Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1004

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 30, 2022 (GE-22-1074)

Tribunal member:	Charlotte McQuade
Decision date:	October 11, 2022
File number:	AD-22-634

Decision

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

Overview

[2] The Claimant worked as a Registered Nurse at a hospital. She was placed on an unpaid leave of absence on October 15, 2021, and then terminated on December 8, 2021. The Claimant applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) initially disqualified the Claimant from benefits for voluntarily leaving her employment.

[3] The Claimant appealed to the Tribunal's General Division. On appeal, the parties agreed that the Claimant had not quit her job. Rather, the Claimant had been suspended and terminated by her employer for failing to comply with the employer's Covid-19 vaccination policy. So, the General Division considered the issue before it to be whether the Claimant was suspended and dismissed for misconduct.

[4] The General Division decided that the Claimant was suspended and dismissed because of her misconduct. The Claimant is now asking to appeal the General Division's decision to the Appeal Division. However, she needs permission for her appeal to move forward.

[5] The Claimant argues that the General Division based its decision on an important mistake of fact because the General Division said she agreed she was guilty of misconduct. The Claimant also argues that the General Division was wrong when it concluded her actions were misconduct. She says not disclosing her vaccination status is not misconduct. As well, she says her employer's policy exceeded the requirements of Directive 6 issued by the Chief Medical Officer of Health of Ontario and was discriminatory.

[6] I am satisfied that the Claimant's appeal has no reasonable chance of success so I am refusing permission to appeal. This means the Claimant's appeal cannot proceed.

Issues

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

a) Is it arguable that the General Division based its decision on an important error of fact that the Claimant had agreed her conduct was misconduct?

b) Is it arguable that the General Division misinterpreted the meaning of misconduct under the *Employment Insurance Act* (EI Act)?

c) It is arguable that the General Division made an error of law or jurisdiction by failing to decide whether the employer's policy exceeded the requirements of Directive 6, or was discriminatory?

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.[1] The law says that I can only consider certain types of errors.[2] 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

[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[2] 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.

- The General Division made an error of law

[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.[3]

It is not arguable that the General Division based its decision on an important error of fact

[11] It is not arguable that the General Division based its decision on an important error of fact that the Claimant had agreed she lost her job because of misconduct.

[12] It is not every error of fact that allows the Appeal Division to intervene. For the Appeal Division to intervene on an error of fact, the General Division must have based its decision on the error of fact. So, it must be a material fact. As well, the erroneous finding of fact must have been made in a perverse or capricious manner or without regard to the material before it.[4]

[13] The Claimant submits that the General Division says in its decision that she agreed she was guilty of misconduct, but she did not agree to that.

[14] The Claimant points to paragraph 7 of the General Division where she says the mistake of fact was made.

[15] Paragraph 7 of the General Division decision provides:

> "At the hearing, the Claimant confirmed that she did not voluntarily leave her job, but it was her employer that imposed the mandatory and unpaid leave of absence. She agreed that the legal issue she disputes is misconduct."

[16] A disqualification can be imposed under section 30(1) of the EI Act if a claimant either voluntarily left their employment without just cause or was terminated for misconduct.

---

[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.
[4] See section 58(1)(c) of the DESD Act.

[17] The Commission had initially disqualified the Claimant for reason she voluntarily left her employment. However, the Commission had changed its position after the Claimant's appeal was filed, arguing instead that the Claimant was suspended and dismissed because of her misconduct.

[18] The General Division was simply confirming in paragraph 7 that the Claimant and the Commission agreed that the **issue** that the General Division had to decide was whether the Claimant should have been disqualified for reason she was suspended and then terminated for misconduct as opposed to whether the Claimant voluntarily left her job without just cause.

[19] It is not arguable that the General Division thought the Claimant agreed she was guilty of misconduct. The General Division understood that the Claimant was disputing that her actions amounted to misconduct.

It is not arguable that the General Division misinterpreted the meaning of misconduct under the EI Act

[20] It is not arguable that the General Division misinterpreted the meaning of misconduct under the EI Act.

[21] The Claimant argues the General Division is wrong when it concluded her conduct amounted to misconduct. She says failing to disclose her vaccination status is not misconduct.

[22] The Claimant worked as a Registered Nurse at a hospital.

[23] The Claimant's employer implemented a vaccination policy on September 7, 2021. The policy states that it was developed and implemented to ensure compliance with directives received from the Chief Medical Officer of Health. The policy required all staff to provide proof of their first Covid-19 vaccine dose by September 7, 2021, and

proof of full vaccination by October 15, 2021, or provide written proof of a medical exemption by October 15, 2021.[5]

[24] The policy provided for consequences if those requirements were not met. The policy stated that failing to comply with the policy by October 15, 2021, would result in an unpaid leave for up to 14 days and further non-compliance may lead to termination of employment, loss of privileges, termination of a contract, or a similar action appropriate to the individual's association with the hospital.[6]

[25] The Claimant was suspended by her employer on October 15, 2021, and then terminated on December 8, 2021.[7]

[26] The law says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until the period of suspension expires, the claimant loses or voluntarily leaves the employment, or the claimant, after the beginning of the suspension, accumulates with another employer enough insurable hours to qualify to receive benefits.[8]

[27] The law says that a claimant who is terminated from their employment because of misconduct is disqualified from benefits if they lost their employment because of misconduct.[9]

[28] The General Division had to decide whether the Commission had proven that the Claimant was suspended and terminated due to misconduct.

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

[30] As the General Division stated, misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also

---

[5] See GD3-44 to GD3-49.
[6] See GD3-46.
[7] See GD2-11 for letter of suspension and GD2-14 for letter of termination.
[8] See section 31 of the *Employment Insurance Act* (EI Act).
[9] See section 30(1) of the EI Act.
[10] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

includes conduct that is so reckless that it is almost wilful.[11] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[12]

[31] Another way to put this is that there is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward his employer and there was a real possibility of being let go because of that.[13]

[32] The General Division stated that the Claimant's employer was a hospital and had imposed a vaccination policy because of the Covid-19 pandemic and in response to Directive 6. The General Division decided that vaccination became a condition of the Claimant's employment when the employer introduced the policy.[14]

[33] The General Division found as a fact that the Claimant was aware of her employer's vaccination policy by September 3, 2021, was aware of the deadlines to comply and had enough time to comply.[15]

[34] The General Division also found as a fact that the requirement for vaccination in the policy applied to the Claimant because, although she sought out a medical exemption from her doctor and then her allergist, she was not able to obtain a medical note. So, she did not submit an exemption request to her employer.[16]

[35] The General Division decided that the reason the Claimant was put on an unpaid leave on October 15, 2021, was because she did not comply with the employer's Covid-19 policy. She was terminated on December 8, 2021, for the same reason. Specifically, the Claimant refused to disclose her vaccine status to the employer and was not willing to be vaccinated.[17]

---

[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[14] See paragraph 47 of the General Division decision.
[15] See paragraphs 25 and 39 of the General Division decision.
[16] See paragraph 45 of the General Division decision.
[17] See paragraph 22 of the General Division decision.

[36] The General Division concluded that the Commission had proven the Claimant's conduct amounted to misconduct.

[37] In reaching this conclusion, the General Division decided the Claimant was aware of the employer's policy, the deadlines for compliance and she had time to comply.

[38] The General Division acknowledged the Claimant's argument that she did not believe refusing a vaccine to be wilful misconduct but rejected that argument on the basis that, even though the Claimant did not have wrongful intent, she still made a conscious choice to breach the employer's policy for her own reasons.

[39] The General Division also did not accept the Claimant's testimony that she did not think she would be suspended or fired because she thought the policy was illegal and she expected things would pass over. The General Division reasoned that the consequences of failing to comply were outlined in the policy and the Claimant was provided with a letter dated October 15, 2021, when her unpaid leave of absence began, which said that dismissal would occur on November 1, 2021, if she did not comply.

[40] The General Division decided that the Claimant's conduct amounted to misconduct because the Claimant made a conscious decision to violate the employer's policy. She knew or ought to have known the consequences of not complying with the vaccination policy would lead to a mandatory and unpaid leave of absence and dismissal.[18]

[41] The General Division's findings of fact are consistent with the evidence on file. The evidence supports the finding that the Claimant deliberately violated the employer's policy, knowing the result could be suspension and termination.

[42] The General Division addressed critical evidence that went against its finding, namely that the Claimant's testimony that she didn't think she would be suspended or

[18] See paragraphs 42 and 43 of the General Division decision.

terminated because she thought the policy was illegal and she expected things would pass over. However, the General Division decided, despite that, the Claimant was aware of the potential consequences as they were stated in a policy and in a letter to her.

[43] The General Division is entitled to weigh the evidence before it and make findings of fact. The Appeal Division cannot interfere with how that evidence was weighed.

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

[45] The courts have said that that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[19] A deliberate violation of the employer's policy is considered to be misconduct.[20]

It is not arguable that the General Division made an error of law or an error of jurisdiction by failing to decide whether the employer's policy exceeded the requirements of Directive 6, or whether the policy was discriminatory

[46] It is not arguable that the General Division was required to decide whether the employer's policy exceeded the requirements of Directive 6 or was discriminatory.

[47] The employer told the Commission that it had implemented its vaccination policy under Directive 6, issued by the Ontario Chief Medical Officer of Health.[21]

[48] The Claimant argued before the General Division that the employer's policy exceeded the requirements of Directive 6 by making vaccination mandatory and not providing an option for testing.[22] She also argued the employer failed to accommodate her.

---

[19] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA) *and Canada (AG) v Lemire*, 2010 FCA 314.
[20] 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. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).
[21] See GD3-43.
[22] See GD2-5.

[49] However, the General Division declined to decide these issues for reason that its role was to decide whether there was misconduct under the EI Act and it was not required to decide these questions to determine whether there was misconduct.

[50] The General Division reasoned that the law said it could not determine whether the suspension or termination was justified.[23] The General Division noted that the Claimant's recourse was to pursue an action in court, or any other tribunal that may deal with her particular arguments and that the Claimant had already filed a union grievance concerning these issues.

[51] 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.[24]

[52] 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.

[53] However, the General Division did consider these factors. The General Division considered that the policy was communicated to the Claimant, that she had enough time to comply and that the employer communicated the consequences of violation of the policy to her.

[54] The General Division also considered the Claimant's belief that she didn't think she would be terminated for refusing vaccination and that she thought the policy was illegal. However, the General Division found that, despite those beliefs, the Claimant knew or ought to have known she could be suspended or terminated for not following the policy, given this was stated in the policy and in a letter of October 15, 2021, from the employer.

---

[23] The General Division referred to the case of *Canada (Attorney General) v Marion*, 2002 FCA 185.
[24] See *Astolfi v Canada (Attorney General),* 2020 FC 30.

[55] This finding was consistent with the evidence and also consistent with the law. The law says that even if the disciplinary sanction was harsher than a claimant expected, that does not mean that the claimant's conduct was not misconduct.[25]

[56] Having considered how the Claimant's belief as to the illegality of the policy impacted whether her behaviour was wilful or not, I see no arguable case that the General Division made an error of law or jurisdiction by not going further and deciding whether the employer's policy exceeded Directive 6.

[57] There is no doubt the Tribunal has broad jurisdiction. It can decide any question of law or fact that is necessary for the disposition of any application made under the EI Act.[26]

[58] But the question of whether the policy exceeded Directive 6 was not necessary for the General Division to decide.

[59] The role of the General Division was to decide whether the Claimant's conduct amounted to misconduct. That involves deciding if the Claimant's behaviour was wilful. As above, the question of wilfulness concerns whether the Claimant refused to comply with the employer's policy, knowing or having ought to have known that her refusal could result in suspension or termination.

[60] The case law makes clear that it is the conduct of the employee that is in question when deciding whether misconduct has occurred, not the conduct of the employer. Considering whether the policy exceeds Directive 6 misdirects the focus onto the employer's behaviour.[27]

[61] The content of the policy is a contractual matter between the Claimant and the employer. In this case, the Claimant had available the grievance process to raise her concerns about the content of the policy.

---

[25] See *Canada (Attorney General) v Jolin*, 2009 FCA 303 (CanLII).
[26] See section 64(1) of the EI Act.
[27] See *Paradis v Canada (Attorney General),* 2016 FC 1282. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[62] Further, the question of whether the employer's policy exceeded Directive 6 by resulting in suspension and termination for failure to vaccinate, as opposed to providing an alternative such as testing, is really a question about whether the Claimant was unjustly or wrongfully suspended or terminated. However, the General Division had no authority to decide whether the employer had imposed too severe a sanction on the Claimant by suspending or terminating her. 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.[28]

[63] There is also very specific direction from 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.[29] The Federal Court reasoned that was because it is the employee's conduct that is relevant to the question of misconduct, not the employer's conduct, and the human rights issue was a matter for another forum.

[64] 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.* In any event, there was no factual basis for a discrimination argument, given it was undisputed that the Claimant never made a request for a medical exemption or any other type of exemption under the *Ontario Human Rights Code* from her employer.

[65] Aside from the Claimant's arguments, I have reviewed the documentary file, and listened to the audio tape from the General Division hearing. The evidence supports the General Division's decision.[30] I did not find any key evidence that the General Division might have ignored or misinterpreted.

---

[28] See Canada (Attorney General) v Caul, 2006 FCA 251.
[29] See *Paradis v Canada (Attorney General),* 2016 FC 1282.
[30] See *Karadeolian v Canada (Attorney General),* 2016 FC 615, which recommends doing such a review.

[66] Since the Claimant has not raised an arguable case that the General Division made a reviewable error, her appeal cannot move forward.

Conclusion

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

Charlotte McQuade
Member, Appeal Division