



Citation: *DA v Canada Employment Insurance Commission*, 2023 SST 171

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

# **Decision**

**Appellant:** D. A.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** M. Allen

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**Decision under appeal:** General Division decision dated November 4, 2022  
(GE-22-2273)

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**Tribunal member:** Janet Lew

**Type of hearing:** In Writing

**Decision date:** February 16, 2023

**File number:** AD-22-909

## **Decision**

[1] The appeal is allowed. The matter will be going 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, D. A. (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 suspension. 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 other cases in which the Appeal Division determined that the summary dismissal procedure was inappropriate in cases of misconduct.<sup>2</sup> In each of these cases, the Appeal Division allowed the appeals and sent the matters back to different members of the General Division for a hearing. The Claimant argues that his appeal should also be sent back to the General Division.

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<sup>1</sup> See General Division decision, at para 22.

<sup>2</sup> See Claimant's email of January 17, 2023, citing *R.N. v Canada Employment Insurance Commission*, 2022 SST 730, *B.H. v Canada Employment Insurance Commission* 2022 SST 945, *TD v Canada Employment Insurance Commission*, 2022 SST 973, and *CC v Canada Employment Insurance Commission*, 2022 SST 977.

[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>3</sup>

[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] I accept the parties' arguments that the General Division erred in summarily dismissing the appeal. The General Division should not have relied on the procedure as

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<sup>3</sup> See Commission's representations to the Social Security Tribunal—Appeal Division (SST-AD), filed December 16, 2022, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

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. 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.

## **Conclusion**

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

Janet Lew  
Member, Appeal Division