



Citation: *HE v Canada Employment Insurance Commission*, 2023 SST 673

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

**Leave to Appeal Decision**

**Applicant:** H. E.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 28, 2023  
(GE-22-3432)

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**Tribunal member:** Janet Lew

**Decision date:** May 29, 2023

**File number:** AD-23-286

## Decision

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

## Overview

[2] The Applicant, H. E. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Claimant had been suspended from his job because of misconduct. As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division failed to follow the rules of procedural fairness. He also argues that the General Division made legal and factual errors.

[4] Before the Claimant can move ahead with his 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 his appeal.

## Issues

[6] The issues are as follows:

- i. Is there is an arguable case that the General Division failed to follow the rules of procedural fairness?
- ii. Is there an arguable case that the General Division misinterpreted labour laws?

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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."

- iii. Is there an arguable case that the General Division failed to consider the legality of the employer's vaccination policy, and
- iv. Is there an arguable case that the General Division made an error about whether the Claimant had stopped working?

## **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 the General Division possibly made a 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 failed to follow the rules of procedural fairness?**

[9] The Claimant argues that that he did not get a fair chance to present his case. He also claims that he did not get all of the file documents.

[10] I asked the Claimant to explain how the General Division deprived him of a fair chance to present his case. I also asked him to identify what documents he believes he did not get.<sup>4</sup>

[11] The Claimant responded to the Tribunal's request for information.<sup>5</sup> However, he did not explain how the General Division might have deprived him of a fair hearing. He also did not identify any documents that he believes he did not get.

[12] As far as I can see from a review of the General Division file, there were only two sets of documents that did not originate with the Claimant. The Respondent, the

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

<sup>4</sup> See letter dated May 19, 2023 from the Social Security Tribunal.

<sup>5</sup> See Claimant's email dated May 24, 2023, at AD-3.

Canada Employment Insurance Commission (Commission), produced its file materials. The Social Security Tribunal labelled these documents collectively as “GD03 – Reconsideration File.” The Commission also prepared written representations. The Tribunal labelled the representations as “GD04 – CEIC Representations.”

[13] The Tribunal sent copies of both GD03 and GD04 to the Claimant with its letter dated November 8, 2022.<sup>6</sup>

[14] At the General Division hearing, the member reviewed what documents were on file. The documents number up to GD-07. The Claimant confirmed that he had all these documents.<sup>7</sup>

[15] In terms of being able to present his case, the Tribunal let the Claimant file any documents. For instance, in its letters of October 31, 2022 and November 8, 2022, the Tribunal told the Claimant how he could send documents.

[16] The Claimant seems to have been aware that he could send documents. He filed a document on February 16, 2023, to let the Tribunal know that he would be bringing a witness with him. Then, on February 17, 2023, he wrote to the Tribunal again. He told the Tribunal that his friend was unable to attend the hearing.

[17] There was no suggestion that the Tribunal or General Division had prevented the Claimant from bringing his witness. And the Claimant did not ask for an adjournment of the hearing to another date when his witness might be available. The Claimant does not now say that he needed to have his witness give evidence.

[18] The audio recording of the General Division indicates that the member checked to ensure that the Claimant was ready and prepared to go ahead with the hearing. The member reviewed the facts and the law and gave the Claimant a chance to give evidence. After the Claimant made his case, the member also asked the Claimant if he

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<sup>6</sup> See Tribunal correspondence dated November 8, 2022.

<sup>7</sup> At approximately 2:40 of the audio recording of the General Division hearing.

had anything else that he wanted to add. The Claimant replied that he did not have anything else to say (though he did talk about his employer's policy).<sup>8</sup>

[19] I am not satisfied that there is an arguable case that the General Division failed to follow the rules of procedural fairness. The evidence shows that the Claimant had a fair chance to present his case and that he had all of the documents from the General Division file.

### **Is there an arguable case that the General Division misinterpreted labour laws?**

[20] The Claimant argues that the General Division misinterpreted labour laws.

[21] I am not satisfied that the appeal has a reasonable chance of success on this point because the General Division had to decide whether misconduct arose under the *Employment Insurance Act*, not under any particular labour laws. The concept of misconduct under the *Employment Insurance Act* is different from how it might be defined by other laws.

### **Is there an arguable case that the General Division failed to consider the legality of the employer's vaccination policy?**

[22] The Claimant also argues that his employer's vaccination policy contravened numerous laws and violated his rights. He suggests that there was no misconduct because he should not have had to comply with a policy that was unlawful. He suggests the General Division should have addressed this issue.

[23] But the Federal Court has ruled that neither the General Division nor the Appeal Division has any power or jurisdiction to decide whether an employer's vaccination policy has any merit, legitimacy, or is lawful. The Court has said the General Division has a limited role in what it can do. It is restricted to determining why a claimant is

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<sup>8</sup> At approximately 31:28 and 33:20 of the audio recording of the General Division hearing.

suspended (or dismissed) from their employment and whether that reason amounts to misconduct.<sup>9</sup>

[24] So, the appeal does not have a reasonable chance of success on this point because the General Division simply did not have the power to examine the legality of the employer's policy and to decide whether the Claimant could have been excused from having to comply with the policy.

### **Is there an arguable case that the General Division made an error about whether the Claimant had stopped working?**

[25] The Claimant argues that the General Division made an important mistake about the facts. He denies that he abandoned his job or that he stopped working. He says his employer prevented him from entering the work site. He says his employer lied that he stopped working. He says that the General Division did not appreciate this evidence.

[26] The General Division found that the Claimant's employer placed him on an unpaid leave of absence. The General Division did not state that the Claimant stopped working because he no longer wanted to work, or anything like that. Rather, it found that the employer put the Claimant on an unpaid leave because the Claimant had not complied with its vaccination policy.

[27] I am not satisfied that the appeal has a reasonable chance of success on this point because the Claimant had in fact stopped working, even if the Claimant was prepared to continue working.

## **Conclusion**

[28] The appeal does not have 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>9</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.