



Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 1253

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

# **Leave to Appeal Decision**

**Applicant:** L. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated June 21, 2023  
(GE-23-607)

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**Tribunal member:** Janet Lew

**Decision date:** September 12, 2023

**File number:** AD-23-733

## Decision

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

## Overview

[2] The Applicant, L. M. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended from his employment because of misconduct. In other words, he had done something that caused him to be suspended. The General Division found that he had not complied with his employer's vaccination policy. As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division misinterpreted what misconduct means.

[5] 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>

[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 his appeal.

## Issue

[7] Is there an arguable case that the General Division misinterpreted what misconduct means?

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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**

[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 the General Division arguably made a jurisdictional, procedural, legal, or a certain type of factual error.<sup>3</sup>

### **Is there an arguable case that the General Division misinterpreted what misconduct means?**

[9] The Claimant denies that he committed any misconduct. He argues that the General Division misinterpreted what misconduct means.<sup>4</sup> He argues that if it had not misinterpreted what misconduct means, it would have accepted that he did not engage in misconduct.

[10] The Claimant argues that misconduct did not arise because:

- i. His employer's vaccination policy was unreasonable,
- ii. His employer's vaccination policy interfered with his legal rights to bodily autonomy and free and informed consent to refuse to undertake a medical procedure,
- iii. His employer's vaccination policy was discriminatory under the *Canadian Human Rights Act*, and
- iv. He was unlawfully or wrongfully suspended from his employment.

[11] The Claimant says the General Division should have considered each of these factors when it assessed whether there was any misconduct.

[12] The General Division determined that it did not have the authority to decide whether the employer's policy was reasonable or whether the Claimant's loss of employment was

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

<sup>4</sup> The Claimant's arguments at AND 1-4 refer to the Commission, but it is understood that the Claimant is referring to the General Division.

justified. The General Division also determined that it did not have the authority to consider whether the employer's actions violated the Claimant's fundamental rights under the *Canadian Charter of Rights and Freedoms*. It also decided that it could not make any rulings based on the *Canadian Human Rights Act*, or any of the provincial laws that protect rights and freedoms.

[13] In a case called *Cecchetto*, which the General Division referred to, the Federal Court ruled that neither the General Division nor the Appeal Division have the mandate or jurisdiction to assess or rule on the merits, legitimacy, or legality of a vaccination policy.

[14] The Court has made it clear that their role is very narrow and specific. It is limited to focussing on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.<sup>5</sup> This narrow focus means then that neither the General Division nor the Appeal Division have any authority to assess or rule on the reasonableness of an employer's policy.

[15] As for the Claimant's rights,<sup>6</sup> the Federal Court determined in both *Kuk* and in *Cecchetto* that these were irrelevant considerations to the misconduct issue. In *Cecchetto*, the Federal Court wrote:

While [Mr. Cecchetto] is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises—for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests—that does not make the decision of the Appeal Division unreasonable. The key problem with [Mr. Cecchetto's] argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.<sup>7</sup>

[16] And, in another case, called *Milovac*,<sup>8</sup> the Federal Court confirmed that *Charter* concerns, as they relate to vaccination policies, are not matters properly before the General Division.

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<sup>5</sup> *Kuk v Canada (Attorney General)*, 2023 FC 1134.

<sup>6</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 120.

<sup>7</sup> *Cecchetto*, at para 32.

<sup>8</sup> *Milovac v Canada (Attorney General)*, 2023 FC 1120

[17] As for the issue of a wrongful or constructive dismissal (suspension in this case), the Courts have consistently said that this is a matter for another forum.<sup>9</sup> In other words, it is irrelevant to the misconduct question.

[18] The Claimant does not have an arguable case that the General Division failed to consider these four issues when it assessed whether there was misconduct. The issues he has raised are irrelevant to the misconduct question.

## **Conclusion**

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

Janet Lew  
Member, Appeal Division

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<sup>9</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paras 30 to 34, *Cecchetto*, at paras 35 and 37 and *Milovac*, at para 36.