Citation: *CS v Canada Employment Insurance Commission*, 2022 SST 975

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. S.
Respondent:	Canada Employment Insurance Commission
Decision under appeal:	General Division decision dated August 3, 2022 (GE-22-947)
Tribunal member:	Charlotte McQuade
Decision date:	October 3, 2022
File number:	AD-22-635

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] C. S. is the Claimant. He worked in a hospital but did not have contact with patients. The Claimant's employer terminated him because he did not comply with the employer's Covid-19 vaccination policy.

[3] The Claimant applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) disqualified the Claimant from benefits for reason he lost his job due to misconduct.[1]

[4] The Claimant appealed to the Tribunal's General Division who dismissed his appeal. The General Division decided the Claimant lost his job due to misconduct. The Claimant is now asking to appeal the General Division's decision to the Appeal Division. However, he needs permission for his appeal to move forward.

[5] The Claimant argues that the General Division didn't follow procedural fairness. He submits that the General Division made a mistake when it decided his behaviour was wilful because he tried to comply with the employer's policy and Directive 6, the employer's policy was unreasonable and the employer never responded to his request for accommodation based on creed. He also says he didn't know until October 13, 2021, that he would be terminated on October 22, 2021, for refusing vaccination. As well, he argues the General Division didn't consider that his employer deliberately refused every creed exemption request. The Claimant argues multiple other people claiming creed exemptions have received EI benefits.

[6] I am satisfied that the Claimant's appeal has no reasonable chance of success so I am refusing permission to appeal.

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[1] Section 30(1) of the *Employment Insurance Act* (EI Act) says claimants who lose their employment because of their misconduct are disqualified from receiving benefits.

Issue

[7] The Claimant’s Application to the Appeal Division raises the following issues:

a) Is it arguable that the General Division didn’t follow procedural fairness?

b) Is it arguable that the General Division overlooked important facts or make an error of law or jurisdiction when it decided the Claimant’s conduct was misconduct under the *Employment Insurance Act* (EI Act)?

Analysis

[8] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[9] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[2] The law says that I can only consider certain types of errors.[3] There errors are:

- The General Division hearing process was not fair in some way
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided or it decided something it did not have the power to decide)
- The General Division based its decision on an important error of fact
- The General Division made an error of law

[2] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[3] Section 58(1) of the DESD Act describes the only errors that I can consider when deciding whether to give permission to proceed with an appeal.

[10] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[4]

It is not arguable that the General Division breached procedural fairness

[11] It is not arguable that the General Division breached procedural fairness by reaching a conclusion that the Claimant believes to be unfair.

[12] The Claimant says in his Application to the Appeal Division that the General Division didn't follow procedural fairness. His submissions explain, however, what he believes to be an unfair result. The Claimant points out that he disagrees with the General Division's conclusion that he was terminated for misconduct as he says his conduct was not wilful.

[13] There is no arguable case that the General Division failed to provide procedural fairness to the Claimant. The fairness of the result is not the same thing as procedural fairness.

[14] I can only intervene in a question of fairness if it involves the manner in which the General Division proceeded. For example, I can intervene if the General Division did something that might have compromised the Claimant's ability to know or respond to the case against him or if the decision maker was biased. The Claimant has not pointed to any unfairness of that type on the part of the General Division. I have reviewed the audio recording from the General Division hearing and I see no evidence of any procedural unfairness.

It is not arguable that the General Division made any other reviewable errors when it decided the Claimant's conduct was misconduct

[15] Misconduct is not defined in the EI Act. However, the courts have come to a settled definition about what this term means.

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[4] See *Osaj v Canada (Attorney General),* 2016 FC 115, which describes what a "reasonable chance of success" means.

[16] As the General Division stated, misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[5] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[7]

[17] Another way to put this is that there is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and there was a real possibility of being let go because of that.[8]

[18] The General Division applied this test to decide if the Claimant's conduct amounted to misconduct.

[19] The evidence supports that the Claimant's conduct was misconduct.

[20] The General Division found as a fact that the Claimant lost his job because he did not comply with the employer's Covid-19 vaccination policy. The Claimant did not dispute that was the reason for termination.

[21] The General Division also found as a fact that:

- The Claimant was aware of his employer's vaccination policy.
- The policy required employees to provide proof of vaccination or having an approved exemption or they would not be allowed to work.
- The Claimant was aware by the October 13, 2021, meeting with his employer that his request for an exemption based on creed was refused.[9]

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.
[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See paragraph 33 of the General Division decision.

- At the October 13, 2021, meeting, the Claimant was given the option to either become vaccinated in accordance with the employer's policy to be followed by a 14-day unpaid leave or be terminated.

- The Claimant refused vaccination and was therefore terminated on October 22, 2021.[10]

[22] None of these facts was disputed by the Claimant.

[23] The General Division decided the Claimant's decision to not comply with the policy was wilful. The General Division decided this was because the Claimant made a conscious and deliberate decision to refuse to comply with the employer's policy when he knew that by doing so, that he could be terminated from his job.

[24] The General Division's decision was consistent with the law.

[25] The courts have said that that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[11] A deliberate violation of the employer's policy is considered to be misconduct.[12]

[26] The facts show the Claimant deliberately violated the employer's policy requiring vaccination, once he was aware on October 13, 2021, that his exemption request was denied. He did so, knowing the result would be termination.

[27] The Claimant submits that he had complied with Directive 6 and he tried his best to comply with his employer's policy by agreeing to testing 3 times per week, completing an educational program and applying for a religious exemption. He also says he was not aware until October 13, 2021, that he would be terminated on October 22, 2021, for refusing the vaccine.

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[10] See paragraphs 26 and 33 of the General Division decision.
[11] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA) *and Canada (AG) v Lemire*, 2010 FCA 314.
[12] See *Attorney General of Canada v Secours*, A-352-94. See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[28] The General Division was not required to consider whether the Claimant complied with Directive 6 or other parts of the employer's policy. The conduct that resulted in his termination was the Claimant's failure to comply with the vaccination requirement, after being made aware that his exemption request had been denied and knowing the consequence would be termination.

[29] The General Division acknowledged the Claimant's testimony that before October 13, 2021, he thought he would be placed on unpaid leave for failing to become vaccinated.[13] However, the General Division concluded, based on the Claimant's testimony, that he was aware by October 13, 2021, that continued refusal of vaccination would result in termination.

[30] The Claimant says the General Division should have considered the fact the employer's policy was unreasonable. He had submitted to the General Division that the employer's policy was unreasonable because a person can still catch and transmit the virus if vaccinated. He also said he had worked 21 years and not been disciplined.

[31] It is not arguable that the General Division was required to consider whether the employer's policy was reasonable. There are several reasons for this. First, as above, a breach of an express or implied duty resulting from the contract of employment, knowing that breach could result in termination is sufficient to amount to misconduct. The legal test for misconduct does not ask a decision maker to look behind the duty or policy and decide whether it was reasonable for the employer to impose that duty or policy.

[32] Secondly, in asking whether the policy was reasonable, the focus of the enquiry shifts to the employer's behaviour, rather than the employee's. However, the courts have said that it is the conduct of the employee that is in question when deciding whether misconduct has occurred, not the conduct of the employer. [14]So, the reasonableness of the policy cannot be a consideration.

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[13] See paragraphs 15 and 16 of the General Division decision.
[14] See *Paradis v. Canada (Attorney General),* 2016 FC 1282. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[33] Whether it was reasonable for the employer to terminate the Claimant as opposed to imposing some less onerous outcome is also not relevant to the question of misconduct. The Federal Court of Appeal has said that it is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.[15]

[34] The Claimant says the General Division also overlooked the fact the employer did not respond to his request for exemption based on creed.

[35] An employer's behaviour may be relevant, in some circumstances, to deciding whether an employee's refusal of a direction from their employer is wilful. [16]For example, whether the employer communicated the policy to an employee, gave the employee time to comply with the policy or communicated the consequences of violating that policy would be relevant to deciding whether an employee's conduct was wilful.

[36] The General Division did consider the Claimant's evidence that the employer did not respond to his request for exemption based on creed.

[37] The General Division acknowledged the Claimant's testimony that the Claimant had submitted a request for an exemption from vaccination in early October 2021 based on creed, that he had submitted a letter from his faith leader, and that the employer did not reply to his request.[17]

[38] However, the General Division concluded, based on the Claimant's testimony, that the Claimant was made aware at the October 13, 2021, meeting with the employer that his request had been denied.[18]

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[15] See *Canada (Attorney General) v Caul*, 2006 FCA 251.
[16] See *Astolfi v Canada (Attorney General),* 2020 FC 30.
[17] See paragraph 26 of the General Division decision.
[18] See paragraph 16 of the General Division decision.

[39] I see no arguable mistake of fact that the Claimant learned at the October 13, 2021, meeting with the employer that his request had been denied. This finding was consistent with his testimony.[19]

[40] It is also not arguable the General Division made an error of law or jurisdiction in not considering whether the employer improperly denied the Claimant's request for exemption.

[41] There is very specific direction from both the Federal Court that says whether an employer failed to accommodate an employee under human rights law or in accordance with its own policy is not relevant to the question of misconduct.

[42] In *Paradis v Canada (Attorney General),* the Federal Court considered whether an employer's failure to provide an employee with reasonable accommodation for a claimed drug disability in accordance with the *Alberta Human Rights Act* and its own company policy was relevant to the question of misconduct.[20] The Federal Court decided it was not. In reaching this conclusion, the Federal Court reiterated the prior instruction from the Federal Court of Appeal that, when considering misconduct, it is the employee's and not the employer's conduct that is relevant.[21] The Federal Court also noted that the question of whether the employer should have provided reasonable accommodation to assist the applicant to deal with his drug dependency was a matter for another forum.

[43] This is binding law on the Tribunal. This means the General Division did not err in law or jurisdiction by not considering whether the employer failed to properly accommodate the Claimant in accordance with its own policy or the *Ontario Human Rights Code*. This is not the type of employer conduct that is relevant to the question of misconduct.

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[19] I heard this from the audio tape of the General Division hearing at approximately 0:44:00 to 0:44:49.
[20] See *Paradis v Canada (Attorney General),* 2016 FC 1282.
[21] The Federal Court cited the Federal Court of Appeal's decision in *Canada (A.G.) v McNamara*, 2007 FCA 107.

[44] The Claimant submits further that the General Division erred by not considering that the Claimant's employer deliberately denied every creed exemption request. I have listened to the audio recording from the General Division hearing and I did not hear the Claimant provide this information in his testimony. I have also reviewed the documentary record before the General Division and do not see this information anywhere. So, this is new evidence that the General Division did not have before it made its decision.

[45] The Appeal Division generally does not accept new evidence about the issues that the General Division decided, with a few very limited exceptions. [22] This is because the Appeal Division isn't rehearing the case. Instead, the Appeal Division decides whether the General Division made certain errors, and decides how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[46] None of the exceptions applies to allow me to consider the Claimant's new evidence that his employer deliberately denied every creed exemption request. So, I can't consider it. Since the Claimant did not provide this evidence to the General Division, it did not make a reviewable error by not considering it.

[47] The Claimant argues further that multiple people are being granted EI because they attempted to comply and submitted creed exemptions. He cites a case from the Tribunal's General Division where the General Division found in favour of a claimant who had refused vaccination because of creed.[23]

[48] While consistency in the law is important, General Division members are not bound to follow decisions of other General Division members. In any event, this case was not provided to the General Division and no argument made to the General Division

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[22] The Federal Court of Appeal has said in a case called *Shamra v Canada (AG),* 2018 FCA 48, on a judicial review, the only exceptions where the Court can accept new evidence is where the new evidence provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. As the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.
[23] See *DL v Canada Employment Insurance Commission*, 2022 SST 281.

by the Claimant about why it was similar to his case. The General Division cannot be faulted for not considering an argument or case that was not provided to it.

[49] I understand that the Claimant disagrees with the General Division's conclusion. However, an appeal to the Appeal Division of the Tribunal is not a new hearing, where a party can present their evidence and arguments again or provide new evidence and ask for a different outcome.

[50] Aside from the Claimant's arguments, I have reviewed the documentary file, listened to the audio tape from the General Division hearing.[24] The evidence supports the General Division's decision. I did not find any key evidence that the General Division might have ignored or misinterpreted.

[51] The Claimant has not identified any reviewable errors upon which his appeal has a reasonable chance of success.

Conclusion

[52] Permission to appeal is refused. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division

[24] See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.