Citation: *LA v Canada Employment Insurance Commission*, 2022 SST 1126

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. A.
Representative:	M. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 8, 2022 (GE-22-1766)

Tribunal member:	Charlotte McQuade
Decision date:	October 31, 2022
File number:	AD-22-711

Decision

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

Overview

[2] Lea Amouyal is the Claimant. She worked for a private school. The Claimant's employer placed her on an unpaid leave and then terminated her for failing to comply with its Covid-19 vaccination policy.

[3] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) refused the Claimant benefits for reason she was terminated due to her own misconduct.

[4] The Claimant appealed to the Tribunal's General Division who dismissed her appeal. The General Division decided the Claimant was suspended and then lost her job due to 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 didn't follow procedural fairness, based its decision on an important error of fact and made an error of law.

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

Issues

[7] I understand the Claimant's Application to the Appeal Division to be raising the following issues:

a) Is it arguable that the General Division based its decision on an important error of fact when it decided that the Claimant did not comply with the employer's policy?

b) Is it arguable that General Division made an error of law that the Claimant's actions were misconduct, in light of her employer's revision of the Record of Employment (ROE) to reflect a dismissal without cause?

c) Is it arguable that General Division made an error of jurisdiction by failing to consider the morality, reasonability or legality of the policy, given there was no required vaccination mandate in the Claimant's industry?

d) Is it arguable that the General Division breached procedural fairness?

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]

[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]

[11] Obtaining leave to appeal is a low bar and does not imply success on the merits of the appeal.

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[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. These errors are that the General Division breached natural justice, made an error of jurisdiction, made an error of law or based its decision on an important error of fact.
[3] See *Osaj v Canada (Attorney General),* 2016 FC 115, which describes what a "reasonable chance of success" means.

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

[12] It is not arguable that the General Division made an error of fact when it decided the Claimant had not complied with the employer's mandatory Covid-19 policy.

[13] The Claimant worked for a private school. Her employer implemented a policy requiring proof of vaccination for Covid-19, absent a valid exemption granted by the employer.[4] The Claimant requested an exemption from vaccination on conscience and religious grounds, which the employer denied. The Claimant maintained her refusal to become vaccinated. The employer put the Claimant on an unpaid leave effective October 25, 2021, and then terminated her on November 8, 2021. The Claimant then applied for EI regular benefits.

[14] The Commission disqualified the Claimant from benefits from October 22, 2021, for losing her employment due to misconduct. The Claimant appealed to the Tribunal's General Division. The General Division dismissed the Claimant's appeal.

[15] The General Division decided that the Claimant was first suspended and then lost her job because she refused to comply with her employer's mandatory Covid-19 vaccination policy.[5] The General Division found the Claimant's conduct was misconduct because her actions were intentional, and she knew or ought to have known that her actions could lead to her being let go.[6]

[16] The Claimant submits that the General Division made an error of fact when it decided that she did not comply with the employer's policy. She submits that, although she refused vaccination, she complied with the rest of the policy by following safety protocols, using preventative measures and submitting an affidavit seeking an exemption based on conscious and religious grounds. She argues the policy isn't one thing requiring a single course of action.

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[4] GD3-24.
[5] See paragraphs 11, 12 and 54 of the General Division decision.
[6] See paragraph 49 of the General Division decision.

[17] 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.[7]

[18] If the General Division makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to have been made perversely, capriciously, or without regard to the evidence.[8]

[19] The evidence was that the employer's policy required employees to provide proof of mandatory vaccination by September 7, 2021, unless the employee had received a valid exemption under the policy or was in the process of becoming fully vaccinated, in which case rapid antigen testing could be used.[9]

[20] There was no dispute before the General Division that the Claimant did not become vaccinated. She testified that she had not gotten vaccinated.[10]

[21] It is not arguable, therefore, that the General Division made an error of fact that the Claimant had not complied with the employer's policy. The evidence supported this finding of fact.

[22] The Claimant says that the policy didn't demand a single course of action. But the policy did in fact demand vaccination, absent receipt of a valid exemption under the policy or being in the process of becoming fully vaccinated.[11] Given the employer denied her request for an exemption, the Claimant's failure to be vaccinated meant she had not complied with the policy.

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[7] See section 58(1)(c) of the DESD Act.
[8] See *Garvey v Canada (Attorney General),* 2018 FC 118.
[9] GD3-24.
[10] See paragraphs 23 and 25 of the General Division decision.
[11] GD3-24.

It is not arguable that the General Division made an error of law

[23] It is not arguable that General Division made an error of law when it concluded the Claimant's conduct in failing to comply with the employer's Covid-19 policy was misconduct under the *Employment Insurance Act* (EI Act).

[24] The EI Act provides for disentitlement from benefits where a claimant has been suspended for reasons of misconduct and disqualification from benefits where a claimant has been dismissed for misconduct.[12]

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

[26] As the General Division stated, misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[13] Misconduct also includes conduct that is so reckless that it is almost wilful.[14]

[27] 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.[15]

[28] The Claimant testified that she decided to not get vaccinated for personal reasons after consulting with her family and doing a risk assessment of the Covid-19 vaccine.[16] She asked the employer to exempt her from the vaccination requirement on grounds of conscience and religion, which request the employer refused.[17] The Claimant continued to refuse vaccination after being made aware of the refusal of her exemption request.

[29] The General Division decided the Claimant did not comply with her employer's vaccination policy, which was the cause of her suspension and termination. The

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[12] See sections 30(1) and 31 of the *Employment Insurance Act*.
[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[14] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See paragraph 23 of the General Division decision.
[17] See paragraph 25 of the General Division decision.

General Division decided that Claimant's actions were intentional as she made a conscious decision not to comply with the policy by refusing to get vaccinated.[18]

[30] The General Division considered the evidence about the Claimant's knowledge of the possible consequences of not complying with the vaccination requirement. After weighing the evidence, the General Division concluded the Claimant knew or ought to have known that her actions could lead to her being let go.[19]

[31] The General Division therefore concluded that the Claimant's conduct in refusing to comply with the employer's mandatory vaccination policy was misconduct.

[32] The General Division's role as the trier of fact is to weigh the evidence and make factual findings. This is not something the Appeal Division can interfere with.

[33] The General Division properly stated and applied the law. The General Division did not misinterpret what "misconduct" means under the EI Act. The General Division's decision is consistent with the law and its finding was supported by the evidence.

[34] The courts have said that that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[20] A deliberate violation of the employer's policy is considered to be misconduct.[21]

[35] That is what happened here. The Claimant deliberately violated the employer's policy, knowing that the possible consequences of non-compliance. Although she did not have wrongful intent in doing so, wrongful intent is not necessary to find misconduct.[22]

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[18] See paragraphs 21 and 22 and 28 of the General Division decision.
[19] See paragraphs 36 to 49 of the General Division decision.
[20] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA 314.
[21] 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.
[22] See *Attorney General of Canada v Secours*, A-352-94.

[36] The Claimant argues that General Division erred in concluding her actions were misconduct, given the employer changed its position and issued a revised ROE reflecting a dismissal without cause.

[37] The General Division is not bound by how the employer and employee might characterize the way employment has ended.[23] It is the General Division's role to assess the evidence and decide whether the Claimant's conduct amounted to "misconduct" under the EI Act.

[38] The case law from the Federal Court of Appeal says that before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct, which would contradict the earlier position taken by the employer. Some weight may also be given to situations where there is reinstatement or the employee is given meaningful compensation.[24]

[39] The General Division properly considered whether the employer's change of position could contradict its finding of misconduct and found it did not.

[40] The General Division considered the Claimant's testimony that her employer was in the process of changing the reason for issue on her record of employment (ROE) to dismissal without cause.[25] The General Division considered the employer's letter of August 29, 2022, which says she wasn't relieved of her duties for cause.[26] The General Division also considered the Claimant's testimony that she didn't know why her employer appears to have changed their position on this matter and that she didn't have any information from her employer about this change except for the brief statement in the letter.[27]

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[23] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).
[24] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).
[25] See paragraph 6 of the General Division decision.
[26] GD9-2.
[27] See paragraph 30 of the General Division decision.

[41] The General Division decided that it didn't have any information from the Claimant about the specific reason for the potential ROE change and, on the other hand, there was clear evidence that the Claimant refused to comply with her employer's mandatory Covid-19 vaccination policy and was let go for this reason. So, the General Division concluded that the potential change to her ROE was not sufficient to show that she didn't commit misconduct.[28]

[42] I see no arguable error of law. The General Division's conclusion was consistent with the law. There was no evidence which altered the facts upon which the Claimant had been suspended and terminated. There was no evidence to suggest that the Claimant had been reinstated or received meaningful compensation from the employer. The only evidence was the letter stating the Claimant was not fired for cause and that the ROE would be changed to reflect that. However, the Claimant was unable to provide an explanation for the employer's change in position.

[43] I note that the Claimant also points out in her Application to the Appeal Division that she submitted to her employer, a "Statement of Conscience and Religious Belief" document, which she says at the time, was the only legally recognized exemption form. She says exemption from vaccination never required the intervention of a religious leader previously. The Claimant submits that it was reasonable that religious leaders required time to investigate all that was necessary to facilitate such an exemption.

[44] I take the Claimant to be arguing that the General Division should have considered whether the employer failed to properly accommodate her request for religious exemption.

[45] The employer's policy provided for exemption based on grounds protected under the *Ontario Human Rights Code*. The employer refused the Claimant's exemption request, advising the Claimant on October 19, 2021, that she had not provided an acceptable exemption.[29]

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[28] See paragraph 35 of the General Division decision.
[29] GD14-11.

[46] The General Division acknowledged the Claimant's argument that she believed the employer treated her unfairly by refusing the exemption but decided it could not consider this issue. The General Division relied on authority from the Federal Court in that regard.[30]

[47] The General Division's conclusion was consistent with the case law from the Federal Court and Federal Court of Appeal that whether an employer has failed to provide accommodation under human rights legislation is not relevant to the question of misconduct under the EI Act. Rather that is a matter for another forum.[31]

[48] So, it is not arguable that the General Division made a reviewable error by not considering whether the Claimant's employer had failed to accommodate her request for a religious exemption.

It is not arguable that the General Division made an error of law or jurisdiction by not considering the legality of the employer's policy

[49] It is not arguable that the General Division made an error of law or jurisdiction by not considering the legality of the employer's policy.

[50] The Claimant submits that the General Division did not consider the reasonability, morality or legality of the employer's policy, particularly in light of an actual mandate in her particular industry.

[51] I will address the issues of reasonability and morality issue below.

[52] Arguments about the lawfulness or legality of the policy are about whether the policy might violate a statute or regulation.

[53] I note there was very little information provided by the Claimant, either in the documentary record or at her hearing about the legality of the employer's policy.

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[30] See paragraphs 27 and 28 of the General Division decision. The General Division refers to the case of *Paradis v Canada (Attorney Genera*l), 2016 FC 1282.
[31] See *Paradis v Canada (Attorney General*), 2016 FC 1282; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[54] The Claimant had argued in her request for reconsideration to the Commission that there was no legal mandate in the industry or sector to support the position by the employer to demand inoculation or to not provide alternatives such as an offer to cover testing.[32] Other than that, I see no specific argument about the lawfulness of the employer's policy in the documentary record.

[55] I have listened to the audio recording of the General Division hearing. The Claimant's representative testified that the employer said they had tests but in order for them to be available to the Claimant, she would have to pay for them. The Claimant's representative testified that, legally, the Claimant was not supposed to be paying for the tests.[33]He also asserted that they spoke to a lawyer and didn't believe the employer would do something unlawful and just terminate someone.[34]

[56] The question of wrongful dismissal does not raise an argument about the lawfulness of the policy itself. The General Division does not have the authority to decide whether the Claimant was wrongfully dismissed.[35]

[57] Respectfully, the employer's decision to impose a mandatory vaccination policy despite no legal mandate in the Claimant's industry to do so, or the failure of the policy to provide alternatives to vaccination or for the payment for testing by the employer are not arguments about the lawfulness of the policy. These are rather, arguments about the reasonableness of the employer's decision to implement the policy and the reasonableness of the content of the policy.

[58] My review of the documentary record and audio tape from General Division hearing reveals no evidence of any argument made to the General Division that the employer's policy violated any specific laws or regulations. I am not satisfied, therefore, that, the Claimant raised an argument about the legality or lawfulness of the employer's policy.

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[32] GD3-35. See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[33] I heard this on the audio tape from the General Division hearing at approximately 0:27:00.
[34] I heard this on the audio tape from the General Division hearing at approximately 0:55:30.
[35] See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[59] The General Division cannot have failed to address an argument that was not made to it. So, there was no reviewable error made by the General Division in failing to consider whether the policy was lawful.

It is not arguable that the General Division made an error of law or jurisdiction by failing to consider the reasonableness or morality of the employer's policy

[60] It is not arguable that the General Division was required to consider the reasonableness or morality of the employer's policy.

[61] The General Division said that it couldn't decide whether an employer's conduct, including their policies, is fair or reasonable when looking at the issue of misconduct.[36] The General Division said it could only look at the Claimant's actions in relation to what the law says about misconduct.

[62] I am unaware of any case law from the Federal Court or Federal Court of Appeal which suggests the reasonableness of an employer's policy is relevant to the question of misconduct. On the other hand, as noted above, the Federal Court of Appeal has made clear that a deliberate breach of an express or implied duty resulting from the contract of employment, is sufficient to amount to misconduct.

[63] Secondly, the Federal Court of Appeal has pointed out that the analysis of what is relevant to the question of misconduct under the EI Act is framed by the legal test for misconduct.[37]

[64] The legal test for misconduct does not ask a decision maker to look behind the duty or policy and decide whether it was reasonable or moral for the employer to impose that duty or policy. It simply asks whether a claimant committed the conduct for which they were suspended or terminated, and whether they knew or ought to have known that conduct could result in suspension or termination.

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[36] See paragraph 28 of the General Division decision. The General Division referred to the case of *Paradis v Canada (Attorney General)*, 2016 FC 1282 in support of its position.
[37] See *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paragraphs 20 and 21.

[65] Further, by asking whether the policy was reasonable, the focus of the enquiry shifts to the employer's behaviour, rather than on the employee's conduct. 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.[38]

[66] It is not arguable, therefore, that the General Division made an error of law or jurisdiction by failing to consider the reasonableness or morality of the employer's policy.

[67] The General Division also could not consider whether it was reasonable for the employer to suspend and terminate the Claimant as opposed to imposing some less onerous outcome. 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.[39]

It is not arguable that the General Division breached procedural fairness

[68] It is not arguable that the General Division breached procedural fairness.

[69] The fairness of the result is not the same thing as a failure to provide procedural fairness. I can only intervene in a question of fairness if it involves the manner in which the General Division proceeded.

[70] 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 her or if the General Division member had prejudged the case. The Claimant has not pointed to any unfairness of that type on the part of the General Division and I see no evidence of any such unfairness.

[71] 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

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[38] See *Paradis v Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[39] See *Canada (Attorney General) v Caul*, 2006 FCA 251.

General Division's decision. I did not find any key evidence that the General Division might have ignored or misinterpreted.[40]

[72] Having regard to the record, the decision of the General Division and considering the arguments made by the Claimant in her Application to the Appeal Division, I find that the appeal has no reasonable chance of success. So, I am refusing leave to appeal.

Conclusion

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

Charlotte McQuade
Member, Appeal Division

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