



Citation: *NS v Canada Employment Insurance Commission*, 2023 SST 1081

**Social Security Tribunal of Canada  
Appeal Division**

**Leave to Appeal Decision**

**Applicant:** N. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated October 7, 2022  
(GE-22-2018)

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**Tribunal member:** Janet Lew

**Decision date:** August 11, 2023

**File number:** AD-22-809

## Decision

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

## Overview

[2] The Applicant, N. S. (Claimant), is appealing the General Division decision of October 7, 2022. The General Division found that the Respondent, Canada Employment Insurance Commission, had proven that the Claimant lost his job because of misconduct. In other words, it found that he had done something that caused him to lose his job. The General Division found that the Claimant had not complied with his employer's vaccination policy.

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

[4] The Claimant denies any misconduct. He says his employer wrongfully dismissed him and, for that reason, says he is entitled to Employment Insurance benefits. He notes that his employer has since reinstated him to his position without any loss of seniority. He says reinstatement means that he should be treated as if his employer had never dismissed him from his employment. The Claimant argues that the General Division made procedural, legal, and factual errors.

[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.

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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."

## Issues

[7] The issues are as follows:

- (a) Is the application for leave to appeal now moot?
- (b) Is there an arguable case that the General Division made any procedural, 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 the General Division arguably made a jurisdictional, procedural, legal, or certain type of factual error.<sup>3</sup>

[9] 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.

## History of proceedings

[10] The Claimant wished to rely on new evidence (anything that had not been before the General Division). As a consequence, he filed an application with the General Division to rescind or amend its decision of October 7, 2022.

[11] The new evidence consisted of a copy of the Claimant's Grievance. The Claimant sought reinstatement to his job and full compensation for his losses relating to his loss of employment.<sup>4</sup> The Claimant also advised in his application to rescind or amend that he had since been reinstated and had since resumed working.

[12] On January 26, 2023, the General Division refused the Claimant's application to rescind or amend.<sup>5</sup> It found that the new evidence did not have any impact on whether

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

<sup>4</sup> Copy of Grievance, at AD1B-5.

<sup>5</sup> General Division decision issued on January 26, 2023, regarding appeal file number GE-22-3892.

the Claimant should be disqualified from receiving benefits. On top of that, the General Division found that it had not made its earlier decision without knowledge of, or that it had not been based on a mistake, as to some material fact.

[13] The Claimant appealed the General Division's decision of January 26, 2023 to the Appeal Division. On August 2, 2023, I allowed the Claimant's appeal (in appeal file number AD-23-200). I found that the General Division made a mistake about the new evidence and about how that new evidence would have impacted the outcome.

[14] The Claimant's new evidence showed that the Claimant's employer reinstated him without loss of seniority. I found that the reinstatement effectively meant that the Claimant's separation from his employment was no longer treated as if the Claimant had been dismissed. So, this meant that he would not be disqualified from receiving Employment Insurance benefits.

[15] I found gaps in the evidence. So, with the gaps, I was unable to conclude, one way or the other, whether the reinstatement meant the Claimant was now entitled to Employment Insurance benefits, dating back to the time his employer had dismissed him. I determined that the evidence fell short in showing that the Claimant's employer would have necessarily treated him as he had been consistently working throughout, without any separation from employment.

[16] It should be noted that the Claimant's dismissal from his employment had been preceded by a suspension. The General Division had not addressed whether the suspension was due to misconduct. That issue may be relevant, in light of the reinstatement. The issues also raises the question as to whether the Claimant would have immediately resumed working after reinstatement, or whether his employer would have placed him on a(n ongoing) leave of absence or suspension.

[17] I returned the matter to the General Division so that it could fully consider the effect of the reinstatement and to determine the Claimant's entitlement to Employment Insurance benefits.

## **The application for leave to appeal is now moot**

[18] I find that the Claimant's application for leave to appeal is moot because of my decision of August 2, 2023 (appeal file number AD-23-200). In other words, there is no tangible and concrete dispute at issue, and the outcome of this application will have no practical effect on the parties' rights.<sup>6</sup>

[19] The underlying issue in this application to the Appeal Division concerns whether the Claimant was dismissed from his employment for misconduct. I have already determined (in appeal file number AD-23-200) that the Claimant's employer reinstated him and that effectively, this means that the Claimant is no longer to be treated as if he had been dismissed. There is no disqualification of Employment Insurance benefits, as effectively, there was no dismissal.

[20] There is no utility in proceeding with this application. I cannot offer any further relief to the Claimant. If the Claimant were to succeed in this application, at most, I would have only been able to return the matter back to the General Division for redetermination. I have already done that.

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

[21] The Claimant argues the General Division made procedural, legal, or factual errors. However, he has not identified any specific errors. For procedural errors, he does not say, for instance, that the General Division failed to ensure disclosure of documents, or that he was deprived of any opportunity to fairly present his case.

[22] The Claimant also does not say that the General Division made any particular legal or factual errors. From what I can determine, the General Division correctly identified and set out the requirements for misconduct and it properly applied the law to

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<sup>6</sup> See *Cardin v Canada (Attorney General)*, 2017 FCA 150, which refers to the test for mootness set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. 4<sup>th</sup> 231.

the facts before it. I do not see anything that suggests the General Division's findings were not consistent with the evidence that was before it.

[23] I am not satisfied that there is an arguable case that the General Division made any procedural, legal, or factual errors.

[24] Even if the General Division had made any errors, the issues that the General Division decided are no longer live issues, in light of the Claimant's application to rescind or amend and my decision of August 2, 2023.

## **Conclusion**

[25] I am not satisfied that the appeal has a reasonable chance of success. As a result, I am refusing permission to appeal. This means that the appeal will not be going ahead.

[26] Although I am refusing this application, for greater clarity, this decision simply confirms that, based on my decision in appeal file number AD-23-200, the General Division shall consider the Claimant's reinstatement and any entitlement to Employment Insurance benefits that he may have.

Janet Lew  
Member, Appeal Division