



Citation: *DW v Canada Employment Insurance Commission*, 2023 SST 757

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

# **Leave to Appeal Decision**

**Applicant:** D. W.  
**Representative:** G. W.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 10, 2023  
(GE-22-1396)

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**Tribunal member:** Melanie Petrunia  
**Decision date:** June 11, 2023  
**File number:** AD-23-255

## Decision

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

## Overview

[2] The Applicant, D. W. (Claimant), was placed on an unpaid leave of absence (suspended) and then dismissed from her job because she did not follow her employer's vaccination policy. She applied for employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant lost her job due to her own misconduct and could not be paid benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Commission had proven that the reason for the Claimant's suspension and dismissal is considered misconduct under the *Employment Insurance Act* (EI Act).

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division made an error of jurisdiction. 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.

## Issues

[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.

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

[12] The Claimant argues that the General Division made an error of jurisdiction. She says that it did not take into consideration that there was nothing in the contract that she signed when she was hired that require her to be vaccinated against COVID-19. She feels that the decision was already made before the hearing. The Claimant says that she was discriminated against and wrongfully fired for being unvaccinated.<sup>6</sup>

[13] The General Division had to decide whether the reason for the Claimant's dismissal is considered misconduct under the EI Act. It noted that the Act does not define misconduct and then accurately set out the key principles concerning misconduct as established by case law from the Federal Court and the Federal Court of Appeal.<sup>7</sup>

[14] 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 implemented a policy requiring vaccination and the Claimant was aware of the policy.<sup>8</sup>
- The Claimant made a deliberate choice not to comply with the policy.<sup>9</sup>
- The Claimant knew, or should have known, that she would be suspended and then terminated if she remained unvaccinated.<sup>10</sup>

[15] The General Division acknowledged and considered the Claimant's argument that the vaccination policy was not a condition of her employment when she was hired and was not part of her collective agreement. The Claimant argued that the employer

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<sup>6</sup> AD1-3

<sup>7</sup> General Division decision at paras 14 to 17.

<sup>8</sup> General Division decision at para 50.

<sup>9</sup> General Division decision at para 52.

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

unilaterally changed the terms of her employment when it put the vaccination policy in place.<sup>11</sup>

[16] The General Division found that the employer has the right to manage the daily operations of the workplace, which includes developing and implementing policies. When the employer implemented the policy, after the Claimant was hired, it became an express condition of her employment.<sup>12</sup>

[17] There is no arguable case that the General Division failed to consider that the contract that the Claimant signed did not require her to be vaccinated. The policy was implemented after she was hired. The General Division recognized this argument and addressed it.

[18] The Claimant's argument that she was discriminated against was also address by the General Division. It noted that questions about discrimination or whether her employer violated her rights are for determination by other courts and tribunals.<sup>13</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>14</sup>

[19] There is no arguable case that the General Division failed to consider whether the Claimant was discriminated against or wrongfully terminated.

[20] The Claimant said in her application for leave to appeal that she feels the decision was already made before the hearing. She has not pointed to any evidence of bias and I see nothing in the record to suggest that she did not have a fair hearing. The General Division properly cited and applied the law when making its decision. It considered all of the relevant evidence and addressed the Claimant's arguments.

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<sup>11</sup> General Division decision at para 29.

<sup>12</sup> General Division decision at para 31.

<sup>13</sup> General Division decision at paras 40 and 41.

<sup>14</sup> General Division decision at para 45.

[21] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. 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 or made an error of law.

[22] 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**

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

Melanie Petrunia  
Member, Appeal Division