



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 786

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant:	J. B.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	General Division decision dated March 16, 2023 (GE-22-3706)
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Tribunal member:	Janet Lew
Decision date:	June 15, 2023
File number:	AD-23-366

Decision

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

Overview

[2] The Applicant, J. B. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Respondent, the Canada Employment Insurance Commission had proven that the Claimant lost her job because of misconduct. In other words, it found that she had done something that caused her to lose her job. The General Division found that the Claimant did not comply with her employer's vaccination policy.

[3] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made legal and factual mistakes. She denies that there could have been any misconduct. The Claimant agrees that she did not comply with her employer's vaccination policy. But she says that her employer had to inform and satisfy her about the safety of the policy and the vaccine. Only then would she have been able to consent to the vaccination policy. Otherwise, she says that she did everything her employer required of her: she wore a mask, she attended meetings, she got tested, and stayed home when required.

[5] 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.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

¹ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) of the *Department of Employment Social Development (DESD) Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

[6] 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

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

I am not giving the Claimant permission to appeal

[8] 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.³

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

[9] The Claimant argues the General Division made important mistakes about the facts. She says that she asked her employer for information about the vaccine, but did not receive any information. So, she says that she was unable to give informed consent.

[10] A factual mistake arises if the General Division based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

[11] The General Division noted the Claimant's evidence that her employer never answered her questions about the vaccine and that she felt she was unable to give her informed consent to vaccination.⁴ The General Division accurately restated the evidence. So, I am not satisfied that there is an arguable case that the General Division made a factual mistake about whether she consented to her employer's policy.

[12] The Claimant is really making a legal argument. She in effect says that there is no misconduct unless an employee gives their consent and agrees with their employer's policies. She suggests that consent can only be expected after full disclosure, and after

³ See section 58(1) of the DESD Act.

⁴ General Division decision, at para 24.

an employer can satisfy employees that their policies are safe, effective, reasonable, or whatever the case may be. So, if she reasonably withheld her consent, she says there was no misconduct.

[13] The courts have established what misconduct means. The General Division referred to several of these court cases. The General Division noted, for instance, that the courts have said that for there to be misconduct, an employee's conduct has to be wilful. The courts have said that this means that the employee's conduct (or omission) has to be conscious, deliberate, or intentional. So, as long as an employee consciously does or omits to do something, that will be seen as misconduct.

[14] The courts have not said that before misconduct can arise, an employee must consent to an employer's policies, and the employer has to justify its policies or prove that its policies are safe. If that were the case, this would require the General Division to examine an employer's policies and determine whether they have any merit or are safe. But the Federal Court has ruled that the General Division does not have any role in scrutinizing an employer's policies.

[15] In a case called *Cecchetto*,⁵ the Federal Court said the General Division and Appeal Division do not have any mandate or jurisdiction to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy.

[16] I am not satisfied that there is an arguable case that the General Division should have considered whether the Claimant reasonably withheld her consent to her employer's policy before misconduct could arise.

Conclusion

[17] Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

⁵ *Cecchetto v Canada (Attorney General)*, 2023 FC 102.