Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1747

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated July 14, 2023 (GE-22-3244)

Tribunal member:	Janet Lew
Decision date:	December 4, 2023
File number:	AD-23-777

Decision

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

Overview

[2] The Applicant, M. M. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant was suspended from her job because of misconduct. In other words, it found that she had done something that caused her to be suspended. The Claimant had not complied with her employer's vaccination policy.

[4] As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[5] The Claimant denies that she committed any misconduct. She argues that the General Division member made procedural, jurisdictional, legal, and factual errors. She says that she did not get a fair hearing or the chance to fully present her case.

[6] The Claimant also says the General Division misinterpreted what misconduct means. She says that for misconduct to arise, there has to be a breach of an express or implied duty arising out of her employment contract. She denies that she breached any duties. She says misconduct does not arise also because her employer changed the terms of her contract. She also says her employer's vaccination policy was unlawful and unreasonable and that she should not have had to comply with it. She also says her employer should have accommodated her.

[7] The Claimant also argues that the General Division failed to consider some of the evidence, including the fact that she filed a grievance against her employer.

[8] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[9] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issues

[10] The issues are as follows:

a) Is there an arguable case that the General Division did not give the Claimant a fair hearing?

b) Is there an arguable case that the General Division failed to investigate the Commission?

c) Is there an arguable case that the General Division misinterpreted what misconduct means?

d) Is there an arguable case that the General Division failed to consider the Claimant's collective agreement?

e) Is there an arguable case that the General Division overlooked some of the evidence?

I am not giving the Claimant permission to appeal

[11] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General

[1] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[12] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[4]

The Claimant does not have an arguable case that the General Division did not give her a fair hearing

[13] The Claimant does not have an arguable case that the General Division did not give her a fair hearing.

[14] The Claimant says she did get the chance to respond to decisions of the Federal Court of Appeal that the General Division relied on in its decision.

[15] The Claimant also argues that she did not get a fair hearing because she was not given enough time to present her case or give evidence. She states that the hearing was delayed by more than half an hour because of technical issues that the member experienced. So, she felt pressured and "had to close [her] presentation hurriedly."[5] She says that she was unable to play an audio recording in its entirety.[6]

– The General Division did not have to give copies of court decisions to the Claimant

[16] The General Division did not have to give copies of Federal Court of Appeal decisions to the Claimant.

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[3] See section 58(1) of the DESD Act.
[4] See section 58(1)(c) of the DESD Act.
[5] See Claimant's Application to the Appeal Division, filed August 20, 2023, at AD 1B-13.
[6] The Claimant had recorded two phone conversations that she had with the Commission, the first on June 27, 2022 (see GD 3-240 and 44:20 of the General Division hearing), and the second on August 31, 2022 (see GD 3-252 and 50:30). She played the first recording (33:34 to 44:18 and from 46:12 and 50:06 of the General Division hearing). The Claimant started playing this second recording at 50:55 of the General Division hearing, and then resumed playing it from 54:40 to 58:56.

[17] The Claimant says the General Division should have given her a chance to respond to decisions that it followed. She suggests that she could not have known the case against her that she had to meet.

[18] However, the Claimant does not say how she would have responded had she received a copy of these decisions. She does not argue, for instance, that the General Division misinterpreted the decisions or that somehow they are distinguishable. It might have been a different matter altogether had the Claimant explained how the General Division might have misinterpreted these decisions and then provided her own supporting authorities, but she does not.

[19] On top of that, case law is unlike evidence. The General Division cannot rely on evidence in making its decision without giving the parties a chance to respond to it, or even refute it. But when it comes to case law, the General Division can take official notice of laws in the field within its jurisdiction. The cases cited by the General Division fell within its jurisdiction, so it was entitled to take official notice of those cases.

[20] As for the Claimant's suggestion that she could not have known the case against her, the Commission set out its arguments.[7] The Commission cited *McNamara*.[8] It argued that the test for misconduct is not to determine whether the dismissal of an employee was wrongful or not, but to decide whether the act or omission of the employee amounted to misconduct within the meaning of the *Employment Insurance Act*. So, it should not have surprised her when the General Division also cited *McNamara* and set out this same test.

[21] The Commission also argued that conduct has to be wilful or deliberate or so reckless as to approach wilfulness for there to be misconduct.[9] So, the Claimant had to have known that the interpretation of misconduct was at issue.

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[7] See Representations of the Commission to the Social Security Tribunal-Employment Insurance section, at GD4.
[8] See Representations of the Commission, at GD 4-5, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See Representations of the Commission, at GD 4-5 and General Division decision at para 18.

[22] I am not satisfied that there is an arguable case that the General Division failed to give copies of decisions to the Claimant, or that she somehow did not know the case that she had to meet.

– **The General Division did not have to allow the Claimant to play the entire audio recording at the hearing**

[23] The General Division did not have to allow the Claimant to play the full audio of a recording at the hearing. The General Division member could have listened to the recording after the hearing if the Claimant had filed a copy of it with the Social Security Tribunal. Besides, the General Division member summarized his understanding of the recording. The Claimant did not correct him or suggest that there was more to the recording. She agreed to continue with the hearing without playing the entire recording.

[24] It is unclear why the Claimant did not file a copy of the audio recording with the General Division before it held a hearing on July 14, 2023. She did not file a copy after the hearing either. If she had filed a copy of the recording, the General Division member could have listened to it outside the hearing. The Claimant did not file a copy until after she filed an application with the Appeal Division.

[25] The recording is about 16 to 17 minutes long.[10] The General Division member invited the Claimant to start the recording but it is clear that he wanted to make judicious use of the hearing time.[11] The Claimant agreed with the member's proposal.

[26] The General Division member asked the Claimant to explain why the recording was relevant. After listening to the recording for several minutes, the member decided that it was unnecessary to continue listening to it. The member said:

> If it's ok, with you, I don't need to listen to the rest of that recording because I can tell it's escalating and again I can see that the EI agent is sort of escalating it themselves. They are not being professional with you and I can see that from the recording and so it's not necessary for me to listen to the rest of it, as long as I'm understanding your argument correctly which I think I am which is that the EI agent, agents when they looked at your file, you gave them all the evidence you feel you needed to give regarding the sincerity of your religious beliefs, which is

[10] See AD1D.
[11] At about 53:34 to 54:18 of the General Division hearing.

> why you had asked for an exemption from your employer's COVID-19 policy and EI still denied your claim even though you had given them all that evidence about the sincerity of your religious beliefs.[12]

[27] The General Division member summarized what he understood was the overall thrust of the recording. The Claimant agreed with his summary. She responded, "yeah, ok."[13] The Claimant did not object or say the General Division should listen to the remainder of the recording at the hearing. If the Claimant did not object or say anything, it is unclear how the General Division could have been expected to know that she felt it was vital to continue playing the recording at the hearing.

[28] Besides, the evidence on the recording appeared elsewhere in the evidence at the General Division. The General Division had to examine why the Claimant had been suspended from her employment or what led to her suspension. The General Division determined that there was already evidence before it that addressed this issue. The General Division determined that the audio recording did not represent the "best evidence" of the circumstances surrounding the Claimant's separation from her employment.

[29] I am not satisfied that there is an arguable case that the General Division failed to give the Claimant a fair hearing by not playing the entire audio recording at the hearing.

– **The General Division gave the Claimant enough time to present her case**

[30] The General Division gave the Claimant enough time to present her case. At the end of the hearing, the Claimant stated that she believed she had addressed everything to her satisfaction.

[31] The Claimant suggests that she felt rushed at the hearing. After more than an hour had passed, the General Division member checked with the Claimant "how much more do you sort of want to go through?"[14] He told the Claimant that he also had some

[12] At about 59:25 to 1:00:14 of the General Division hearing.
[13] At about 1:00:15 of the General Division hearing.
[14] At about 1:09 of the General Division hearing.

questions to ask. He asked and she stated that she was almost finished at that point.[15] The member also told the Claimant that he wanted to keep the hearing on track.[16]

[32] The General Division had scheduled the in-person hearing for 90 minutes.[17] However, I do not get any sense that the General Division member rushed the Claimant. He allowed her to give evidence and make her arguments. Although the hearing had been scheduled for 90 minutes, the member allowed the hearing to go on for just under two hours.[18]

[33] After about 1.75 hours, the Claimant signalled that she had finished her case. She said, "I think, let me see if I finished [reviewing] all the pages because I don't want to go over that you know."[19] The member replied, "We should probably start wrapping up, unless there is something completely new that isn't in your documents."[20]

[34] The Claimant then reviewed something from the documents that she felt she had not already explained. The member let her continue without placing any time constraints on her. She stated that she wanted to ensure she had covered everything to her satisfaction. She then said, "I think I've covered everything to my satisfaction."[21]

[35] Given this, I am not satisfied that there is an arguable case that the General Division did not give the Claimant enough time to present her case.

The Claimant does not have an arguable case that the General Division failed to consider the constitutionality of section 31 of the *Employment Insurance Act*

[36] The Claimant does not have an arguable case that the General Division should have considered the constitutionality of section 31 of the *Employment Insurance Act*.

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[15] At about 1:09:29 to 1:09:33 of the General Division hearing.
[16] At about 1:16 of the General Division hearing.
[17] See Notice of Hearing dated January 4, 2023, at GD1.
[18] The General Division hearing starts at about 5 minutes into the recording of the General Division hearing.
[19] At about 1:48:20 of the General Division hearing.
[20] At about 1:48:32 of the General Division hearing.
[21] At about 1:49:05 of the General Division hearing

[37] The Claimant argues that the General Division should have decided the constitutionality of section 31 of the *Employment Insurance Act*. The section deals with suspensions for misconduct. A claimant who is suspended from their employment because of misconduct is not entitled to receive benefits until:

i. the suspension expires,

ii. the claimant loses or voluntarily leaves the employment, or

iii. the claimant, after the beginning of the period of suspension, accumulates the number of hours that are required under either section 7 or 7.1 to qualify for benefits.

[38] However, there was no basis for the General Division to consider the constitutionality of the section. It was not apparent from the Claimant's 48-page Notice of Appeal at the General Division, the 44 separate attachments, or her other documents[22] that she was raising a constitutional question.

[39] The Claimant referred to breaches of the *Canadian Charter of Rights and Freedoms* throughout her Notice of Appeal. But she was alleging that her employer's vaccination policy – rather than section 31 of the *Employment Insurance Act* - violated her Charter rights. That is a distinct issue altogether from saying that section 31 of the *Employment Insurance Act* violates any provisions of the Charter.

[40] On top of that, the Claimant did not comply with the notice requirements. She did not give notice of her constitutional challenge to any of the Attorneys Generals across Canada. This procedural defect alone would not have defeated any Charter challenge(s) (as it could have been cured).

[41] But, if the Claimant did not set out the provision that she was challenging, set out the material facts relied on to support the constitutional challenge, and set out a

[22] The Claimant filed additional documents numbered GD6 (381 pages), GD10 (4 pages), GD11 (4 pages), and GD13 (20 pages). As she stated, she had already sent copies of some of these documents before.

summary of the legal argument to be made in support of the constitutional challenge, then the General Division could hardly be expected to have known that the Claimant was pursuing a constitutional challenge of section 31 of the *Employment Insurance* Act. The member could not have been aware that it was a live issue.

[42] I am not satisfied that there is an arguable case that the General Division failed to consider the constitutionality of section 31 of the *Employment Insurance Act*.

The Claimant does not have an arguable case that the General Division failed to investigate the Commission

[43] **The** Claimant does not have an arguable case that the General Division failed to investigate the Commission.

[44] The Claimant argues that the General Division and the Tribunal should have investigated why the Commission considered her religious accommodation invalid. She says that is the main reason why it refused her claim for Employment Insurance benefits. She says the General Division should have also investigated why the Commission did not follow its own guidelines.

[45] The General Division is an independent administrative tribunal. Members do not conduct any investigations. They assess the relevant facts and the evidence before them. Besides, it was irrelevant why the Commission turned down the Claimant's application for benefits. Rather, what was important is why the employer suspended the employee from their employment, and whether that reason constituted misconduct.

[46] I am not satisfied that the Claimant has an arguable case that the General Division failed to investigate the Commission.

The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means

[47] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means.

[48] The Claimant denies that she committed any misconduct. She argues that the General Division misinterpreted what misconduct means. She says that it should have followed the case of *Lemire*.[23] She says that the Federal Court of Appeal established that for misconduct to arise, there has to be a breach of an express or implied duty arising out of one's collective agreement.

[49] The Claimant says that an employer cannot unilaterally change the terms and conditions of her collective agreement. She denies that she breached any duties owing to her employer arising out of her employment contract.

[50] The Claimant also says that she did not have to comply with her employer's policy because it was unlawful and unreasonable. So, she argues that misconduct did not arise under these circumstances.

[51] She also argues that misconduct does not arise if her employer could have accommodated her.

– **The General Division did not have to consider the Claimant's collective agreement**

[52] The General Division did not have to consider the Claimant`s collective agreement when assessing whether there was any misconduct. An employer's policies do not have to form part of the collective agreement for there to be misconduct.

[53] The Claimant says that the General Division should have looked at her collective agreement to determine whether she owed a duty to her employer to get vaccinated. If her collective agreement did not require vaccination, then she argues that her actions could not be viewed as misconduct.

[54] The Claimant relies on *Lemire*. But even there, the Court of Appeal found that there was misconduct even though the appellant did not breach any terms of his employment contract. He sold contraband cigarettes on his employer's work premises. He had breached a policy that was not part of his employment contract. This is

[23] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

confirmed where the Court wrote, "… The employer has a policy on this matter… The claimant was aware of the policy."[24] The Court of Appeal referred to the policy again, at paragraphs 17, 18, and 20. The Court noted that the employer had a policy that Mr. Lemire chose to disregard.

[55] It has become well established that an employer's policies do not have to form part of the collective agreement or employment agreement for there to be misconduct. The following cases also show this:

- In a recent case called *Matti*, the Federal Court determined that it was unnecessary for the employer's vaccination policy to be in the initial agreement, as "misconduct can be assessed in relation to policies that arise after the employment relationship begins."[25]

- In *Kuk*,[26] the appellant chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. The Federal Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Federal Court found that there was misconduct because Mr. Kuk knowingly did not comply with his employer's vaccination policy and knew what the consequences would be if he did not comply.

- In *Nelson*,[27] the appellant lost her job because of misconduct. The case did not involve vaccination. Ms. Nelson was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal found that

[24] See *Lemire, at para 3.*
[25] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[26] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[27] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.

there was misconduct. It was irrelevant that the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *Nguyen,*[28] the Federal Court of Appeal found that there was misconduct. Mr. Nguyen had harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and did not form part of his employment agreement.

- In *Karelia*,[29] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Federal Court of Appeal determined that Mr. Karelia had to comply with them—even if the conditions were new—otherwise there was misconduct.

[56] In addition to *Matti* and *Kuk*, two other decisions address the misconduct issue. These two decisions are in the context of vaccination policies. In *Cecchetto*[30] and in *Milovac*,[31] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[57] I am not satisfied that there is an arguable case that the General Division failed to consider the Claimant's collective agreement.

– **The General Division did not have to consider whether the employer could change the terms and conditions of the collective agreement**

[58] The General Division did not have to consider whether the Claimant`s employer was allowed to unilaterally change the terms and conditions of the Claimant`s employment by introducing new policies.

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[28] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[29] See *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.
[30] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[31] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.

[59] The Claimant argues that if her collective agreement did not require vaccination, she would not have to get vaccinated.

[60] However, this issue simply was not relevant to the General Division's determination of whether the Claimant had committed any misconduct. As I have noted above, the issue regarding the Claimant's collective agreement was an irrelevant consideration. An employer may introduce new policies. Those policies do not have to be part of the collective agreement for misconduct to arise.

– **The General Division did not have to consider the legality or reasonableness of the employer's vaccination policy**

[61] The General Division did not have to consider whether the employer's vaccination policy was unlawful or unreasonable.

[62] The Claimant argues that her employer's vaccination policy was unlawful and unreasonable. She says that because the policy was unlawful and unreasonable, she did not have to comply with it. So, she says the General Division should have examined the policy. She says it would have concluded the policy was unlawful and unreasonable.

[63] However, arguments about the legality and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has held that the General Division and the Appeal Division do not have the authority to address these types of arguments. In *Cecchetto*, the Court wrote:

> [46] As noted earlier, it is likely that the Applicant [Cecchetto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
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> [47] The SST-GD [Social Security Tribunal-General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."…
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> [48] **Despite the Claimant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the**

> **merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SSTGD**. [Citation omitted][32]
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> (my emphasis)

[64] Recently, the Federal Court has held that the General Division and Appeal Division, "are not the appropriate fora to determine whether the [employer's] policy or [the employee's] termination were reasonable."[33]

[65] I am not satisfied that there is an arguable case that the General Division failed to consider the legality or reasonableness of the Claimant's employer's vaccination policy.

– **The General Division did not have to consider whether the employer could have accommodated the Claimant**

[66] The General Division did not have to consider whether the Claimant`s employer could have accommodated the Claimant.

[67] The Claimant argues that the General Division failed to consider whether her employer should have accommodated her, by providing options or alternatives to vaccination. If her employer had accommodated her, she would not have had to undergo vaccination.

[68] I find that the General Division did not fail to consider this issue because an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[34]

The Claimant does not have an arguable case that the General Division made important factual errors

[69] The Claimant does not have an arguable case that the General Division made important factual errors. The Claimant says that the General Division overlooked some

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[32] See *Cecchetto*.
[33] See *Davidson v Canada (Attorney Genera)*, 2023 1555 at para 77.
[34] See *Kuk*, at para 36, citing *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 14.

of the evidence, but some of it was irrelevant, and some of it does not support what the Claimant says it does, or the General Division did not base its decision on that evidence.

[70] Besides, a decision-maker is not required to refer to all of the evidence before it, unless it is of such significance that it could affect the outcome. A decision-maker is presumed to have considered all of the evidence. As the Federal Court has held, a decision-maker expresses only the most important factual findings and justifications for them.[35]

– **Paragraphs 5 and 9 to 12, inclusive, of the General Division decision**

[71] The Claimant argues that the record of employment was, "not appropriately used here."[36] Her employer stated that it issued the record for "other" reasons.[37] In the comments section, the employer also wrote, "Leave due to non-compliance with the employer's vaccination policy. Please treat as a code M." Code M meant dismissal or suspension.[38]

[72] It seems that the Claimant is arguing that the Commission – rather than the General Division - inappropriately used the record of employment. I do not see any indication in its decision that the General Division based its decision on the record of employment. The only time the General Division referenced the record of employment was at paragraph 4, where it wrote:

> [4] Even though the [Claimant] doesn't dispute this happened, she says she doesn't know why her employer suspended her. She says her Record of Employment (ROE) doesn't give a specific reason why she was suspended. .

[73] The General Division did not rely on or base its decision on the record of employment. In assessing whether misconduct took place, the General Division had to

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[35] *Canada v South Yukon Forest Corporation*, 2012 FCA 165.
[36] See Claimant's Application to the Appeal Division, at AD 1B-13.
[37] See Record of Employment dated March 25, 2022, at GD 3-19.
[38] See Important Information and Instructions for Employees, at GD 3-20.

examine all of the evidence surrounding the Claimant's separation. The record of employment was not determinative.

[74] I am not satisfied that there is an arguable case that the General Division made a factual error by basing its decision on the record of employment.

– **Employer's procedures for addressing employee misconduct**

[75] The Claimant argues the General Division overlooked her employer's procedures for addressing employee misconduct.[39] She says that if the General Division had considered that her employer disciplined those who committed misconduct, it would have concluded that she did not commit any misconduct if her employer did not discipline her.

[76] The employer's procedures were irrelevant to the misconduct issue. The courts have held that there is a distinction between suspension for disciplinary purposes and suspension for the purposes of the *Employment Insurance Act*. In other words, an employer's characterization is not determinative of whether misconduct occurred. Or, put another way, an employer's determination, or subjective assessment of whether an employee engaged in misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.[40]

– **The employer's vaccination policy – requirements under the policy**

[77] The Claimant argues that the General Division did not carefully look at her employer's vaccination policy. She says that if it had looked at her employer's policy, it would have accepted that she had been fully compliant with it.[41]

[78] Under the vaccination policy, employees could request accommodation. The employer had a duty to accommodate employees' needs when they related to one of

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[39] See employer's procedures for addressing employee misconduct, at GD 8-9 to 8-21
[40] See *Nelson v Canada (Attorney General)*, 2019 FCA 222 and *Canada (Attorney General) v Nguyen*, 2001 FCA 348.
[41] The Claimant refers to pages GD 6-79 to 108 and GD 8-5 to 26, and in particular, GD 6-80, 86, 88, 90 and 93. Some of these pages are the employer's guide to implementing the policy.

the prohibited grounds of discrimination under the *Canadian Human Rights Act.* This could include religious considerations.

[79] The Claimant suggests as long as she was entitled to an accommodation, and as long as she made an attestation (disclosed her vaccination status), then she was compliant with her employer's policy.

[80] The General Division was clearly mindful of the Claimant's evidence that she had sought an accommodation and that she had disclosed her status.[42] As well, the General Division acknowledged the Claimant's argument that she had complied with her employer's policy.[43]

[81] The General Division determined however that the employer's vaccination policy required employees to attest **and get vaccinated**, including those who did not get exemption requests.[44] The policy stated that, "all employees … are to be fully vaccinated unless accommodated…"[45]

[82] The employer's policy also set out the consequences. The employer stated that it would place employees on leave without pay until they either got vaccinated or received an accommodation.[46]

[83] The General Division's findings about the Claimant's compliance were consistent with the employer's policy.

– **Paragraph 30 of the General Division decision**

[84] The Claimant says that, at paragraph 30, the General Division misstated what her employer's policy required. The General Division wrote that if the employer denied an employee's accommodation request, that employee had two weeks from the date of the request to attest to their vaccination status.

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[42] See General Division decision, at para 31.
[43] See General Division decision, at para 37.
[44] See General Division decision, at paras 30 and 37, citing GD 6-86.
[45] See 6.1.1 of the employer's policy, at GD 6-98.
[46] See 6.7.1.2 of the employer's policy, at GD 6-100.

[85] The Claimant says that the two-week deadline to attest was irrelevant. She says that she was still negotiating and in communications with her employer. In other words, she says the deadline did not apply to her and she did not have to attest or get vaccinated.

[86] The Claimant filed a grievance against her employer. However, the fact that there was a grievance did not suspend the requirements under the policy. And certainly, there was no indication from the employer that it no longer required compliance with its vaccination policy, pending the outcome of any negotiations or the grievance.

[87] So, the General Division did not misstate the evidence when it found that the policy required employees to attest to their vaccination status.

– **Religious discrimination**

[88] The Claimant says that the General Division failed to consider the fact that there was religious discrimination involved when her employer did not grant her a religious exemption or accommodation. She relies on documents at pages GD 13-1 and GD 13-14 to 20 to show the sincerity of her religious beliefs. She says that her beliefs prevent her from being able to get vaccinated.

[89] As I have noted above, this was an irrelevant consideration. The General Division had to consider whether the Claimant was aware of the policy and the consequences that would follow by not following the policy, not whether the Claimant should have received a religious exemption.

[90] This is not to say that the Claimant is without any options to pursue a claim for any breach of her rights. But her options lie outside the Social Security Tribunal.

Conclusion

[91] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division