerning misconduct as established by case law from the Federal Court and the Federal Court of Appeal.<sup>8</sup>

[15] The General Division then applied the legal test, as set out in the case law, to the Claimant's circumstances. It found that the Commission had proven that the Claimant was suspended due to misconduct for the following reasons:

- The employer had a policy requiring vaccination or an approved exemption from vaccination which was communicated to the Claimant.

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

<sup>6</sup> AD1-5

<sup>7</sup> AD1-5

<sup>8</sup> General Division decision at paras 31 to 35.

- The Claimant made a conscious and deliberate choice not to be vaccinated and did not have an approved exemption.
- The Claimant knew, or should have known, that he would be suspended if he remained unvaccinated and did not have an approved exemption.<sup>9</sup>

[16] The General Division acknowledged and considered the Claimant's arguments that his request for a religious exemption should have been approved and that his employer discriminated against him. The Claimant also argued that the employer changed the terms of his employment with the introduction of the vaccination policy.<sup>10</sup>

[17] The General Division found that the Claimant's arguments concerning discrimination and his religious rights are for determination by other courts and tribunals.<sup>11</sup> It does not have the authority to make decisions about the conduct of the employer and can only consider what the Claimant did or did not do. It cited a recent decision of the Federal Court, along with other case law, in support of this finding.<sup>12</sup>

[18] There is no arguable case that the General Division's decision was not in line with case law, was arbitrary or used to advance a political agenda. The General Division properly cited and applied the law when making its decision.

### **No arguable case that the General Division made an error of jurisdiction**

[19] In his application for leave to appeal, the Claimant states that the General Division would not rule on whether the employer's policy was fair or whether his request for religious accommodation should have been granted.<sup>13</sup>

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<sup>9</sup> General Division decision at para 55.

<sup>10</sup> General Division decision at para 46.

<sup>11</sup> General Division decision at para 49.

<sup>12</sup> General Division decision at para 52.

<sup>13</sup> AD1-5

[20] As discussed above, the General Division explained its reasons for not deciding about the employer's policy or its conduct in denying the Claimant's exemption request.<sup>14</sup> The General Division supported this decision with reference to case law.<sup>15</sup>

[21] Both the Federal Court and Federal Court of Appeal have said that the question of whether an employer has failed to accommodate an employee is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and these issues can be dealt with in other forums.<sup>16</sup>

[22] As the General Division noted, a recent decision from the Federal Court also confirmed that the Tribunal cannot consider the conduct of the employer.<sup>17</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.

[23] 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 based its decision on an important mistake about the facts.

[24] 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>14</sup> General Division decision at para 51.

<sup>15</sup> See General Division decision at paras 38 to 40.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>17</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

## **Conclusion**

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

Melanie Petrunia  
Member, Appeal Division