Citation: *HL v Canada Employment Insurance Commission*, 2024 SST 140

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	H. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 26, 2023 (GE-22-3971)

Tribunal member:	Janet Lew
Decision date:	February 14, 2024
File number:	AD-24-37

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, H. L. (Claimant), is seeking leave to appeal the General Division decision on the misconduct issue.[1] The General Division dismissed the Claimant's appeal of her claim for Employment Insurance benefits.

[3] The General Division decided that the Claimant was disentitled from receiving Employment Insurance benefits. This was because it found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant was suspended because of misconduct. In other words, she had done something that caused her to be suspended. The General Division found that she had not complied with her employer's COVID-19 vaccination policy.

[4] The Claimant denies that she committed any misconduct. She argues that the General Division member made jurisdictional, procedural, legal, and factual errors. In particular, she says that the General Division misinterpreted what misconduct means. She also argues that the General Division failed to fully consider the evidence before it.

[5] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.[3]

[6] 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 the appeal.

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[1] The Claimant has two other appeals at the Appeal Division. One deals with the issue of availability for work, and the other, with the antedate issue.
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] 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."

Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division made a jurisdictional error?

b) Is there an arguable case that the General Division made a procedural error?

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

d) Is there an arguable case that the General Division made factual mistakes?

I am not giving the Claimant permission to appeal

[8] 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 Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[4]

The Claimant does not have an arguable case that the General Division made any jurisdictional errors

[9] The Claimant does not have an arguable case that the General Division made jurisdictional errors. A jurisdictional error involves the General Division either exceeding its authority or failing to make a decision that it should have made.

– General scope of authority

[10] The Claimant argues that the General Division was wrong to rely on the case of *Cecchetto*[5] to define its scope of authority. She says *Cecchetto* "superficially created the limitation of the SST jurisdiction by referring two cases which had nothing to do with

[4] See section 58(1) of the DESD Act.
[5] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

jurisdiction." She says that it is "shocking and shame[ful] for what SST and Federal court [*sic*] are doing now."[6]

[11] The Claimant argues that it is contradictory for the General Division to deny that it has the power to assess or rule on the merits, legitimacy, or legality of a vaccination policy. Otherwise, she questions how it would be able to properly assess whether misconduct occurred.

[12] Without broad, expansive powers, the Claimant says the General Division will be unable to determine whether a claimant breached an express or implied duty of their employment contract. She says misconduct only arises if a claimant breaches an express or implied duty of their employment contract.

[13] There are flaws in the Claimant's reasoning. The General Division has to determine a claimant's duties and obligations that they owe to an employer. The duties and obligations can be set out in the employment contract or an employer's policies. But determining a claimant's duties and obligations does not extend so far as to ensuring that those duties and obligations are either reasonable, legitimate, or lawful, or that they have some merit.

[14] Once the General Division determines what a claimant's obligations are, it does not have to go any further and assess the reasonableness or legality of those obligations. In short, it is possible to figure out what a claimant's duties and obligations are, without having to examine whether they are reasonable, legitimate, lawful, or meritorious.

[15] The Claimant says the Tribunal should provide the cases that actually show that there are such limits to the Tribunal's jurisdiction. She also wonders why the Federal Court does not examine the merits, legitimacy, or legality of an employer's vaccination policy.

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[6] See Claimant's Application to the Appeal Division-Employment Insurance, at AD 1-33.

[16] The Claimant disagrees with the Federal Court and Federal Court of Appeal on the scope of the Tribunal's authority. But that is not for the Tribunal to take up. Both the General Division and Appeal Division are required to follow cases of the Federal Court and Court of Appeal.

[17] There is a growing library of jurisprudence that endorses the Federal Court's decision in *Cecchetto* regarding the limited scope of the Tribunal's authority. For instance, in *Matti*,[7] the Federal Court confirmed that the Tribunal does not have jurisdiction to, and therefore should not, consider the soundness of the employer's vaccination policy. And in *Sullivan*,[8] the Federal Court of Appeal determined that the Tribunal cannot delve into the reasonableness of an employer's work policies that led to a claimant's dismissal.

[18] Rather, when assessing misconduct, the Tribunal has to focus on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.[9]

[19] I am not satisfied that there is an arguable case that the General Division made an error about the scope of its jurisdictional powers and that it failed to assess the merits, legitimacy, legality, or reasonableness of her employer's vaccination policy. This was beyond its jurisdiction.

– **Section 29(c) of the *Employment Insurance Act***

[20] The Claimant argues that the General Division failed to consider section 29(c) of the *Employment Insurance Act*. In particular, she says that the General Division failed to consider the following issues:

- Religious discrimination as a just cause for her employer's conduct.[10] The Claimant explains that she is unable to take the vaccines because of her

[7] See *Matti v Canada (Attorney General)* 2023 FC 1527, at para 18, citing *Cecchetto* and *Milovac v Canada (Attorney General)*, 2023 FC 1120 at para 27.
[8] See *Sullivan v Canada (Attorney General)*, 2024 FCA 7.
[9] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[10] See Claimant's Application to the Appeal Division-Employment Insurance, at AD 1-10.

religious beliefs. She explains that getting vaccinated "would irreparably inhibit [her] ability to connect through [her] religious practices with the spiritual/divine."[11]

- "Discrimination on genetic characteristics as a just cause"[12] for her employer's conduct.[13]

- Practices of her employer that she says are contrary to law. She argues that her employer violated the *Canadian Charter of Rights and Freedoms*, *Constitution Act*, *Canadian Bill of Rights*, *Canadian Human Rights Act*, Ontario *Occupational Health and Safety Act*, *Criminal Code*, and the Canada *Labour Code*,

- Working conditions that constituted a danger to her health or safety.

[21] Section 29(c) of the *Employment Insurance Act* provides a claimant with just cause for voluntarily leaving an employment or taking a leave of absence from their employment if that claimant did not have any reasonable alternatives to leaving or taking leave, having regard to all of the circumstances.

[22] However, these considerations do not apply when dealing with a suspension or a dismissal from one's employment. The Claimant neither left nor took a voluntary leave of absence from her employment. Section 29(c) simply did not apply in the Claimant's circumstances. Therefore, the General Division did not make a jurisdictional error when it did not consider whether there was discrimination, practices of her employer that were contrary to the law, and whether there were working conditions that constituted a danger to the Claimant's health or safety.

[23] The Claimant argues that these considerations still apply even if there is a suspension or a dismissal from one's employment. However, the courts have consistently said that it is beyond the scope of authority of the Social Security Tribunal

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[11] See Claimant's Application to the Appeal Division-Employment Insurance, at AD 1-10.
[12] See Claimant's Application to the Appeal Division-Employment Insurance, at AD 1-11.
[13] Discrimination on the basis of one's genetic characteristics is not a specified circumstance under section 29(c) of the *Employment Insurance Act*, but I have placed it under this heading as the Claimant suggests that it is a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act,* in which case it does fall under section 29(c)(iii) of the *Employment Insurance Act*.

(Tribunal) to address these issues.[14] There are other avenues that the Claimant can pursue on these issues.

[24] I am not satisfied that there is an arguable case that the General Division failed to consider the applicability of section 29(c) of the *Employment Insurance Act*.

The Claimant does not have an arguable case that the General Division made any procedural errors

[25] The Claimant does not have an arguable case that the General Division made a procedural error. Although the Claimant argues that the General Division made a procedural error, she has not identified any.

[26] A procedural error involves the fairness of the process at the General Division. It is not concerned with whether a party feels that the decision is unjust. Parties before the General Division enjoy rights to certain procedural protections such as the right to be heard and to know the case against them, the right to timely notice of hearings, and the right to an unbiased decision-maker.

[27] The Claimant does not allege that she did not receive all of the file materials, that she did not receive adequate notice of the hearing, or that she did not know the case that she had to meet. There is no indication either that the General Division did not give the Claimant a fair hearing or a reasonable chance to present her case. There is no suggestion of bias either.

[28] I am not satisfied that there is an arguable case that the General Division process was unfair or that the member did not act fairly.

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[14] See, for example, *Cecchetto*, at para 32, and *Abdo v Canada (Attorney General)*, 2023 FC 1764.

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

[29] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means. The General Division cited and applied established case authorities from the Federal Court of Appeal.

[30] The Claimant argues that the General Division used an incomplete legal test to determine if there was any misconduct. She argues that the General Division had to consider the legality and reasonableness of an employer's policy. For instance, she says that surely misconduct does not arise if an employer requires an employee to kill someone or if an employee has to submit to being sexually assaulted.

[31] The Claimant also argues that for misconduct to exist, it has to meet the "must" legal test. She says this means that:

- the misconduct must be committed by the employee while they were employed by the employer,
- misconduct must constitute a breach of a duty that is express or implied in the contract of employment,
- there must be a causal relationship between the misconduct and the dismissal. In other words, the conduct must be the real reason for the loss of employment and not an excuse or pretext,
- the employer's policy and the conduct required of an employee must fulfill an employer's operative needs, and
- the misconduct must have a material and adverse effect on the employer.

[32] The Claimant has not cited any legal cases to support her arguments, although there is no doubt that the conduct in question has to be committed while a claimant is employed, and that there has to be a causal relationship between the misconduct and

the dismissal. And generally, there has to be a breach of a duty owing to one's employer, although it need not be rooted in the contract of employment.

– **The Claimant says misconduct involves a breach of employment contract**

[33] The Claimant argues that for misconduct to arise, there has to be a breach of a duty that is express or implied in the contract of employment.

[34] In this regard, she argues that the General Division misinterpreted the cases of *McNamara*,[15] *Paradis*,[16] and *Mishibinijima*.[17]

[35] The Claimant says that *McNamara* and *Paradis* do not apply because the facts are so dissimilar to her own case. The Claimant says that Mr. McNamara was required to submit to regular drug testing under the terms of his collective agreement. Otherwise, and if he did not pass any drug tests, he would not be allowed to access any work sites. Similarly, in *Paradis*, the Claimant says that Mr. Paradis's collective agreement required him to submit to testing to show that he was free from the influence of any drugs or alcohol.

[36] The Claimant also says that *Mishibinijima* does not apply. She says Mr. Mishibinijima failed to show up for work to perform duties that were set out in his employment contract.

[37] The Claimant says that each of these cases is distinguishable from hers. She says the claimants in each of those cases had collective agreements that clearly spelled out the duties required of them. She says that, in her case, her collective agreement employment did not require vaccination. Hence, when she did not get vaccinated, she could not possibly have breached any terms or conditions of her collective agreement.

[38] However, these cases do not stand for the proposition that there has to be a breach of one's collective agreement or contract of employment before misconduct can

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[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

arise. On top of that, the facts in *McNamara* and *Paradis* are not quite as set out by the Claimant.

[39] In *McNamara*, the Court of Appeal did not have a copy of the collective agreement that set out the terms upon which the employer could carry out drug testing. However, the contractor had its own policy regulating access to the site, and the Claimant submitted to a drug test to gain access to the contractor's site. According to the contractor's policies, he was not allowed access to the site because he did not pass the drug test. His employer therefore terminated his employment. The Court did not have a copy of the contractor's policy either.

[40] In short, although Mr. McNamara had a collective agreement, he was dismissed because he was unable to access the work site due to not complying with the contractor's policies.

[41] *Paradis* did not involve a collective agreement. That case involved an employer's policy. The policy stated that all employees had to remain free from the effects of and dependency on illegal drugs and alcohol while on the work site.

[42] It is well established that an employer's policies and requirements do not have to be in the employment contract or job description for there to be misconduct. As long as an employer has a policy or requirement—whether express or implied—an employee will be expected to comply with that policy.

[43] Apart from *McNamara* and *Paradis*, there are other examples that show this:

- In *Lemire*,[18] the Court of Appeal found that there was misconduct even though Mr. Lemire had not breached 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 confirmed where the Court wrote, "… The employer has a policy on this matter… The claimant was aware of the policy."[19] The Court of Appeal referred to the policy again, at

[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Lemire*, at para 3.

paragraphs 17, 18, and 20. It noted that the employer had a policy that Mr. Lemire chose to disregard.

- In *Nelson*,[20] the appellant lost her job because of misconduct**.** 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. Even so, the Federal Court of Appeal found that 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,*[21] 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*,[22] 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.

[44] As I mentioned above, there is a growing library of cases involving claimants in the COVID-19 vaccination setting who have denied that they committed any misconduct. They argued that they should not have to get vaccinated under their employers' vaccination policies. Their collective agreements, employment contracts, or job descriptions did not require vaccination.[23]

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[20] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[21] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[22] See *Karelia v Canada (Human Resources and Skills Development), 2012 FC 140.*
[23] See, for example, *Matti*, at para 19, and *Kuk*.

[45] These claimants, all working within a wide range of industries, argued that they were still able to fulfill their duties even if they were not vaccinated. Even so, the courts found that there had been misconduct when the employees did not comply with their employer's vaccination policies that were not part of the original collective agreement, employment contract, or job description.

[46] I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what misconduct means when it did not consider her collective agreement, nor conduct a "must" legal test.

– The Claimant says an employer's policy has to fulfill operative needs and misconduct has to have a material and adverse effect on an employer

[47] The Claimant says that for misconduct to occur, an employer's vaccination policy has to fulfill "operative needs" and an employee's misconduct has to have a material and adverse effect on the employer. The Claimant says her employer held out that its vaccination policy was intended to address workplace safety. She challenges this assertion. She says that she could have worked from home without being vaccinated, without any impact on her employer.

[48] The Claimant has not however provided any legal authorities to support her arguments.

[49] The courts have defined what misconduct means for the purposes of the *Employment Insurance Act*. The courts have not required that there be a material and adverse effect on an employer, or that its policy (and any requirements of an employee) fulfill an employer's operative needs.

[50] The General Division adopted the definition of misconduct from several Federal Court of Appeal decisions. The General Division's interpretation of misconduct under the *Employment Insurance Act* is consistent with these decisions.

[51] I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what misconduct means when it did not consider whether her

employer's vaccination policy was truly designed to fulfill its operative needs, or whether any misconduct could have a material and adverse effect on her employer.

The Claimant has an arguable case that the General Division made a factual mistake

[52] The Claimant has an arguable case that the General Division made a factual mistake.

[53] For factual mistakes under section 58(1)(c) of the *Department of Employment and Social Development* (DESD) *Act*, 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.[24]

[54] This means that not every factual mistake meets this definition. For instance, if the General Division did not base its decision on that mistake, then that mistake will not qualify to raise an arguable case. So, I will just address the types of errors that the Claimant says the General Division made that could fall into section 58(1)(c) of the DESD Act.

[55] The Claimant says the General Division made two important factual mistakes that (1) her employer's policy applied to her at the time, and (2) that she refused to comply with her employer's policy.

– The Claimant says that her employer's deadline of December 13, 2021 did not apply

[56] The Claimant argues that the usual deadlines for compliance under her employer's vaccination policy did not apply because she was on sick leave from December 31, 2021, to February 21, 2022.

[24] See section 58(1)(c) of the DESD Act.

[57] The employer had a deadline of December 13, 2021, for full compliance. She says that her employer's policy gave employees who were on leave two weeks to complete their attestation after returning to work.

[58] The General Division acknowledged the December 13, 2021 deadline.[25] However, the General Division did not require the Claimant to prove that she had been compliant by this deadline. The General Division noted that the Claimant asked her employer for an accommodation, and that her employer turned down her request. The General Division also noted that the employer told the Claimant that "[her] last day will be March 22, 2022, unless [she had] proof of vaccination."[26]

[59] I am not satisfied that there is an arguable case that the General Division made an error in finding that the applicable deadline for vaccination was December 13, 2021. The General Division clearly considered a date after December 13, 2021.

– **The Claimant says that she complied with her employer's policy**

[60] The Claimant argues that she complied with her employer's policy. The Claimant says the General Division overlooked evidence that shows she was compliant, including the following:

- Her religious beliefs prevented her from being able to get vaccinated. She says that her employer should have accepted that her religious beliefs are her own. She applied for a medical accommodation on March 8, 2022 (the date by which she was to have given an attestation), and a religious accommodation on March 22, 2022.[27] Her employer denied the requests, on March 9, 2022[28] and on April 4, 2022.

- The Claimant says that she was entitled to a religious accommodation and that her employer should have granted her an exemption.

[25] See General Division decision, at para 41.
[26] See General Division decision, at para 41.
[27] See emails between the Claimant and her employer, at GD 3-35.
[28] See employer's letter dated March 9, 2022, at GDJ 5-69.

- The Claimant also says that after her employer rejected her accommodation request, it should have given her two weeks to re-attest and another two weeks to take a training course on COVID-19 vaccines. She says the two weeks for attestation should have started running after her last request for an accommodation. Contrary to its own policy, she says that her employer did not give her a chance to re-attest or take a training course before placing her on a leave of absence. She says that she had been compliant with the policy up to that point.

- She had natural immunity against COVID-19, so there was no need for her to get vaccinated. And besides, she got infected in February 2022 and was unable to get vaccinated for three months following her infection. Furthermore, she says getting infected counts as getting vaccinated at least once.

- She says it was her employer that committed misconduct.

    - **The employer's vaccination policy**

[61] The Claimant's employer's policy can be found at GDJ 5-3 to GDJ 5-16. The employer prepared a guide for implementation of its policy on vaccination and testing.[29] The employer also set outs its requirements for employees.[30]

[62] Under the policy, all employees were to be fully vaccinated unless accommodated. Employees also had to disclose their vaccination status by providing an attestation of their status of vaccination and, if required, proof of vaccination. The policy also required employees on approved leave to disclose their vaccination status within two weeks of their return from any approved leave.[31]

[63] The employer also had a duty to accommodate based on medical or religious reasons, or other prohibited grounds of discrimination.

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[29] See employer's guide at GD 3-39 to GD 3-42 and at GDJ 5-19 to GDJ 5-30.
[30] See employer's COVID-19 vaccination requirements for employees at GDJ 5-31 to 5-41.
[31] See section 6.1.5 of the employer's policy, at GDJ 5-5.

[64] Under section 6.7 of the policy, the employer detailed the consequences of non-compliance. For employees for whom an accommodation did not apply or for those unwilling to be fully vaccinated or to disclose their vaccination status, the employer was to implement the following measures:

> 6.7.1.1 Within two weeks of the attestation deadline, require employees to complete online training on COVID-19 vaccination and
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> 6.7.1.2. Two weeks after the attestation deadline, place employees on an administrative leave without pay.

[65] Appendix A to the policy set out the attestation deadlines.[32] Generally, the deadline was November 26, 2021, or two weeks after the date on which an employee was informed by their manager that the duty to accommodate did not apply, or two weeks after their return from an approved leave.

[66] Ordinarily unvaccinated employees were required to complete online training between November 26, 2021, and December 10, 2021.[33] And, by December 13, 2021, those same employees were placed on administrative leave if they were unwilling to be vaccinated or were unwilling to attest to their vaccination status. They were considered unwilling if they had not attested to having received their first vaccination dose and/or not submitted a request for accommodation.

[67] The General Division listed when the employer told the Claimant about its requirements and the consequences for not following them. The employer's letter of April 5, 2022 noted that it had reminded the Claimant on February 22, 2022, of its requirements.[34] This was the day after the Claimant returned from her sick leave.

[68] On March 8, 2022, two weeks after she returned from leave, the Claimant requested a medical accommodation. The following day, her employer denied her

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[32] See Appendix A: Definitions to the policy, at GDJ 5-13.
[33] See employer's guide at GD 3-41 and GDJ 5-21.
[34] See employer's letter dated April 5, 2022, at GD 3-32.

request, finding that it was unsupported.[35] The employer advised her that she had until March 22, 2022, to comply with its policy; otherwise, it would place her on a leave of absence.

[69] There was an exchange of communications between the Claimant and her employer. The Claimant wrote to her employer on March 10, 2022, stating that she should get an extension of time for having developed natural immunity, or another two weeks to attest if she were to make another accommodation request.

[70] The employer responded that same day, writing, “There will be no extension. All of them have been denied and the last day will be March 22, 2022 unless you have proof of vaccination.”[36]

[71] On March 22, 2022, the date by which she was expected to comply or be placed on a leave, the Claimant sought a religious accommodation.

[72] Despite the employer’s response of March 10, 2022, it did not place the Claimant on a leave of absence on March 22, 2022. This was clear by its letter of April 4, 2022.

[73] On April 4, 2022, the employer denied the Claimant’s request for a religious accommodation.[37] It also advised her that if she did not comply with its policy by April 5, 2022, it would place her on leave, effective April 6, 2022, until she complied.

[74] On April 5, 2022, the employer wrote again, saying that it had reminded her on February 22, 2022, of the policy requirements.[38] The employer said that according to its records, the Claimant was unwilling to be vaccinated, so considered her non-compliant. She would be placed on leave effective April 6, 2022. It followed through and placed her on leave effective April 6, 2022.

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[35] See employer’s letter dated March 9, 2022, at GDJ 5-69.

[36] See exchange of emails between the Claimant and her employer, at GDJ 5-72 to 5-74.
[37] See employer’s letter dated April 4, 2022, at GD 3-30.
[38] See employer’s letter dated April 5, 2022, at GD 3-32.

[75] The General Division did not address the communications between the Claimant and her employer leading up to her suspension on April 6, 2022. The Claimant maintains that her employer should have given her two more weeks to attest after it turned down her accommodation request on April 4, 2022.

[76] I am satisfied that there is an arguable case that the General Division failed to consider the evidence before it. The employer's policy required employees to attest two weeks after a manager informed them that the duty to accommodate did not apply. It is unclear from the General Division decision whether the member considered whether this provision applied in the case of the Claimant's most recent request of March 22, 2022 and, if so, what consequence that had, if any, on the misconduct issue.

[77] The Claimant's employer told her that she would not get any extensions if she were to make another request for accommodation, and that she would be placed on a leave of absence effective March 22, 2022. Yet, when that date came, the Claimant's employer did not place her on a leave of absence. So, there is an arguable case that the Claimant could reasonably expect that her employer would assess her request for accommodation, and, if it turned down her request, that she would get two weeks to attest before being placed on a leave of absence.

[78] In other words, there is an arguable case that the misconduct may not have arisen on April 6, 2022 when the Claimant's employer suspended her. The Claimant had expected that she would be getting two weeks to attest, from the date when she learned that her employer refused her accommodation request.

Granting leave would be an academic exercise

[79] Although the Claimant has an arguable case, I am not giving her permission for the appeal to go ahead, for two reasons:

(1) The Claimant was late when she filed her application for Employment Insurance benefits. She did not file an application until two months after she had been suspended from her employment. She was unable to get her application antedated (backdated) as if she had made her application

earlier. This was because she had not acted like a reasonable person throughout the entire period of the delay,[39] and

(2) The Claimant was not available for work for the purposes of the *Employment Insurance Act*. She had to show that she was available for work for a period of nine days, between June 13, 2022, and June 24, 2022. But she did not show a sufficient desire to return to the labour market by her efforts to find a suitable job, and she set personal conditions that unduly limited the chances of her returning to the labour market.[40]

[80] The result of these two decisions on the antedate and availability issues means that even if the Claimant were to succeed on an appeal of this matter, she would not be entitled to Employment Insurance benefits from the time of her suspension in April 2022 to her return to work in June 2022. In other words, the outcome of any appeal would be entirely academic.

[81] There are some parallels to the *Hines*[41] case. There, the Appeal Division had granted leave to appeal. It found that the General Division had made an overly broad legal statement that Ms. Hines was absolutely barred from being entitled to Canada Pension Plan disability benefits because of her age.

[82] The Appeal Division found that the General Division had not considered that there were exceptions, including whether Ms. Hines might have been incapacitated, such that her application could have been deemed to have been made at an earlier date before she turned 65. The Appeal Division had stressed that if Ms. Hines hoped to succeed with her appeal, it was an uphill climb to establish that she was incapacitated and therefore entitled to receive disability benefits.

[83] The Federal Court held that the Appeal Division could not grant leave on a "purely theoretical basis" unsupported by the record. There was no evidence that could

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[39] See General Division's decision in GE-23-95 and Appeal Division's decision in AD-24-38.
[40] See General Division's decision in GE-22-3973 and Appeal Division's decision in AD-24-34.
[41] See *Canada (Attorney General) v Hines*, 2016 FC 112.

support a finding of incapacity. Hence, Ms. Hines could not backdate her application and could not be found entitled to Canada Pension Plan disability benefits.

[84] It did not matter that the General Division misstated the law in the *Hines* case by making an overly broad legal statement. The Federal Court held that the evidence still had to show that Ms. Hines could succeed on appeal and be found incapacitated and therefore eligible for benefits. Ultimately the evidence did not support Ms. Hines.

[85] That is the same situation facing the Claimant. The General Division arguably may have failed to address all of the critical evidence before it on the misconduct issue, but the evidence from the antedate and availability cases means that the Claimant ultimately would not be entitled to receive Employment Insurance benefits.

[86] While the antedate and availability cases are separate matter, the Claimant has asked in the past that her claims be considered together.[42] I have considered all three cases together and decisions of the Tribunal are final.[43] So, if I were to grant leave, I would be doing so on a "purely theoretical basis," unsupported by the overall record. Even if there was no misconduct, that would not open the doors to receiving Employment Insurance benefits because of the antedate and availability issues.

Conclusion

[87] Overall, I am not satisfied that the appeal has 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

[42] See Notice of Appeals at General Division (see GD 2-1, GD 2-5 and GD 2-12 in GE-22-3971 and GE-22-3973; and GD2 in GE-23-95).
[43] See section 67 of the DESD Act. N.B. Decisions are final, and except for judicial review under the *Federal Courts Act*, are not subject to appeal to or review by any court.