Citation: *RZ v Canada Employment Insurance Commission*, 2022 SST 1383

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 29, 2022 (GE-22-1159)

Tribunal member:	Charlotte McQuade
Decision date:	November 17, 2022
File number:	AD-22-694

Decision

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

Overview

[2] R. Z. is the Claimant. He worked as a station attendant for a federal airline. The Claimant's employer implemented a Covid-19 vaccination policy. One of the requirements of the policy was that employees report their vaccination status.

[3] The Claimant refused to disclose his vaccination status, as he believed his employer could not override laws that protected his medical privacy rights. Since the Claimant had not disclosed his vaccination status, the Claimant's employer put the Claimant on a six-month unpaid leave of absence on October 30, 2021, after which he returned to work on May 12, 2022.

[4] The Claimant applied for Employment Insurance (EI) regular benefits after he was put on leave. The Canada Employment Insurance Commission (Commission) initially decided that the Claimant could not be paid benefits as he had voluntarily left his employment without just cause. The Claimant appealed that decision to the Tribunal's General Division. On appeal, the Commission modified its position to say the Claimant was instead disentitled to benefits for being suspended due to his own misconduct.

[5] The General division decided that the Commission had proven that the Claimant was suspended from his job because of misconduct so he was not entitled to benefits for the period of his suspension.

[6] The Claimant is now asking to appeal the General Division's decision to the Appeal Division. He says the General Division made an error of law and based its decision on an important error of fact when it concluded his conduct was misconduct.

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

Issue

[8] Is it arguable that the General Division made a reviewable error by failing to refer in its decision to laws that protect the Claimant's medical privacy rights or by failing to refer to any legislation allowing the employer's policy to override those laws?

Analysis

[9] 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.

[10] 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] These 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.

[11] 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]

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

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

It is not arguable that the General Division made a reviewable error

[13] The Claimant worked as a station attendant for a federal airline.

[14] On September 10, 2021, the Claimant's employer implemented a Covid-19 vaccination policy. The policy required employees to become fully vaccinated and to report their vaccination status and document proof of vaccination. The policy provided that employees who did not comply with the policy by October 30, 2021, would be put on an unpaid leave of absence for six months, after which their employment would be reassessed.

[15] The Claimant refused to disclose his vaccination status by the required deadline. As a result, the Claimant's employer placed the Claimant on a six-month unpaid leave of absence on October 30, 2021. The Claimant resumed his employment on May 12, 2022.

[16] The Claimant applied for Employment Insurance (EI) regular benefits after being placed on leave.

[17] The Commission initially decided that the Claimant was disqualified from EI benefits because he had voluntarily left his employment without just cause.

[18] The Claimant appealed that decision to the Tribunal's General Division. On appeal, the Commission modified its position to say the Claimant was disentitled to benefits from October 30, 2021, as he had been suspended due to his own misconduct.

[19] The General Division considered that there was no evidence that the Claimant had voluntarily taken a leave of absence. So, the General Division decided the issue before it was whether the Commission had proven that the Claimant was suspended due to misconduct.

[20] The *Employment Insurance Act* (EI Act) provides that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits for the period of the suspension.[4]

[21] There was no dispute before the General Division that the reason the Claimant had been suspended was his failure to disclose his vaccination status as required by the employer's Covid-19 policy.

[22] The Claimant explained to the General Division that he did not have to follow the employer's policy because he didn't consent to the policy or consent to providing his medical information to his employer. The Claimant asserted that employer could not impose a policy, which violated his privacy rights under various laws by asking him to disclose his vaccination status.[5]

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

[24] Misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7]

[25] Another way to put this is that there is misconduct if a 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]

[26] The General Division found as a fact that the Claimant was aware of the employer's policy by August 25, 2021, noting the Claimant did not dispute that the policy was communicated to him.

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[4] Section 31 of the *Employment Insurance Act* (EI Act) provides for a disentitlement from benefits where a claimant has been suspended for misconduct.
[5] GD9-1 to GD9-2 where the Claimant lists the statutes he says the employer's policy violated.
[6] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

[27] The General Division also found as a fact that the Claimant was aware of the deadlines to comply and had enough time to comply.

[28] The General Division decided the Claimant chose to not to comply with the policy for his own personal reasons.[9]

[29] The General Division considered the Claimant's testimony that he did not think the policy would apply to him because he did not consent to the policy. However, the General Division reasoned that, generally, the employer has a right to exercise their management rights to develop and impose policies at the workplace and the employer did not need the Claimant's consent to develop and impose a policy at the workplace.

[30] The General Division decided that, even if the Claimant did not agree with the policy or consent to the policy, that didn't mean that he was not subject to the consequences of non-compliance, which was an unpaid leave of absence for six months.[10]

[31] The General Division found that the Claimant knew or ought to have known that the consequences of not complying would lead to a mandatory unpaid leave of absence and suspension for six months as this was outlined in the policy. As well, the employer had communicated the consequences to employees, including the Claimant by emails which the Claimant confirmed receiving, on September 9, 2021, and October 22, 2021.[11]

[32] The General Division decided, therefore, that the Claimant's actions were wilful. He had deliberately chosen not to comply with the policy for his own personal reasons and he knew or ought to have known that would lead to a mandatory suspension for six months.

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[9] See paragraph 40 of the General Division decision.
[10] See paragraph 45 of the General Division decision.
[11] See paragraphs 42 and 43 of the General Division decision.

[33] The General Division concluded, therefore, that the Commission had proven the Claimant's conduct was misconduct. So, the General Division decided the Claimant was not entitled to benefits for the period of his suspension.

[34] The General Division acknowledged other arguments made by the Claimant. The General Division listed some of these arguments which included:

- The Claimant's employer wanted him to disclose his private medical information, which is protected.
- There was no informed consent.
- The employer's actions were against his civil rights.
- He was invoking section 96(1) of the Common Law and Equity.
- It was illegal for his employer to put him on a leave of absence.
- Constitutional rights and the Bill of Rights protect him.

[35] The General Division explained it could not determine whether the dismissal or penalty was justified.[12]Rather, the General Division said it had to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act, which the General Division decided it had.

[36] The General Division also stated it did not have the authority to decide the Claimant's other arguments and the Claimant's recourse was to pursue an action in court, or any other Tribunal that may deal with his particular arguments.

[37] The Claimant is now asking to appeal the General Division's decision to the Appeal Division. He says the General Division made an error of law and based its decision on an important error of fact when it decided his conduct was misconduct.

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[12] The General Division referred to *Canada (Attorney General) v Marion*, 2002 FCA 185.

[38] Specifically, the Claimant submits that medical privacy laws don't allow employers to enforce medical policies without informed consent. He argues that the General Division did not refer in its decision to any of the medical privacy laws that his employer's policy overrides, or refer to any legislation allowing his employer's policy to override those laws.

[39] The Claimant asks the Appeal Division to review the following laws which he says contain his privacy rights:

- the *Personal Information Protection and Electric Documents Act, 2000 (PIPEDA)* which says "Organizations covered by PIPEDA must generally obtain an individual's consent when they collect, use or disclose that individual's personal information."
- The *Personal Health Information Protection Act, 2004.*
- The *Employment Standards Act.*
- The *Occupational Health and Safety Act.*
- The *Health Care Consent Act.*

It is not arguable that the General Division misinterpreted what misconduct means

[40] It is not arguable that the General Division misinterpreted what misconduct means under the EI Act when it decided the Claimant had been suspended for misconduct.

[41] As above, there is misconduct if the Claimant knew or ought to have known that his conduct could get in the way of carrying out his duties to his employer and that there was a real possibility of being suspended or let go as a result.[13]

[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[42] Case law from the Federal Court of Appeal says that breach of an express or implied duty resulting from a contract of employment can amount to misconduct.[14]

[43] Duties to an employer are not limited to the performance of the work tasks themselves. Case law from the Federal Court of Appeal also says that a deliberate violation of an employer's policy can also be considered misconduct.[15]

[44] That is what happened here. The employer's policy required the Claimant to report his vaccination status by a required date, failing which he would be placed on an unpaid leave. Since the Claimant would not have been permitted to work without reporting his vaccination status, reporting his status was an essential duty of his employment. The Claimant was aware that by violating the policy he would be subject to an unpaid leave. However, he refused to comply with the policy anyway.

It is not arguable that the General Division made an error of law or an error of jurisdiction by not referring to the privacy laws the Claimant said his employer's policy violated

[45] It is not arguable that the General Division made an error of law or an error of jurisdiction by failing to refer to, or consider the privacy laws the Claimant alleged his employer's policy overrode.

[46] The Claimant submits that medical privacy laws don't allow employers to enforce medical policies without informed consent. He submits that the General Division did not refer to the various laws that protect his privacy or refer to any legislation to explain how his employer's policy could override those laws.[16]

[47] The General Division did not address the specific laws the Claimant referred to in his documentation.[17]However, it arguably did not need to.

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[14] *See Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire, 2010 FCA 314.*
[15] See *Attorney General of Canada v Secours*, A-352-94; See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87; See also *Canada (Attorney General) v Gagnon*, 2002 FCA 460. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).
[16] See GD9-1 to GD9-2 for the statutes the Claimant alleged his employer's policy violated.
[17] See GD9-1.

[48] The Claimant's main argument was that the employer's policy did not apply to him, as he did not consent to his employer's policy or consent to providing medical information to his employer. The General Division addressed this argument and gave reasons for rejecting it.

[49] The General Division reasoned that employers generally have a right to exercise their management rights to develop and impose policies at the workplace. The General Division pointed out that the employer does not need the Claimant's consent to develop and impose a policy at the workplace. The General Division concluded, therefore, that even if the Claimant did not agree or consent to the policy, that did not mean he was not subject to the policy.[18]

[50] I see no arguable error of law in this conclusion. In general, consent is not required for employers to implement policies. Policies asking for medical information from employees are not unusual. For example, employers routinely require medical verification for matters such as sick leave or to accommodate requests for modified work.

[51] The Claimant provided no evidence to the General Division to suggest, under his collective agreement, that his consent or the consent of his union was required for the employer to implement its Covid-19 vaccination policy.

[52] While typically consent is required for the collection of health information, there are exceptions. For example, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which applies to federally regulated industries, such as the Claimant's employer, provides that consent of an individual is required for the collection, use or disclosure of personal information, except where inappropriate.[19]

[53] PIPEDA also provides that employers are allowed to collect, use and disclose personal information *without the consent* [emphasis added] of the individual if, the collection, use or disclosure is necessary to establish, manage or terminate an

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[18] See paragraph 45 of the General Division decision.
[19] See section 4.3 of Schedule 1 to the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

employment relationship and the employer has informed the individual that the information will be collected, used or disclosed for those purposes.[20]

[54] I note the Claimant's employer's policy provided that it was being implemented so the employer could fulfill its obligation to ensure a safe workplace for all employees and the employer's customers and to help prevent the spread of Covid-19 in the workplace.[21]

[55] The policy explained that the employer needed the information collected pursuant to the policy to ensure its employees would be in compliance with federal laws, which were expected to take effect October 31, 2021, and to plan for post-October 31, 2021, operations.[22]

[56] The policy also explained that the personal information was being collected and used to ensure that the employees were in compliance with the policy and federal and foreign laws and that to ensure compliance and manage the employment relationship, employees' managers and their managers may have access to this personal information. The policy contained hyperlinks to other employer's policies including an "Employee Privacy Policy" and a "Protection of Personal Medical Information" policy.

[57] I have reviewed the documentary record and listened to the audio recording from the General Division hearing. I am not satisfied that the Claimant raised anything more than allegations that the employer's policy breached various laws.

[58] No specific explanation was provided by the Claimant, having regard to the terms of the employer's policy and its related privacy policies, how the employer had failed to comply with PIPEDA or any of the other statutes he claimed had been violated.[23]The only detail provided was with respect to the *Occupational Health and Safety Act*, which

[20] Section 7.3 of PIPEDA.
[21] GD8-2.
[22] GD8-3.
[23] See GD9-1 to GD9-2 for the statutes the Claimant alleged his employer's policy violated.

is provincial legislation and would not apply to the Claimant, being employed in a federally regulated airline.

[59] The General Division must address key arguments made by the Claimant in its decision. But bare allegations alone do not amount to arguments. There must be some detail provided to explain an allegation.

[60] The General Division addressed the Claimant's main argument that he was not required to follow the policy as he did not consent to it. The General Division also explained why it considered the Claimant's conduct to be misconduct.

[61] The Claimant provided allegations but insufficient information to actually raise an argument before the General Division that the employer's policies violated the laws he said it did. It is not arguable, therefore, that the General Division made an error of law or jurisdiction by not considering whether the policy violated the statutes in question.

[62] I understand the Claimant disagrees with the General Division's conclusion. It is clear the Claimant had no wrongful intent in refusing to comply with the employer's policy. However, the Claimant doesn't have to have wrongful intent for his behaviour to be misconduct under the law.[24]

[63] The General Division's conclusion that the Claimant's conduct amounted to misconduct is consistent with how the Federal Court of Appeal has defined misconduct under the EI Act.[25]

It is not arguable the General Division made any other reviewable errors

[64] I see no arguable case that the General Division based its decision on an important error of fact. The Claimant did not point to any specific factual errors. He has not identified any evidence that the General Division ignored or misunderstood.

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[24] See *Attorney General of Canada v Secours*, A-352-94.
[25] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[65] Having reviewed the documentary file, and listened to the audio tape from the General Division hearing. I did not find any key evidence that the General Division might have ignored or misinterpreted.[26]

[66] The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence that the General Division proceeded in an unfair manner.

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

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

Conclusion

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

Charlotte McQuade
Member, Appeal Division

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