



Citation: *RZ v Canada Employment Insurance Commission*, 2023 SST 616

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

# **Extension of Time and Leave to Appeal Decision**

**Applicant:** R. Z.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated September 26, 2022  
(GE-22-1868)

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**Tribunal member:** Melanie Petrunia

**Decision date:** May 22, 2023

**File number:** AD-23-279

## Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant, R. Z. (Claimant), was suspended and then dismissed from his job because he did not comply with his employer's vaccination policy. The Claimant applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason that the Claimant lost his job is considered misconduct. It disqualified the Claimant from receiving EI benefits.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant lost his job because he did not comply with the employer's vaccination policy. It decided that this reason is considered 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.

## Issues

[7] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

## Analysis

### The application was not late

[8] The General Division decision was issued on September 26, 2022, but was not sent to the Claimant until February 24, 2023. The Claimant filed his application for leave to appeal on March 19, 2023.

[9] An application for leave to appeal must be made within 30 days after the General Division decision and reasons are communicated to the claimant.<sup>1</sup> In this case, the decision is dated September 26, 2022, but the Tribunal records show that the decision was not communicated to the Claimant until February 24, 2023. The Claimant filed his application for leave within 30 days after this date, so it was not late.

### I am not giving the Claimant permission to appeal

[10] 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>2</sup>

[11] 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>3</sup>

[12] 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;

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<sup>1</sup> See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>2</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>3</sup> DESD Act, s 58(2).

c) based its decision on an important factual error;<sup>4</sup> or

d) made an error in law.<sup>5</sup>

[13] 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>6</sup>

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

[14] In his application for leave to appeal, the Claimant argues that the General Division failed to follow procedural fairness. He says that the General Division did not understand that he did not agree to the vaccination policy at the time that he was employed and that he did not need to comply in order to do his job.<sup>7</sup>

[15] The Claimant made the same arguments in correspondence to the Tribunal sent after the application for leave to appeal but says that the General Division made an important error of fact. The Claimant argues that the General Division did not address that he did not agree to the vaccination policy at the time that he was employed and that he did not need to comply in order to do his job. He says that the General Division would not have found that there was misconduct if it understood these facts.<sup>8</sup>

[16] I find that there is no arguable case that the General Division failed to follow procedural fairness or based its decision on an important error of fact by not stating that

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<sup>4</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>5</sup> This paraphrases the grounds of appeal.

<sup>6</sup> *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

<sup>7</sup> AD1-6

<sup>8</sup> AD1B

it understood the that the Claimant did not agree to the vaccination policy at the time that he was employed and that he did not need to comply in order to do his job.

[17] In its decision, the General Division noted the Claimant's arguments that he could have continued to work remotely and that the vaccination policy was not part of his employment contract.<sup>9</sup>

[18] The General Division considered the Claimant's argument that he could have worked remotely to avoid dismissal. He testified that the vaccination policy applied to all remote workers with no exceptions.<sup>10</sup> The General Division found that whether or not it was appropriate for the employer to enforce the policy on remote workers was not for it to decide.<sup>11</sup> It referred to case law from the Federal Court of Appeal and found that it can only look at the actions of the Claimant.<sup>12</sup>

[19] The General Division also found that, once the employer imposed a vaccination policy, it became a mandatory condition of the Claimant's employment. It noted that the employer has a right to manage the day-to-day operations of the workplace.<sup>13</sup>

[20] I find that there is no arguable case that the General Division failed to address the Claimant's arguments or that it would not have found that there was misconduct if it understood the facts as he outlined.

[21] The General Division decision demonstrates that it understood the Claimant's argument that it wasn't necessary for him to follow the policy in order to continue working, because he could have worked remotely. It addressed this argument when it found that the employer's decision to impose the policy on remote workers was not for it to decide or consider.

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<sup>9</sup> General Division decision at para 6.

<sup>10</sup> General Division decision at para 26.

<sup>11</sup> General Division decision at para 28.

<sup>12</sup> See the General Division decision at footnote 13 with reference to *Canada (Attorney General) v. Caul*, 2006 FCA 251.

<sup>13</sup> General Division decision at para 29.

[22] There is no arguable case that the General Division did not understand or consider the Claimant's argument that the vaccination policy was not agreed to at the time of his employment. It addressed this argument when it found that the policy became a condition of his employment when the employer introduced it.

[23] A recent decision from the Federal Court, *Cecchetto v. Canada (Attorney General)*, confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.<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.

[24] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any errors of law or jurisdiction, and I see no evidence of such errors. The General Division properly cited and applied the law concerning misconduct. There is no arguable case that it failed to follow procedural fairness or based its decision on an important error of fact.

[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] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia  
Member, Appeal Division

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