



Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 645

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

# **Leave to Appeal Decision**

**Applicant:** N. H.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated March 8, 2023  
(GE-22-2645)

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**Tribunal member:** Janet Lew

**Decision date:** May 24, 2023

**File number:** AD-23-324

## Decision

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

## Overview

[2] The Applicant, N. H. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Claimant stopped working because of misconduct under the *Employment Insurance Act*. Her employer suspended her and then dismissed her from her job because she had not complied with its vaccination policy. This meant she would not be getting Employment Insurance benefits.

[3] The Claimant argues that the General Division made jurisdictional, legal, and factual mistakes. The Claimant denies that she had to comply with her employer's vaccination policy. And, as she says that she did not have to comply with her employer's policy, misconduct could not have arisen.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.<sup>1</sup> If the appeal does not have a reasonable chance of success, this ends the matter.<sup>2</sup>

[5] 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 her appeal.

## Issue

[6] Is there an arguable case that the General Division made any jurisdictional, legal, or factual mistakes?

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<sup>1</sup> *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>2</sup> 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."

## **I am not giving the Claimant permission to appeal**

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.<sup>3</sup>

[8] For factual errors, 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.

## **Is there an arguable case that the General Division made any jurisdictional, legal, or factual errors?**

[9] The Claimant argues the General Division made several mistakes. She writes:

A finding of misconduct, in this case, would mean the [Canada Employment Insurance] Commission ignores the unlawful, coercive, unfair, unjust, immoral COVID-19 Vaccination Status Reporting and Preventive measures [...] set by the Employer (GD9-2) as being relevant to the employee's actions. In this case you cannot divorce the employee's actions from the Employer's new policy because the actions of the employee are direct consequences of the Employer's new policy, which does not exist in the Collective Agreement.

A finding of misconduct, in this case, by the Commission will confirm for all employers that they can implement policies that are coercive and threatening to the safety and security of employees without consequence.

[10] From this, I understand that the Claimant is arguing that the General Division is arguing that (1) her collective agreement did not require vaccination and (2) vaccination was irrelevant to her employment. Or, in other words, there was no duty owing to her employer to get vaccinated against COVID-19.

[11] On top of that, the Claimant suggests that misconduct does not arise if an employer asks its employees to comply with a policy that she considers unlawful, coercive, unfair, unjust, immoral, and unsafe.

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<sup>3</sup> Under section 58(1) of the DESD Act.

[12] On this latter point, essentially the Claimant is arguing that the General Division had to examine the employer's vaccination policy. That way, it could determine whether the policy was unlawful, coercive, unfair, unjust, immoral, and unsafe. And, if the policy was, then she says it would conclude that she did not have to comply with it.

[13] But the Federal Court confirmed that neither the General Division nor Appeal Division have the power or jurisdiction to assess or rule on the merits, legitimacy, or legality of an employer's policy. The Court said that the General Division and Appeal Division have a narrow and specific role. Their role is to determine why an applicant was (suspended or) dismissed from their employment, and whether that reason constitutes misconduct.<sup>4</sup>

[14] Because of the General Division's limited role, I am not satisfied that the Claimant has an arguable case that the General Division should have examined the employer's policy to decide whether the policy was unlawful, unfair, unjust, immoral, and unsafe, before it could decide whether there was misconduct.

[15] The Claimant also argues that she did not have a duty to get vaccinated against COVID-19. She notes that she her collective agreement did not require vaccination. So, she says that vaccination was irrelevant to her duties.

[16] The collective agreement did not specifically mention or provide for vaccination against COVID-19. Even so, the collective agreement gave extensive rights to the employer. Under "Article 6 – Management Rights" under the agreement, the union agreed that all employees would be governed by all rules as adopted by the employer and published to employees, as long as those rules did not conflict with the agreement.<sup>5</sup>

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<sup>4</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>5</sup> See Article 6.01 of the Collective Agreement between the Association of Unions and the Health Employers Association of B.C., at GD 10-19.

[17] The collective agreement also let the employer dismiss employees if they refused vaccination, inoculation and other immunization when required, unless the employee had sufficient medical grounds.<sup>6</sup>

[18] Given the wide latitude that the collective agreement gave the employer over vaccination, I am not satisfied that the Claimant has an arguable case that vaccination was irrelevant to her employment and that she did not owe a duty to her employer to get vaccinated when required.

## **Conclusion**

[19] 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 proceed.

Janet Lew  
Member, Appeal Division

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<sup>6</sup> See Article 6.02 of the Collective Agreement between the Association of Unions and the Health Employers Association of B.C., at GD 10-19.