



Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 1120

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** J. S.  
**Representative:** C. M.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Anick Dumoulin

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**Decision under appeal:** General Division decision dated May 25, 2022  
(GE-22-1071)

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**Tribunal member:** Janet Lew

**Type of hearing:** On the Record  
**Decision date:** October 31, 2022  
**File number:** AD-22-472

## Decision

[1] The appeal is allowed. The matter will go back to a different member of the General Division for reconsideration.

## Overview

[2] This is an appeal of the General Division decision. The General Division summarily dismissed the appeal of the Appellant, J. S. (Claimant). The General Division found that the Claimant had been dismissed for misconduct. As a result, he was disqualified from receiving benefits.

[3] The General Division did not hold a hearing to address the misconduct issue. The General Division found that it would have made no difference if the Claimant present new evidence and made other arguments. The General Division determined that the Claimant's appeal had no reasonable chance of success in that the appeal was bound to fail.

[4] The Claimant has not directly addressed the summary dismissal issue in his appeal. However, he denies that there was any misconduct. He also argues that the General Division acted beyond its jurisdiction. He also argues that labelling his actions as misconduct is contrary to and prohibited by the *Canadian Charter of Rights and Freedoms*, as well as provincial and federal human rights legislation.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), accepts that the General Division erred in law in summarily dismissing the Claimant's appeal. The Commission says that appeals misconduct cases are not clearly bound to fail, so the General Division should not have summarily dismissed the Claimant's appeal.

## Issue

[6] The issue in this appeal is: Did the General Division make an error by summarily dismissing the Claimant's appeal?

## Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.

### **Did the Division make an error by summarily dismissing the Claimant's appeal?**

[8] The General Division determined that the Claimant did not comply with his employer's COVID-19 vaccination policy, that he was aware of the consequences of non-compliance, and that his non-compliance led to his dismissal. The General Division found that the Claimant's actions amounted to misconduct. The General Division also found that there was nothing the Claimant could have added to his appeal to change the outcome.

[9] The General Division referred to section 53(1) of the *Department of Employment and Social Development Act*. The section requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[10] The General Division found that it was clear from the record that the Claimant's appeal did not have any reasonable chance of success and that his appeal was bound to fail. For that reason, it summarily dismissed the Claimant's appeal.

[11] The Commission notes that the Federal Court of Appeal has held that an appeal should only be summarily dismissed when it is obvious that the appeal is bound to fail no matter what evidence or arguments might be presented at a hearing.”<sup>1</sup>

[12] The Commission argues that this is unlike cases such as those where a claimant does not meet the qualifying conditions, has insufficient insurable hours, or where a claimant has reached the maximum number of weeks paid for sickness benefits. The Commission says that those types of appeals are clearly bound to fail.

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<sup>1</sup> See Commission's representations to the Social Security Tribunal—Appeal Division (SST-AD), filed September 12, 2022, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

[13] The Commission argues that appeals of misconduct cases are not clearly bound to fail because there could be evidence or arguments submitted at a hearing that could alter the outcome.

[14] The Commission argues that, in effect, the General Division decided the case on the record when it decided that the appeal has no reasonable chance of success. But, the Commission notes, the Employment Insurance Section of the General Division does not have any authority to decide cases on the record. The Commission notes that the general rule is that appellants must be given an opportunity to be heard.

[15] The Commission argues that the General Division used the summary dismissal procedure to disguise what it is not permitted to do. The Commission argues that the General Division should not be using the summary dismissal procedure to circumvent the general rule for Employment Insurance cases that appellants be given the chance to be heard.

[16] The Commission submits that, in the context of the summary dismissal procedure, it is inappropriate for the General Division to consider a case on its merits in the parties' absence and then find that the appeal has no reasonable chance of success.

[17] Indeed, the Claimant has raised several arguments. He has not had an opportunity to fully address these arguments. Some of them may mean that the appeal has a reasonable chance of success.

[18] I accept the parties' arguments that the General Division erred in summarily dismissing the appeal when there was a reasonable chance of success. The General Division should not have relied on the procedure as a means to give a decision on the record, in light of the Claimant's evidence and arguments and the nature of the issues involved.

## Remedy

[19] It is clear that the Claimant has more evidence and that he wishes to expand on some of his arguments.<sup>2</sup> The Commission asks the Appeal Division to send the matter back to the General Division for reconsideration. That is the appropriate remedy in this case, as it will provide the Claimant with a fair opportunity to give evidence and make his arguments.

[20] While the Claimant suggests that the Appeal Division should conduct a thorough review, it is not appropriate for me to hear the matter at the Appeal Division and decide whether there was misconduct, in part, because it would involve receiving evidence for the first time. Finally, to be clear, I have not made any determination—one way or the other—on the merits of the Claimant's case on the misconduct issue.

## Conclusion

[21] The appeal is allowed. I am returning this matter to a different member of the General Division for reconsideration.

Janet Lew  
Member, Appeal Division

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<sup>2</sup> See Claimant's submissions at AD7.