Citation: *SD v Canada Employment Insurance Commission*, 2023 SST 1

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 31, 2023 (GE-22-3365)

Tribunal member:	Candace R. Salmon
Decision date:	September 19, 2023
File number:	AD-23-152

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] S. D. is the Claimant. She was suspended from her job because she refused to comply with the employer's mandatory COVID-19 vaccination policy.[1] She was recalled to work after a three-month suspension.

[3] 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 did not prove that she was available for work during the three months when she was suspended.

[4] The General Division agreed with the Commission, finding the Claimant wasn't entitled to EI benefits because she didn't prove that she was available for work.

[5] 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.

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

Issues

[7] Is there an arguable case that the General Division failed to provide a fair process?[2]

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[1] See General Division decision at paragraph 18.
[2] 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).

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

I am not granting permission to appeal

[9] An appeal can only proceed if the Appeal Division gives permission to appeal.[3] I must be satisfied that the appeal has a reasonable chance of success.[4] This means that there must be some arguable ground upon which the appeal might succeed.[5]

[10] To meet this legal test, the Claimant must establish that the General Division may have made an error recognized by the law.[6] 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.[7]

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

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

[12] The Claimant submitted that she was not given a termination letter. She says that she was laid off due to non-compliance with a vaccine mandate. She did not point to any specific paragraph in the General Division decision that stated she was terminated or explain how there was an important mistake about the facts of the case.

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[3] See section 56(1) of the DESD Act.
[4] See section 58(2) of the DESD Act.
[5] See, for example, *Osaj v Canada (Attorney General)*, 2016 FC 115.
[6] 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.
[7] See section 58(1) of the DESD Act.

[13] The General Division decision says that the Claimant was suspended from her job because she didn't comply with her employer's vaccination policy.[8] There is no evidence that the General Division found the Claimant was terminated from her job.

[14] The Claimant appears to believe she shouldn't have to prove she was available for work because she wasn't terminated from her job. She told the General Division that she expected to be recalled to her usual job.[9]

[15] The General Division stated that two sections of the law require a person to show they are available for work after experiencing an interruption of earnings. One section says a Claimant has to make "reasonable" and "customary" efforts for find a suitable job, while the other section says the Claimant has to be capable of and available for work but unable to find a suitable job.[10]

– **Reasonably and Customary Efforts**

[16] The General Division considered the Claimant's reasonable and customary efforts. It found that she didn't prove her efforts to find work were reasonable and customary.

[17] The Claimant said that she anticipated her suspension, so she prepared a résumé. She applied to work at one restaurant, and received an interview. She told the prospective employer that she expected to return to her regular employment, and the employer didn't want to hire and train her if she planned to leave immediately. The Claimant said that if her usual employer hadn't lifted the suspension, she could have worked at the restaurant.[11]

[18] The Claimant also said that she registered with the Government of Canada Job Bank and reviewed the postings emailed to her, but didn't apply for any jobs aside from

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[8] See General Division decision at paragraph 29. The Claimant testified that she was suspended from her job. This is reflected at paragraph 16.
[9] See General Division decision at paragraph 16.
[10] See General Division decision at paragraphs 8 to 10; see also *Employment Insurance Act* (EI Act) at sections 18(1)(a) and 50(8). The explanations of the requirements are found in *Employment Insurance Regulations* (EI Regulations) section 9.001 and *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[11] See General Division decision at paragraphs 20 and 21.

the restaurant position. She didn't attend any job fairs, workshops, or network. She also stated that she started working on her GED, and a self-guided computer course to improve her skills.

[19] The General Division decided that waiting to see if the suspension was lifted was not sufficient to show that the Claimant was available for work. It also said she didn't actively pursue the job opportunity with the restaurant, or pursue any other job, and said reviewing job postings without applying for more positions did not support that she was trying to find a job.[12] The General Division reiterated that other Tribunal decisions have confirmed that a claimant cannot simply wait to be called back to work and must look for employment to be entitled to benefits.[13]

– **Capable of and Available for Work**

[20] The General Division also considered whether the Claimant showed that she was capable of and available for work. It found that the Claimant did not want to return to work as soon as a suitable job was offered and didn't make enough efforts to find a job. It explained that while it analyzed three factors and the Claimant met one of them, since she failed to meet the other two, she didn't prove her availability.

[21] There is no arguable case that the General Division made an error of fact. The Claimant didn't allege any specific facts that she believed the General Division got wrong. Instead, she suggested that the rules of availability shouldn't apply to her. The General Division made findings that are consistent with the law and are supported by the evidence. There is no basis for the Appeal Division to intervene in this case.

The Claimant's appeal has no reasonable chance of success

[22] 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

[12] See General Division decision at paragraph 29.
[13] See General Division decision at paragraph 28; see also *MP v Canada Employment Insurance Commission*, 2022 SST 802 at paragraph 19.

their case. It determines whether the General Division made an error under the DESD Act.

[23] The Claimant's other submissions were that:

a) The COVID-19 vaccine mandate was unlawful and discriminatory;

b) Making a decision to deny her EI benefits a year later was not fair because she didn't know if she would be recalled to work;

c) She doesn't know why she had to complete EI reports if she wasn't going to receive money anyway;

d) She has paid into EI for many years and now that she needs it, she is denied; and

e) Due to not receiving the COVID-19 vaccination, her job opportunities were limited to salaries she could not live on.[14]

[24] A recent Federal Court decision confirmed that the Tribunal's role is narrow. It said that the Tribunal is not permitted by law to address legal, ethical, and factual questions that are beyond the scope if its mandate.[15]

[25] The Tribunal doesn't have the authority to make decisions about the legal status of COVID-19 vaccination mandates. The Tribunal must base its decisions on the law, so it also cannot decide an issue based on fairness. Questions about why EI report cards had to be completed are best made to the Commission, as the Tribunal does not control the processing of EI benefits. Further, EI is an insurance plan and, like other types of insurance, a person has to qualify to receive the benefit.

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[14] See AD1-2.
[15] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 46.

[26] 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.[16]

[27] I am satisfied that there is no arguable case that the General Division made an error of fact or failed to properly consider any relevant evidence.[17]

Conclusion

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

Candace R. Salmon
Member, Appeal Division

[16] See *Garvey v Canada (Attorney General)*, 2018 FCA 118 at paragraph 6.
[17] See *Karadeolian v Canada (Attorney General)*, 2016 FC 165, at paragraph 10.