Citation: *DD v Canada Employment Insurance Commission*, 2023 SST 975

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 3, 2023 (GE-22-3562)

Tribunal member:	Solange Losier
Decision date:	July 25, 2023
File number:	AD-23-414

Decision

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

Overview

[2] D. D. is the Claimant in this case. He worked as a transit operator for a municipality. When he stopped working, he applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided that he could not get EI regular benefits from June 6, 2022, to September 16, 2022, because he had been suspended from his job due to misconduct.[1]

[3] The General Division came to the same conclusion.[2] It said that the Claimant was aware of his employer's Covid-19 vaccination policy, knew his duty to disclose his vaccination status and that he would be suspended if he did not comply.

[4] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] He argues that the General Division made an error of jurisdiction; an error of law, and an important error of fact.

[5] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

Issues

[6] I have focused on the following questions:

a) Is there an arguable case that the General Division made an error of jurisdiction or an error of law?

b) Is there an arguable case that the General Division based its decision on an error of fact?

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[1] See reconsideration decision at pages GD3-35 to GD3-36.
[2] See General Division decision at pages GD1A-1 to GD1A-10.
[3] See application to the Appeal Division at pages AD1-1 to AD1-12.

Analysis

[7] An appeal can proceed only if the Appeal Division gives permission to appeal.[4]

[8] I must be satisfied that the appeal has a reasonable chance of success.[5] This means that there must be some arguable ground upon which the appeal might succeed.[6]

[9] The possible grounds of appeal to the Appeal Division are that the General Division:

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact.[7]

[10] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

I am not giving the Claimant permission to appeal

– **There is no arguable case that the General Division made an error of jurisdiction or an error of law**

[11] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.[8]

[12] An error law happens when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[9]

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[4] See section 56(1) of the *Department of Employment and Social Development Act* (DESD Act).
[5] See section 58(2) of the DESD Act.
[6] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[7] See section 58(1) of the DESD Act.
[8] See section 58(1)(a) of the DESD Act.
[9] See section 58(1)(b) of the DESD Act.

[13] The Claimant argues the following in this appeal:[10]

- First, he says that that employees are entitled to and not required to undergo a genetic test, or disclose the results of a genetic test based on the *Genetic Non-Discrimination Act* (GNDA) which amended the *Labour Code*.[11] He argues that the employer's policy required him take a Polymerase Chain Reaction (PCR) antigen test. He argues that PCR tests are genetic tests that violate the *Labour Code*.

- Second, he says the employer cannot impose any disciplinary action or threaten any action against an employee for refusing to take a genetic test and/or disclose the results of a genetic test.[12]

- Third, he says that the General Division ignored the GNDA and the *Labour Code* and based its decision solely on the *Employment Insurance Act* (EI Act).

[14] The General Division had to decide whether the Commission had proven that the Claimant was suspended due to misconduct according to the EI Act.

[15] The law says that a Claimant who is suspended because of misconduct is not entitled to receive EI benefits.[13]

[16] Misconduct is not defined in the EI Act. The Federal Court of Appeal defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[14]

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[10] See Claimant's arguments at page AD1-6.
[11] See sections 2 and 3 of the *Genetic Non-Discrimination Act*, S.C. 2017, c.3 and section 247.98 of the *Canada Labour Code*, R.S.C., 1985, c. L-2.
[12] See section 247.98(4) of the *Canada Labour Code*, R.S.C., 1985, c. L-2.
[13] Section 31 of the *Employment Insurance Act* (EI Act) says that a person who is suspended for misconduct is disentitled to EI benefits until the period of suspension expires, or if they lose or voluntarily leave their job, or if they accumulate enough hours of insurable employment with another employer to qualify for EI benefits.
[14] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

[17] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal (or suspension in this case) was a real possibility.[15]

[18] In its decision, the General Division relied on the relevant section of the law.[16] It stated and applied the above legal test for misconduct based on the EI Act.

[19] The General Division did not ignore the GNDA or the *Canada Labour Code*, it simply decided that it could not make any decision based on other laws. It stated that it could only decide if there was misconduct based on the EI Act.[17]

[20] Specifically, the General Division stated that it could not decide the following:[18]

- if the Claimant was constructively dismissed, wrongfully dismissed or suspended without pay according to employment law
- if the employer breached the collective agreement or how to interpret an employment contract
- if the employer discriminated against the Claimant or if he should have been accommodated under other human rights laws
- if there was a breach of privacy or other rights in the employment context

[21] Because of that, the General Division noted that it did not make any findings about the validity of the policy or any violations of the Claimant's rights under other laws.[19]

[22] The General Division underlined the Tribunal's limited jurisdiction.[20] It quoted the following paragraph from a recent Court decision called *Cecchetto* which had similar

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[15] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[16] See section 31 of the EI Act.
[17] See paragraph 30 of the General Division decision.
[18] See paragraph 46 of the General Division decision.
[19] See paragraph 43 of the General Division decision.
[20] See paragraph 42 of the General Division decision.

facts. Mr. *Cecchetto* was suspended and dismissed from his job because he didn't comply with the employer's Covid-19 policy.[21] The Court said the following in paragraph 32 of its decision:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[23] The General Division was entitled to rely solely on the EI Act and the applicable case law that defines misconduct. The Claimant was asking the General Division to decide issues that it cannot decide. The Court has already said that the Tribunal does not have the authority to decide the issues that the Claimant is raising around the policy, consent, testing and private medical information.[22]

[24] The General Division correctly focused its analysis on the Claimant's conduct and not the employer's conduct. This is what the case law says to do.[23]

[25] Additionally, the Court has said that the Tribunal doesn't have to determine whether the penalty (suspension in this case) was justified. Instead, it has to determine whether the conduct amounted to misconduct within the meaning of the EI Act.[24]

[26] The General Division decided that the Claimant knew about the policy. He made a deliberate choice to not comply with the policy and knew the consequences for failing to do so.[25] As a result, the General Division said that he was suspended from his job due to his own misconduct.

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[21] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.
[22] I listened to the recording and the Claimant raised some of these other issues throughout the hearing.
[23] See *Paradis v Canada (Attorney General),* 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[24] See *Canada (Attorney General) v Marion*, 2002 FCA 185.
[25] See paragraph 46 of the General Division decision.

[27] For these reasons, it is not arguable that the General Division made an error of jurisdiction or an error of law. The General Division referred to the correct parts of the law and applied them correctly. It also decided the issues that it had the power to decide. The question of whether the employer breached the GNDA, *Canada Labour Code* or other laws when it implemented and enforced its own policy is not a decision that the General Division could decide. There is no reasonable chance of success on either of these grounds.

– **There is no arguable case that the General Division based its decision on an important error of fact**

[28] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[26]

[29] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:[27]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[30] The Claimant argues that the General Division made a mistake when it said that he refused to declare his vaccine status and was in breach of the employer's

[26] See section 58(1)(c) of the DESD Act.
[27] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

policy.[28] He submits that the employer's policy only required PCR testing at the employee's expense.

[31] The General Division decided that the Commission had proven the Claimant's conduct was misconduct because he knew about the policy and duty to disclose his vaccination status by the deadline.[29]

[32] The General Division also decided that the Claimant knew the consequences if he failed to do the antigen testing. It acknowledged that the Claimant was free to decline to be vaccinated and tested because that was his personal choice.[30] However, it also said that the employer has a right to implement a policy that ensures the safety of employees and clients.

[33] The evidence in the file supports the General Division's findings.

- At the hearing, the Claimant told the General Division that he did not comply with the policy because he didn't declare his vaccination status and didn't do the antigen testing.[31]
- The employer's policy says that, effective November 1, 2021, employees who have not been vaccinated, or who do not disclose their vaccination status, are required to submit to regular rapid antigen testing for Covid-19 and provide proof of a negative test.[32]
- The Claimant previously told the Commission that he was on a forced leave of absence because he did not want to share his vaccination status with the employer.[33]

[28] See page AD1-6.
[29] See paragraph 46 of the General Division decision.
[30] See paragraphs 44 and 45 of the General Division decision.
[31] See 32:33 and 42:10 of the hearing recording.
[32] See page GD3-32.
[33] See page GD3-18.

- The unpaid leave letter says that the Claimant was placed on an unpaid leave because he failed to provide proof of a negative rapid antigen test.[34]

[34] The General Division did not directly refer to all of the above evidence in its decision. It did not need to refer to every piece of evidence. Case law holds that an administrative tribunal charged with fact-finding is presumed to have considered all the evidence before it and is not required to mention every piece of evidence in its reasons.[35] In this case, there is no basis to set aside the presumption. The General Division can be presumed to have considered all of the evidence.

[35] It is not arguable that the General Division made a mistake about the facts of this case. Its key findings about the misconduct were consistent with the facts and evidence. There is no reasonable chance of success on this ground.

– **There are no other reasons for giving the Claimant permission to appeal**

[36] I reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.[36] I did not find any relevant evidence that the General Division might have ignored or misinterpreted. As well, the General Division applied the relevant section in law and case law.

Conclusion

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

Solange Losier
Member, Appeal Division

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[34] See page GD3-24.
[35] See *Simpson v Canada (Attorney General)*, 2012 FCA 82 and *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[36] The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.