



Citation: *XS v Canada Employment Insurance Commission*, 2023 SST 1137

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

# **Leave to Appeal Decision**

<b>Applicant:</b>	X. S.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	General Division decision dated May 4, 2023 (GE-22-2634)
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<b>Tribunal member:</b>	Melanie Petrunia
<b>Decision date:</b>	August 21, 2023
<b>File number:</b>	AD-23-581

## Decision

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

## Overview

[2] The Applicant, X. S. (Claimant), was suspended 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.

[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 was suspended from her job because she did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct according to 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 errors of law and jurisdiction and based its decision on important factual errors. 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 are:

- a) Is there an arguable case that the General Division made an error of law by relying on irrelevant case law?

- b) Is there an arguable case that the General Division made an error of law by not following the *Digest of Benefit Entitlement Principles* (Digest)?
- c) Is there an arguable case that the General Division made an error of law by misstating the legal test for misconduct?
- d) Is there an arguable case that the General Division made an error of law by not considering whether the Claimant had just cause for taking a leave of absence?
- e) Is there an arguable case that the General Division made an error of jurisdiction by not interpreting the Claimant employment contract?
- f) Is there an arguable case that the General Division failed to consider the Claimant's evidence?

## **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;

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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).

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>

– **The General Division decision**

[12] The General Division considered the reasons for the Claimant's suspension. It noted that the Claimant did not disagree that the employer placed her on an unpaid leave of absence for not following the policy but disagreed that this amounts to misconduct.<sup>6</sup> The General Division found that she was suspended for non-compliance with the policy and that the Claimant did not voluntarily take a leave of absence.<sup>7</sup>

[13] The General Division then considered whether this reason for the Claimant's suspension is considered misconduct according to the EI Act. It set out the legal test for misconduct as established by case law from the Federal Court and the Federal Court of Appeal.<sup>8</sup>

[14] The General Division then applied the legal test, as established 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:

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<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.

<sup>6</sup> General Division decision at para 17.

<sup>7</sup> General Division decision at para 20.

<sup>8</sup> General Division decision at paras 22 to 29.

- The employer had a vaccination policy that said employees who did not comply would be placed on unpaid leave.
- The Claimant was clearly advised of the policy and what was expected of her.
- The employer communicated the policy to all staff.
- The Claimant knew or should have known the consequences of not complying with the policy.<sup>9</sup>
- The Claimant knowingly did not comply with the policy.<sup>10</sup>

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

[15] In her application for leave to appeal, the Claimant argues that the General Division made numerous legal errors. She says that the General Division relied on several irrelevant cases in its decision and incorrectly referred to them as law. The Claimant says that there is no caselaw concerning misconduct in the context of refusing a COVID-19 vaccination.<sup>11</sup>

[16] In its decision, the General Division refers to decisions from the Federal Court and the Federal Court of Appeal.<sup>12</sup> These decisions deal with different factual circumstances from the Claimant's but the legal principles set out in those cases apply to the issue of misconduct generally. These cases are binding on the General Division and it did not make any legal errors by relying on them.

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<sup>9</sup> General Division decision at para 33.

<sup>10</sup> General Division decision at para 37.

<sup>11</sup> AD1-8

<sup>12</sup> The General Division references *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v. Her Majesty the Queen*, A-402-96; *Attorney General of Canada v. Secours*, A-352-94; *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107; *Canada (Attorney General) v. Marion*, 2002 FCA 185; *Canada (Attorney General) v. Lemire*, 2010 FCA 314; and, *Minister of Employment and Immigration v Bartone*, A-369-88.

[17] The General Division also referred to a recent decision from the Federal Court which did concern COVID-19 vaccinations and the issue of misconduct.<sup>13</sup> In *Cecchetto v. Canada (Attorney General)*, 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.<sup>14</sup> The Court also confirmed that the Tribunal is not permitted, by law, to address the merits, legitimacy or legality of the employer's policy.<sup>15</sup>

[18] The Claimant argues that the General Division based its decision on an important error of fact when it found that it is not bound by the *Digest of Benefit Entitlement Principles* (Digest). The Claimant argues that this was also a legal error because the General Division was in contempt by not following the Digest.<sup>16</sup>

[19] The General Division accurately explained that the Digest is a reference tool not law. The General Division stated that it must apply the legislation and case law applicable to a misconduct analysis and it is not bound by Digest principles. This has been affirmed by the Federal Court and the Federal Court of Appeal.<sup>17</sup>

[20] I find that there is no arguable case that the General Division made a factual or a legal error when it made this determination. The General Division acknowledged the Claimant's arguments concerning the Digest and explained why it disagreed.

[21] The Claimant argues that the General Division made a legal error in its interpretation of misconduct. She says that while the conduct must be wilful in order for misconduct to apply, this does not mean that all wilful action is misconduct. The Claimant argues that the General Division wrongly found that any wilful conduct that results in a loss of employment is misconduct.<sup>18</sup>

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<sup>13</sup> General Division decision at para 40.

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

<sup>15</sup> See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

<sup>16</sup> AD1-8

<sup>17</sup> See *Canada (Attorney General) v Greey*, 2009 FCA 296 at para 28 and *Sennikova v Canada (Attorney General)*, 2021 FC 982.

<sup>18</sup> AD1-8

[22] There is no arguable case that the General Division made an error of law in its interpretation of misconduct. It accurately stated and applied the law. The statement that the General Division made is in line with the principles established by case law.

[23] The Claimant argues that the General Division made an error of law and based its decision on a factual error by not considering whether she had just cause for her leave of absence. She says that section 29(c) of the EI Act applies to her situation. She argues that her loss of employment meets the definition of voluntarily leaving with cause, due to the actions of her employer.<sup>19</sup>

[24] The Claimant says that her employer did not give her any options, therefore she had no reasonable alternative to leaving. There was a significant change or modification to the terms of her employment.

[25] The phrase “without just cause” applies to situations where a claimant has voluntarily left their employment or taken a leave of absence. It does not apply to misconduct cases. In this case, the facts are clear that the employer placed the Claimant on a leave of absence because she did not comply with its policy. The leave was not voluntary by the Claimant and was equivalent to a suspension.

[26] The General Division did not err in law by not considering whether the Claimant had just cause for the leave of absence. It found that the leave was not initiated by the Claimant and was not voluntary. It was not required to consider whether there was just cause.

### **No arguable case that the General Division made an error of jurisdiction**

[27] In her application for leave to appeal, the Claimant argues that the General Division made an error of jurisdiction and an error of fact. She says that the General

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<sup>19</sup> AD1-9

Division should have considered the employment contract and whether the employer breached the employment agreement.<sup>20</sup>

[28] The Claimant argues that there are many references to employment contracts throughout the EI Act and it conflicts with the foundation of employment insurance for the General Division to refuse to interpret the collective agreement or employment contract.<sup>21</sup>

[29] The General Division cited case law from the Federal Court of Appeal when it found that it cannot consider whether the employer breached the employment contract.<sup>22</sup> It noted that employees have recourse in other tribunals or courts if they believe that the collective agreement was violated or their rights were contravened.<sup>23</sup>

[30] It is well accepted that the conduct of the employer is not at issue in a misconduct analysis. The General Division did not err by not interpreting the collective agreement or the employment contract.

### **No arguable case the General Division made a factual error**

[31] The Claimant argues that the General Division did not consider her evidence as outlined in her post-hearing submission. She says that the General Division only summarized her arguments, while ignoring important context. She argues that the Commission did not provide enough evidence to support its decision.<sup>24</sup>

[32] There is no arguable case that the General Division based its decision on a factual error or failed to consider all the evidence. The General Division is not required to set out all the evidence that was before it. It addressed all the Claimant's key arguments, applied the proper legal test, and supported its findings with reference to the evidence. I cannot reweigh the evidence.

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<sup>20</sup> AD1-9

<sup>21</sup> AD1-9

<sup>22</sup> General Division decision at para 26 citing *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>23</sup> General Division decision at para 41.

<sup>24</sup> AD1-10



[33] 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 erred.

[34] 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**

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

Melanie Petrunia  
Member, Appeal Division