



Citation: *WS v Canada Employment Insurance Commission*, 2023 SST 201

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

# **Leave to Appeal Decision**

**Applicant:** W. S.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** General Division decision dated July 13, 2023  
(GE-23-276)

---

**Tribunal member:** Janet Lew

**Decision date:** September 21, 2023

**File number:** AD-23-767

## Decision

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

## Overview

[2] The Applicant, W. S. (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 was suspended and then lost his job because of misconduct. In other words, it found that he had done something that caused him to be suspended and then lose his job. The General Division found that the Claimant did not comply with his employer's vaccination policy.

[4] As a result of the misconduct, the General Division determined that the Claimant could not get Employment Insurance benefits.

[5] The Claimant denies any misconduct. He argues that the General Division made jurisdictional, legal, and factual errors. In particular, he argues that the General Division based its decision on false assumptions. He also argues that the General Division ignored the evidence about his employer's vaccination policy.

[6] The Claimant says that if the General Division had not ignored evidence or had not made false assumptions, it would have accepted that his employer's vaccination policy was unreasonable. And, as he says the policy was unreasonable, he should not have been expected to have had to comply with it.

[7] 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>

[8] 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

[9] Is there an arguable case that the General Division made any jurisdictional, legal, or factual errors?

## I am not giving the Claimant permission to appeal

[10] 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>

### – The Claimant says the General Division made a false assumption

[11] The Claimant says the General Division made a false assumption about the settlement he had with his employer in a wrongful dismissal court action. Following the settlement, the employer reissued a record of employment. The employer recorded the reason for issuing it was code “K – Other.” In the initial record of employment, the employer wrote that it was issuing the record because the Claimant was on a leave of absence.<sup>4</sup>

[12] The General Division wrote:

Clause 3 of the settlement agreement creates a legal fiction—in other words, a state of affairs accepted by the parties to the agreement—for the purposes of settling the lawsuit. It doesn’t change reality after-the-fact. The employer issued the new records of employment because it agreed to do that in the settlement

---

<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."

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

<sup>4</sup> Record of Employment dated November 8, 2021, at GD 2-12 and GD 3-22.

agreement (and to use Code K Other and “notice/severance was agreed upon”). Their agreement about those things is the only fact Clause 3 of the settlement agreement proves.

[13] The Claimant says the General Division made a false assumption that his employer settled his wrongful dismissal action to avoid litigation. He says that there was no evidence to support the General Division’s assumption.

[14] Settlement of the Claimant’s wrongful dismissal action clearly meant the end of any litigation on that issue. Whether the employer settled the action to avoid litigation, or for other reasons, might be the subject of some debate, but I find that it was not relevant to the General Division’s decision.

[15] The employer’s reasons for settling the action had no impact on the outcome. The General Division determined that the issue was not why the employer settled the litigation. Rather, the issue was whether the revised record of employment was conclusive proof that the Claimant had not committed any misconduct under the *Employment Insurance Act*.

[16] I am not satisfied that the Claimant has an arguable case that the General Division made a false assumption about the evidence. Even if the General Division had made a false assumption, it did not base its decision on that assumption.

– **Accommodations or exceptions under the vaccination policy**

[17] The Claimant argues that the General Division ignored evidence when it found that his employer’s vaccination policy did not provide any exceptions or accommodations.

[18] The Claimant says that the General Division ignored an email dated August 31, 2021, from the President and CEO. The President and CEO stated that the

employer would be updating its policy to include mandatory vaccinations with no exceptions. No exceptions would be tolerated nor granted.<sup>5</sup>

[19] The Claimant spoke with the Commission on March 9, 2022. He confirmed his understanding that his employer did not allow for any exceptions.<sup>6</sup>

[20] 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.<sup>7</sup>

[21] The General Division did not base its decision on whether the employer's vaccination policy provided any exceptions or accommodations. Instead, the General Division focused on whether the Claimant complied with his employer's vaccination policy, knowing what the consequences might be, and whether he was suspended and then dismissed because of that.

[22] Given that the General Division did not base its decision on whether the employer's policy provided any exceptions, I am not satisfied that the Claimant has an arguable case that the General Division made a reviewable factual error.

[23] Setting aside this consideration, I find that there was a solid evidentiary foundation upon which the General Division could conclude that the employer's vaccination policy gave options and accommodations.

- The employer's vaccination policy stated, "Only employees with permitted exceptions, due to bona fide and supported medical prohibition on obtaining the vaccine, or other applicable unsubstantiated ground under [the employer's] human rights policy will be reviewed (for which options and accommodations shall be instituted, such as regularly/weekly required COVID-19 testing)."<sup>8</sup>

---

<sup>5</sup> Employer's email dated August 31, 2021, at GD 3-34.

<sup>6</sup> See Supplementary Record of Claim dated March 9, 2022, at GD 3-25.

<sup>7</sup> Section 58(1)(c) of the DESD Act.

<sup>8</sup> Employer's COVID-19 Vaccination Policy, at GD 2-6 and GD 3-41.

- The policy also provided, “Mandatory access to COVID-19 testing will be implemented for those who cannot complete vaccination due to a bona fide medical exemption (or other bona fide exemption pursuant to the Human Rights Code) ...”<sup>9</sup> The policy appears to be dated September 7, 2021. The initial policy was developed on August 3, 2021.<sup>10</sup>
- Memorandum dated October 29, 2021, from the President and CEO to the Claimant. He wrote that the Claimant had not provided a “bona fide reason for not being vaccinated in accordance with the exemptions which would be considered under [the employer’s] COVID-19 Vaccination Policy.”<sup>11</sup>
- Memorandum dated December 9, 2021, from the President and CEO to the Claimant. He again wrote that the Claimant had not provided a “bona fide reason for not being vaccinated in accordance with the exemptions which would be considered under [the employer’s] COVID-19 Vaccination Policy.”<sup>12</sup>
- Termination letter dated January 4, 2022. The President and CEO wrote to the Claimant that he had not provided any medical, or other relevant exception to comply with the employer’s mandatory policy.<sup>13</sup>

[24] The President and CEO had emailed management in August 2021, advising that the employer’s vaccination policy would be updated to include mandatory vaccinations without any exceptions. But the policy, memoranda, and termination letter clearly indicate that the employer continued to make exceptions available.

[25] I am not satisfied that the Claimant has an arguable case that the General Division made a factual error that the vaccination policy did not allow for any exceptions.

---

<sup>9</sup> Employer's COVID-19 Vaccination Policy, at GD 2-7, GD 2-10, GD 3-42, and GD 3--45.

<sup>10</sup> Employer's COVID-19 Vaccination Policy, at GD 2-9.

<sup>11</sup> Employer's memorandum dated October 29, 2021, at GD 3-47.

<sup>12</sup> Employer's memorandum dated October 29, 2021, at GD 3-48.

<sup>13</sup> Termination letter dated January 4, 2022, at GD 3-49

– **The General Division did not decide whether the policy was reasonable**

[26] The Claimant suggests the General Division should have decided whether his employer's vaccination was reasonable. He says that if it had considered this issue, it would have decided that the policy was unreasonable and that he did not have to comply with it.

[27] The General Division found that it could not consider whether his employer's policy was reasonable.

[28] The General Division's determination on this issue was consistent with the case law. In both *Kuk*<sup>14</sup> and *Cecchetto*,<sup>15</sup> the Federal Court said it was beyond the jurisdiction of the General Division and the Appeal Division to assess an employer's policies as their authority is limited. The Court said that their role, when considering misconduct under the *Employment Insurance Act*, is to focus on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.

[29] I am not satisfied that the Claimant has an arguable case that the General Division failed to decide whether the employer's vaccination policy was reasonable.

## **Conclusion**

[30] 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

---

<sup>14</sup> *Kuk v Canada (Attorney General)*, 2023 FC 1134.

<sup>15</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 120.