



Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 155

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** L. M.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

---

**Decision under appeal:** General Division decision dated September 29, 2022  
(GE-22-1512)

---

**Tribunal member:** Janet Lew

**Type of hearing:** In Writing

**Decision date:** February 14, 2023

**File number:** AD-22-877

## **Decision**

[1] The appeal is allowed. The matter will be go 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, L. M. (Claimant). The General Division found that the Claimant had been suspended for misconduct, which meant that he was disentitled from receiving Employment Insurance benefits. The Claimant had not complied with his employer's vaccination policy.

[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 presented new evidence or 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 argues that the General Division failed to follow the rules of procedural fairness. In particular, he says that he should have been given the chance to be heard.

[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 of 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 simply: 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 General 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 this amounted to misconduct. The General Division also found 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.<sup>1</sup>

[11] The Claimant argues that his case is similar to another case. There, the Appeal Division determined that the summary dismissal procedure was inappropriate in cases of misconduct. The Appeal Division allowed the appeal and sent the matter back to a different member of the General Division for a hearing. The Claimant argues that his appeal should also be sent back to the General Division.

[12] 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>2</sup>

---

<sup>1</sup> See General Division decision, at para 53.

<sup>2</sup> See Commission's representations to the Social Security Tribunal—Appeal Division (SST-AD), filed September 20, 2022, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

[13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] The Commission submits that, in the context of the summary dismissal procedure, it is not appropriate 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.

[18] The Claimant has since raised another argument. He argues that misconduct does not arise in cases where an employee does not comply with an employer's new policy. He argues that the new policy is not part of his original employment contract so he did not have to comply with it, and therefore there can be no misconduct.

[19] I refer to the Claimant's latest argument simply to show that, by summarily dismissing the Claimant's appeal, he did not get the chance to fully make these types of arguments that he might have made had there been a hearing.

[20] 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**

[21] It is clear that the Claimant has more evidence and that he wishes to expand on some of his arguments. 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 her arguments.

### **Conclusion**

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

Janet Lew  
Member, Appeal Division