



Citation: *MH v Canada Employment Insurance Commission*, 2024 SST 244

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

# **Leave to Appeal Decision**

**Applicant:** M. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated November 8, 2023  
(GE-23-1864)

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**Tribunal member:** Melanie Petrunia

**Decision date:** March 10, 2024

**File number:** AD-23-1104

## **Decision**

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

## **Overview**

[2] The Applicant, M. H. (Claimant) worked for the federal government. She was placed on an administrative leave of absence for not complying with her employer's COVID-19 vaccination policy. The Claimant applied for employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the reason for the Claimant's leave of absence was misconduct so she could not be paid benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was placed on a leave of absence due to misconduct and she was not entitled to be paid EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues the General Division based its decision on an important error of fact.

[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 based its decision on an important error of fact when it found that the Claimant was placed on a leave of absence for disciplinary reasons?
- b) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

## 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;
- c) based its decision on an important factual error;<sup>3</sup> or

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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).

<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.

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>

## **Background**

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19 effective October 6, 2021.<sup>6</sup> The policy required employees to be fully vaccinated or have a valid exemption. Employees who did not comply would be placed on an unpaid leave of absence.<sup>7</sup>

[13] The Claimant did not provide proof of vaccination status by the required deadlines. The employer placed her on an unpaid leave of absence effective April 7, 2022.<sup>8</sup> The Claimant returned to work on June 20, 2022.<sup>9</sup>

[14] The Commission decided that the reason for the Claimant's leave of absence was misconduct. The Claimant appealed this decision to the Tribunal's General Division. She argued that she was placed on an administrative leave which was not disciplinary.<sup>10</sup>

[15] The General Division found that the Claimant was placed on an unpaid leave of absence because she did not comply with the employer's vaccine policy.<sup>11</sup> It relied on a letter from the employer explaining why she was being put on a leave without pay. It also considered that the Claimant made a request for a religious exemption that was

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<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> See *Policy on COVID-19 Vaccination for the Core Public Administration Including the RCMP* at GD3-46.

<sup>7</sup> GD3-54

<sup>8</sup> General Division decision at para 3.

<sup>9</sup> GD3-26

<sup>10</sup> See GD2

<sup>11</sup> General Division decision at para 8.

denied. The Claimant provided a doctors note for the period she was on leave which said that she did not meet the requirements for a medical exemption.<sup>12</sup>

[16] The General Division then considered whether this reason amounted to misconduct under the EI Act. It found that the Commission had proven that the reason for the leave of absence was misconduct for the following reasons:

- The employer had a policy requiring vaccination or an approved exemption.
- The Claimant did not have an approved exemption.
- The Claimant made a conscious and informed decision not to comply with the policy.
- The Claimant knew what the consequences were for non-compliance.<sup>13</sup>

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

[17] The Claimant argues that the General Division made an important error of fact. She says that the justification given for dismissing her appeal was that she placed on leave without pay for disciplinary reasons. She says that this is an error of fact because all of the documents that she has say that she was placed on leave for other reasons, and that it was not a disciplinary measure.<sup>14</sup>

[18] The Claimant made this argument at the General Division as well. The General Division considered her argument.<sup>15</sup> It found that the Commission had proven misconduct for the reasons stated above. The General Division did not make a finding that the leave of absence was a disciplinary measure, but rather that it was a consequence of not complying with the policy.

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<sup>12</sup> General Division decision at para 11.

<sup>13</sup> General Division decision at para 18.

<sup>14</sup> AD1-7

<sup>15</sup> General Division decision at paras 10 and 17.

[19] The case law on misconduct has established that the employer's characterization of reasons for leave is not determinative.<sup>16</sup> Even though it was recorded as an unpaid administrative leave, the evidence is clear that the reason for the leave of absence was non-compliance with the vaccine policy.

[20] The General Division had to determine why the Claimant was placed on an unpaid leave of absence and then decide whether this reason amounted to misconduct under the EI Act. There is no arguable case that the General Division based its decision on an error of fact when it made this determination.

[21] Aside from the Claimant's arguments, I have also considered 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 made an error of jurisdiction. I have not identified any errors of law.

[22] 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**

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

Melanie Petrunia  
Member, Appeal Division

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<sup>16</sup> See *Canada (Attorney General) v Boulton*, A-45-96.