



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 92

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

# **Leave to Appeal Decision**

**Applicant:** S. M.  
**Representative:** Christopher Hall

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated July 21, 2023  
(GE-23-193)

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**Tribunal member:** Janet Lew

**Decision date:** September 20, 2023  
**File number:** AD-23-745

## Decision

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

## Overview

[2] The Applicant, S. 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 Claimant lost her job as a hospital administrator 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 had not complied with her employer's vaccination policy.

[4] As a result of the dismissal due to misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made an important error of fact. She argues that the General Division failed to consider that she was prepared to work, but that her employer failed to accommodate her. For instance, she says that she could have worked remotely and undergone testing when attending work in person. She says the General Division should have considered that she was fully capable of working.

[6] 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>

[7] 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.

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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."

## **Issue**

[8] Is there an arguable case that the General Division overlooked any of the evidence?

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

[9] 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 types of factual errors.<sup>3</sup>

[10] 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 overlooked any of the evidence?**

[11] The Claimant argues the General Division overlooked an important piece of evidence, namely, that she was willing and prepared to work, but that her employer did not accommodate her. She says that if the General Division had considered this evidence, it would have accepted that there was no misconduct on her part.

[12] In fact, the General Division noted the Claimant's evidence that she had asked her employer for accommodation. It noted that she had asked for remote work and/or rapid testing, social distancing, and the use of personal protective equipment in the workplace. The General Division also noted the Claimant's evidence that she wanted to work and was willing to work from home and do rapid testing.

[13] The General Division also noted the Claimant's arguments that her employer could have accommodated her request. It would not have caused any hardship or had

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

any impact on the employer. If her employer had accommodated her, she could have continued working.

[14] The General Division did not overlook any of this evidence regarding the Claimant's willingness to work and her employer's refusal to accommodate her. The General Division determined that these considerations were irrelevant when considering whether there was any misconduct under the *Employment Insurance Act*.

[15] These factors might be relevant in the labour law context, but they were not relevant to the General Division's assessment. As the Federal Court has set out, the role of the General Division and Appeal Division is very narrow and specific. Its role is to determine why a claimant was dismissed from their employment, whether that reason constitutes misconduct, and whether the dismissal was or should have been foreseeable.<sup>4</sup>

[16] In essence, the Claimant is attacking the reasonableness of her employer's vaccination policy. But the role of the General Division and Appeal Division is very narrow and specific, and assessing the reasonableness of a vaccination policy is beyond the scope of the General Division and Appeal Division.

## **Conclusion**

[17] 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 be going ahead.

Janet Lew  
Member, Appeal Division

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<sup>4</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 and *Kuk v Canada (Attorney General)*, 2023 FC 1134.