



Citation: *JD v Canada Employment Insurance Commission*, 2023 SST 901

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

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

**Applicant:** J. D.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated January 19, 2023  
(GE-22-2820)

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**Tribunal member:** Melanie Petrunia

**Decision date:** July 9, 2023

**File number:** AD-23-259

## 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, J. D. (Claimant), was suspended and then dismissed from her job because she did not comply with her 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 her job is considered misconduct. It disentitled her from receiving benefits for the period that she was suspended and disqualified her following her termination.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal, with modification. It found that the Claimant lost her job because she did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct but it changed the date that the Claimant's disentitlement started.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division based its decision on an important factual error. 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] 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 January 19, 2023 but was not sent to the Claimant until February 16, 2023. The Claimant filed her application for leave to appeal on March 14, 2023.

[9] An application for leave to appeal must be made within 30 days after the General Division decision and reasons are communicated to a claimant.<sup>1</sup> In this case, the decision is dated January 19, 2023, it appears that that the decision was not communicated to the Claimant until February 16, 2023. The Claimant filed her 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;

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

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>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 her 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 her application for leave to appeal, the Claimant argues that the General Division made an important error of fact. She says that her collective agreement does not require vaccination.<sup>7</sup> The Claimant argues that there was no express duty to be vaccinated arising out of her employment contract.

[15] The Claimant argues that she did not agree to her employer's policy before her leave of absence or termination and the employer did not try to meet with the bargaining agent to have vaccination addressed in the collective agreement. The Claimant filed a grievance with her union.<sup>8</sup>

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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> AD1-7

<sup>8</sup> AD1-7

[16] The Claimant argues that there was no legal requirement that people be vaccinated. She says that individuals have the right to control what happens to their bodies. The Claimant relies on another decision of the Tribunal's General Division.

[17] There is no arguable case that the General Division based its decision on an important factual error. The Claimant raised these issues before the General Division and they were considered in its decision.<sup>9</sup>

[18] The General Division set out in its decision the key case law from the Federal Court and the Federal of Appeal concerning the issue of misconduct.<sup>10</sup> It 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 lost her job due to misconduct for the following reasons:

- The employer had a vaccination policy that provided for unpaid leave and termination for non-compliance.<sup>11</sup>
- The Claimant testified that she was aware of the policy.<sup>12</sup>
- The Claimant knew or ought to have known about the consequences of not complying.<sup>13</sup>
- The Claimant made a personal and deliberate decision not to comply with the policy.<sup>14</sup>
- The Claimant knew that her decision could result in unpaid leave and termination.<sup>15</sup>

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<sup>9</sup> General Division decision at para 20.

<sup>10</sup> General Division decision at paras 14 to 18.

<sup>11</sup> General Division decision at para 21.

<sup>12</sup> General Division decision at para 22.

<sup>13</sup> General Division decision at para 21.

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

<sup>15</sup> General Division decision at para 45.

[19] The General Division considered the Claimant's arguments about the conduct of the employer. As stated in its decision, whether or not the Claimant was wrongfully suspended and terminated are not for it to decide.<sup>16</sup>

[20] The Claimant indicated in her application for leave to appeal that she has filed a grievance. That is the proper forum for decisions about her employer's conduct and the validity of the vaccination policy.

[21] The General Division noted that the employer has to manage the day-to-day operations of the workplace.<sup>17</sup> To do so, it can develop policies that address health and safety. It is not the role of the General Division to decide if the employer's policies are reasonable or valid. It is also not the role of the Tribunal to decide if the employer's actions were justified. It can only look at the conduct of the Claimant.<sup>18</sup>

[22] A recent decision of 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>19</sup>

[23] In *Cecchetto*, 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. The Court confirmed that the Tribunal is not permitted, by law, to address the merits, legitimacy or legality of the employer's policy.<sup>20</sup>

[24] 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 made an error of law or jurisdiction.

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<sup>16</sup> General Division decision at para 17.

<sup>17</sup> General Division decision at para 33.

<sup>18</sup> General Division decision at para 44.

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

<sup>20</sup> See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

[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