



Citation: *JJ v Canada Employment Insurance Commission*, 2023 SST 964

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

# **Leave to Appeal Decision**

<b>Applicant:</b>	J. J.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	General Division decision dated May 3, 2023 (GE-23-220)
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<b>Tribunal member:</b>	Solange Losier
<b>Decision date:</b>	July 24, 2023
<b>File number:</b>	AD-23-411

## Decision

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

## Overview

[2] J. J. is the Claimant in this case. He worked for a power company. When he stopped working, he applied for Employment Insurance (EI) regular benefits.<sup>1</sup>

[3] The Canada Employment Insurance Commission (Commission) decided that he could not get EI regular benefits from February 7, 2022, to February 21, 2022 because he was suspended from his job due to misconduct.<sup>2</sup>

[4] The General Division came to the same conclusion.<sup>3</sup> It said that the Claimant made a personal and deliberate decision to not comply with the employer's vaccination policy which resulted in his suspension for misconduct.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.<sup>4</sup> He argues that the General Division made a mistake about three specific facts of his case.

[6] The General Division did make a few factual errors in the "overview" section of the decision. Specifically, in paragraphs 4, 5 and 6. Even so, I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

## Issue

[7] Is there an arguable case that the General Division based its decision on an important error of fact when it decided the Claimant was suspended due to misconduct?

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<sup>1</sup> See application for EI benefits at pages GD3-3 to GD3-15.

<sup>2</sup> See reconsideration decision at pages GD3-40 to GD3-41.

<sup>3</sup> See General Division decision at pages AD1A-1 to AD1A-9.

<sup>4</sup> See Application to the Appeal Division at pages AD1-1 to AD1-7.

## Analysis

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.<sup>5</sup>

[9] I must be satisfied that the appeal has a reasonable chance of success.<sup>6</sup> This means that there must be some arguable ground upon which the appeal might succeed.<sup>7</sup>

[10] 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.<sup>8</sup>

[11] 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.

[12] 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".<sup>9</sup>

[13] 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:<sup>10</sup>

- Does the evidence squarely contradict one of the General Division's key findings?

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<sup>5</sup> See section 56(1) of the *Department of Employment and Social Development Act* (DESD Act).

<sup>6</sup> See section 58(2) of the DESD Act.

<sup>7</sup> See *Osaj v Canada (Attorney General)*, 2016 FC 115.

<sup>8</sup> See section 58(1) of the DESD Act.

<sup>9</sup> See section 58(1)(c) of the DESD Act.

<sup>10</sup> This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

- 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?

[14] Not all errors of fact will allow me to intervene. An error of fact needs to be important enough that the General Division relied on it to make a finding that impacted the outcome of the decision. For example, if the General Division made a mistake about a fact in this case that does not impact the outcome of the case, then I can't intervene.

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

[15] There is no arguable case that the General Division based its decision on an important mistake about the facts of the case, so I am not giving the Claimant permission to appeal. My reasons are below.

[16] The Claimant argues that the General Division made three factual errors in the decision:<sup>11</sup>

- He was not placed on an involuntary unpaid leave of absence starting November 2, 2021;
- He did not claim EI benefits from June 6, 2022 to September 16, 2022; and
- He never brought up genetic testing as part of his claim

– **There is no arguable case that the General Division based its decision on an important mistake about the facts**

[17] The General Division had to decide whether the Commission had proven that the Claimant was suspended and later dismissed for misconduct.<sup>12</sup>

[18] Misconduct is not defined in the *Employment Insurance Act* (EI Act) but the Courts have provided some guidance. The Federal Court of Appeal defines "misconduct" to be conduct that is wilful, which means conscious, deliberate, or

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<sup>11</sup> See page AD1-3.

<sup>12</sup> See sections 30(1) and 31 of the *Employment Insurance Act*.

intentional.<sup>13</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>14</sup>

[19] 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 was a real possibility.<sup>15</sup>

[20] The General Division outlined the above legal test for misconduct.<sup>16</sup> It said that it could only decide whether there was misconduct under the EI Act and could not make any decisions based on other laws.<sup>17</sup>

[21] The General Division decided that the Claimant knew about the vaccination policy and that non-compliance could lead to his termination.<sup>18</sup>

[22] The General Division found that the Claimant did not comply with the employer's vaccination policy because he did not disclose his vaccination status.<sup>19</sup>

– **The General Division made an error about the date the Claimant's unpaid leave of absence started**

[23] In paragraph 4, the General Division wrote that the Claimant's unpaid leave of absence started on November 2, 2021. Footnote 2 also says he was suspended in November 2021.<sup>20</sup>

[24] In paragraph 16 of the decision, it says that the parties agreed that the Claimant was suspended effective February 1, 2022.<sup>21</sup>

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<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>14</sup> See *McKay-Eden v Her Majesty the Queen*, 1997 CanLII 17410 (FCA).

<sup>15</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>16</sup> See paragraphs 21, 22, 23, 24 and 25 of the General Division decision.

<sup>17</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>18</sup> See paragraph 31 of the General Division decision.

<sup>19</sup> See paragraph 39 of the General Division decision.

<sup>20</sup> See page AD1A-2.

<sup>21</sup> See page AD1A-4.

[25] The evidence supports that the Claimant was placed on suspension effective February 1, 2022.<sup>22</sup>

[26] The General Division made an error by putting in its background summary the incorrect date that the Claimant stopped working. Even though there was an error of fact made, the General Division did identify the correct date he stopped working in paragraph 16 of the same decision.<sup>23</sup> This error was not connected to any of the General Division's key findings because it did not rely on the date to make its determination on the issue of misconduct.

– **The General Division made an error about the dates the Claimant was disentitled to EI benefits**

[27] In paragraph 5, the General Division wrote that the Commission was unable to pay him EI benefits from June 6, 2022, to September 16, 2022.<sup>24</sup> Footnote 2 also says that the disentitlement started in June 2022, based on the date he applied for EI benefits.

[28] The evidence shows that the Claimant applied for EI benefits on January 31, 2022 and not in June 2022.<sup>25</sup>

[29] The Commission's reconsideration decision indicates that he was not entitled to EI benefits from February 7, 2022, to February 21, 2022.<sup>26</sup>

[30] The Claimant told the General Division at the hearing that his last day of work was January 31, 2022, and that he was only seeking EI benefits for only three weeks in February 2022, because he started a new job.<sup>27</sup>

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<sup>22</sup> See application at page GD3-6; Record of Employment at page GD3-16, and Claimant's letters at pages GD3-25 and GD3-34.

<sup>23</sup> See page AD1A-4.

<sup>24</sup> See page AD1A-2.

<sup>25</sup> See application at page GD3-13.

<sup>26</sup> See reconsideration decision at pages GD3-40 to GD3-41.

<sup>27</sup> See hearing recording at 12:47.

[31] The General Division made an error by incorrectly identifying the dates the Claimant was disentitled to EI benefits in the background summary of its decision.<sup>28</sup> The General Division then concluded by saying that the Commission made the correct decision in his EI Claim.<sup>29</sup>

[32] Even though there was an error, the key finding made was that the Commission made the correct decision in the Claimant's EI Claim (ie. he was disentitled from February 7, 2022, to February 21, 2022) and not what it wrote in the background summary.<sup>30</sup>

– **The General Division made an error when it said that the Claimant made an argument about genetic testing**

[33] In paragraph 6, the General Division said that the Claimant disagreed with his suspension because his employer cannot require genetic testing under the *Genetic Non-Discrimination Act*.<sup>31</sup>

[34] This was an error made by the General Division. I found no evidence that the Claimant made this argument in his written arguments or at the hearing.

[35] Regardless of this mistake, the General Division did not analyze the *Genetic Non-Discrimination Act* in any detail or make any findings about it. So, I do not see how this mistake could change the outcome of the decision.

[36] The General Division did make three errors of fact, but its decision was not based on these errors. In other words, they do not affect the General Division's key findings about misconduct. There is no reasonable chance of success that the General Division based its decision on an important error of fact.

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<sup>28</sup> See paragraph 5 of the General Division decision.

<sup>29</sup> See paragraph 43 of the General Division decision.

<sup>30</sup> See Commission's reconsideration decision at pages GD3-40 to GD3-41. It says that he was disentitled to EI benefits from February 7, 2022 to February 21, 2022.

<sup>31</sup> See *Genetic Non-Discrimination Act*, S.C. 2017, c. 3 and page AD1A-2.

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

[37] I also reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.<sup>32</sup> I did not find any relevant evidence that the General Division might have ignored or misinterpreted.

## **Conclusion**

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

Solange Losier  
Member, Appeal Division

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<sup>32</sup> 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.