



Citation: *CP v Canada Employment Insurance Commission*, 2023 SST 1258

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

# **Leave to Appeal Decision**

**Applicant:** C. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated June 13, 2023  
(GE-22-2057)

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**Tribunal member:** Candace R. Salmon

**Decision date:** September 13, 2023

**File number:** AD-23-711

## Decision

[1] I am refusing leave (permission) to appeal because there is no arguable case that the General Division made a mistake. This means the appeal will not proceed.

## Overview

[2] C. P. is the Claimant. She worked for an airline during the COVID-19 pandemic. Her employer adopted a COVID-19 vaccination policy. Part of the policy stated that employees had to either show proof of vaccination against COVID-19, or obtain an exemption from the policy.

[3] The Claimant asked for an exemption from the policy. Her employer refused the request. She did not provide proof of vaccination by the employer's deadline, so it placed her on an unpaid leave of absence.

[4] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided that she did not qualify for benefits because she lost her employment due to her own misconduct.

[5] The General Division agreed with the Commission, finding the Claimant wasn't entitled to EI benefits while suspended from her job because her suspension was caused by her own misconduct.

[6] The Claimant wants to appeal the General Division decision to the Appeal Division. She needs permission for the appeal to move forward. She says that the General Division made errors of fact and law.

[7] I am refusing permission to appeal because the Claimant's appeal has no reasonable chance of success.

## Issues

[8] Is there an arguable case that the General Division made an error of law or based its decision on an important mistake about the facts of the case when it concluded that the Claimant couldn't get EI benefits because of misconduct?<sup>1</sup>

[9] Are there any other reasons to give permission to appeal?

## I am not granting permission to appeal

[10] An appeal can only proceed if the Appeal Division gives permission to appeal.<sup>2</sup> I must be satisfied that the appeal has a reasonable chance of success.<sup>3</sup> This means that there must be some arguable ground upon which the appeal might succeed.<sup>4</sup>

[11] To meet this legal test, the Claimant must establish that the General Division may have made an error recognized by the law.<sup>5</sup> 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; or
- based its decision on an important error of fact.<sup>6</sup>

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) says that I must refuse permission to appeal if I find the "appeal has no reasonable chance of success." This means that I must refuse permission for the appeal to move forward if I find there's no arguable case (*Fancy v Canada (Attorney General)*, 2010 FCA 63 at paragraphs 2 and 3).

<sup>2</sup> See section 56(1) of the DESD Act.

<sup>3</sup> See section 58(2) of the DESD Act.

<sup>4</sup> See, for example, *Osaj v Canada (Attorney General)*, 2016 FC 115.

<sup>5</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act. These errors are also explained on the Notice of Appeal to the Appeal Division.

<sup>6</sup> See section 58(1) of the DESD Act.

## **There is no arguable case that the General Division made an error of law**

[12] An error of law can happen 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.<sup>7</sup>

[13] The law says that a claimant who is suspended because of misconduct is not entitled to receive EI benefits.<sup>8</sup> This results in a “disentitlement” to EI benefits.

[14] Misconduct is not defined in the *Employment Insurance Act* (EI Act). The Federal Court of Appeal defines “misconduct” as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.<sup>9</sup>

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

[16] The Claimant submits that the General Division relied on the wrong section of applicable law and didn’t apply the correct law.<sup>11</sup> She also submitted that the General Division said it couldn’t, “make a decision” on the case because it wasn’t at the correct level.

[17] The Claimant didn’t specify which sections of law she believed the General Division failed to apply. She also didn’t explain how the sections of law used by the General Division were incorrect. I reviewed the entire decision to check for any legal mistakes.

[18] The General Division considered whether the Claimant was suspended or not. The Claimant said she was forced into an unpaid leave of absence, which she believed

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<sup>7</sup> See section 58(1) of the DESD Act.

<sup>8</sup> Section 31 of the *Employment Insurance Act* (EI Act) says that a person who is suspended for misconduct is disentitled from 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.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>10</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

<sup>11</sup> See AD01-1.

was not the same as a suspension.<sup>12</sup> The General Division decided that the Claimant stopped working because her employer placed her on a temporary leave of absence due to non-compliance with its COVID-19 vaccination policy.<sup>13</sup> The General Division determined that this was the same as a suspension, and that there was no evidence showing that the Claimant stopped working for any other reason than refusing to comply with the employer's COVID-19 policy.<sup>14</sup>

[19] The General Division then considered whether the Claimant's suspension was due to misconduct. It explained how the courts have described misconduct, some of the elements to consider when deciding if misconduct exists, and stated that the burden of proving misconduct lay with the Commission.<sup>15</sup> The General Division decided that the Claimant's suspension was due to her own misconduct, and based its finding on court decisions that explain misconduct.<sup>16</sup>

[20] There is no arguable case that the General Division used the incorrect law when it decided the Claimant's suspension was due to misconduct. The decision is supported by the legislation and case law identified in the General Division decision.

[21] Further, the General Division said the Claimant made a number of other submissions that were not in its jurisdiction to decide. The Claimant described this as the General Division being at the incorrect level to make a decision.<sup>17</sup> The Appeal Division is no more able to make a decision on issues of collective agreements, the employer's exemption process, or the safety of the COVID-19 vaccine than the General Division.<sup>18</sup> The General Division said it had only the power to make decisions about a person's entitlement to EI benefits, which means only being able to consider their

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<sup>12</sup> See General Division decision at paragraph 11.

<sup>13</sup> See General Division decision at paragraph 14.

<sup>14</sup> See General Division decision at paragraph 17.

<sup>15</sup> See General Division decision at paragraphs 20 to 22 and 34.

<sup>16</sup> See General Division decision at paragraph 35; see also *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34; and *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>17</sup> See AD01-1.

<sup>18</sup> The Claimant made submissions on these three points. The General Division addressed them in its decision at paragraphs 30 and 31.

actions and how they relate to the requirements of the EI Act.<sup>19</sup> There is no arguable case that this is an error of law.

### **There is no arguable case that the General Division made an error of fact**

[22] There is no arguable case that the General Division based its decision on an important mistake about the facts of the case.

[23] The Claimant submits that she was forced to take an unpaid leave of absence. She said the leave of absence wasn't done correctly because she did not ask for it, and her union contract says she had to ask for a leave of absence.

[24] The General Division did not ignore or misunderstand that the Claimant didn't choose to take a leave of absence. It clearly recognized that the employer suspended the Claimant from her job because she didn't follow a policy. It specifically stated that the Claimant didn't choose to leave her job and didn't stop working because of a shortage of work.<sup>20</sup>

[25] The Claimant also stated that the "facts" she submitted were not acknowledged. The Claimant submitted evidence to the General Division. The General Division decided what evidence was fact and explained why it relied on certain facts. The General Division did not have to refer to every piece of evidence in the file. It is presumed that the General Division considered everything.<sup>21</sup>

### **The Claimant's appeal has no reasonable chance of success**

[26] The Tribunal must follow the law, including the *Department of Employment and Social Development Act* (DESD Act). It provides rules for appeals to the Appeal Division. The Appeal Division does not provide an opportunity for the parties to re-argue their case. It determines whether the General Division made an error under the DESD Act.

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<sup>19</sup> See General Division decision at paragraph 32.

<sup>20</sup> See General Division decision at paragraph 14.

<sup>21</sup> See *Simpson v Attorney General of Canada*, 2012 FCA 82 at paragraph 10.

[27] There is a recent Federal Court decision dealing with facts similar to this case. It is also about a person who couldn't receive EI benefits because he lost his job for not complying with his employer's COVID-19 vaccination policy.

[28] In that case, the Court confirmed the Tribunal's narrow role. It said that the Tribunal must decide whether a claimant was dismissed from their job and whether that reason was misconduct. The Court said that the Tribunal is not permitted by law to address the legal, ethical, and factual questions that the claimant was raising because it was beyond the scope of the Tribunal's mandate.<sup>22</sup>

[29] In this case, the Claimant submitted that she wasn't given enough information to make an informed decision, said she had to do all of her own research, and said that her Record of Employment showed she had a personal leave of absence, which isn't misconduct. She also reiterated that her collective agreement was violated and that her employer didn't accommodate her sincerely held beliefs. These are all examples of arguments that are outside the scope of the Tribunal's jurisdiction.

[30] I also noted that the Claimant submitted that the employer's policy violated her rights under the *Canadian Charter of Rights and Freedoms* (Charter). This is one of the many arguments made in submissions to the General Division. I listened to the hearing, and the Claimant did not make any specific submissions about her Charter rights. Again, the General Division does not have to refer to every piece of evidence, or argument, submitted. The Federal Court has recently confirmed that it is, "not unreasonable for a decision-maker not to address legal arguments when they fall outside the scope of its legal mandate."<sup>23</sup> This echoes the decision in *Ceccetto*, which confirmed the Tribunal's narrow and specific role.<sup>24</sup>

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<sup>22</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 46.

<sup>23</sup> See *Kuk v. Attorney General of Canada*, 2023 FC 1134 at paragraph 44.

<sup>24</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 47.

[31] I acknowledge that the Claimant disagrees with the General Division's decision, but that is not enough for me to intervene. I cannot reweigh the evidence to come to a conclusion more favourable for the Claimant.<sup>25</sup>

[32] I am satisfied that the General Division did not misinterpret the law or fail to properly consider any relevant evidence.<sup>26</sup> There is no arguable case that the General Division made an error.

## **Conclusion**

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

Candace R. Salmon  
Member, Appeal Division

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<sup>25</sup> See *Garvey v Canada (Attorney General)*, 2018 FCA 118 at paragraph 6.

<sup>26</sup> See *Karadeolian v Canada (Attorney General)*, 2016 FC 165, at paragraph 10.