Citation: *RF v Canada Employment Insurance Commission*, 2023 SST 185

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. F.
Representative:	J. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Rebekah Ferriss

Decision under appeal:	General Division decision dated July 26, 2022 (GE-22-960)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	December 12, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 17, 2023
File number:	AD-22-626

Decision

[1] The appeal is dismissed.

[2] The General Division made an error of law by not considering an argument that was raised before it, but it does not change the result. The Claimant lost his job due to his own misconduct.

Overview

[3] R. F. is the Claimant. He worked for a hospital as a Decision Support Consultant. The Claimant's employer implemented a Covid-19 policy requiring mandatory vaccination. The Claimant requested an exemption based on creed but that was refused by his employer. The Claimant did not become vaccinated by the required date. As a result, the Claimant's employer terminated him.

[4] 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.

[5] 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 appealed that decision to the Tribunal's Appeal Division.

[6] The Claimant argues that the General Division misinterpreted the law and based its decision on important errors of fact. The Claimant also says the General Division erred in law by overlooking an important argument he raised.

[7] I am dismissing the appeal. The General Division made an error of law by not considering the Claimant's *Charter* based argument or providing reasons why it wasn't

doing so, but that doesn't change the result.[1] The Claimant was terminated due to his own misconduct.

Post hearing submissions

[8] At the hearing, I asked the Claimant's counsel to provide post-hearing submission concerning several cases discussed at the hearing. I also requested submissions concerning whether a decision about "misconduct" was an exercise of statutory discretion.[2]

[9] The Claimant provided post-hearing submissions.[3] He also included a case from the Tribunal's General Division which was decided after the hearing.[4] The Claimant's submissions were forwarded to the Commission for reply and the Commission provided responding submissions.[5]

[10] I have considered all the post-hearing submissions as well as the new case the Claimant provided. The case is relevant to the Claimant's argument about the change in his employment contract and there is no prejudice to the Commission, given the Commission had the opportunity to respond to the Claimant's submissions about that case.

Issues

[11] The issues in this appeal are:

a) Did the General Division make errors of law or base its decision on important errors of fact when it decided the Claimant's conduct was misconduct under the *Employment Insurance Act* (EI Act)?

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[1] See *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.
[2] See AD7-3 for the questions I asked the Claimant's counsel to address.
[3] AD7.
[4] See *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[5] AD8.

b) Did the General Division make an error of law by overlooking the Claimant's argument that, in deciding misconduct, the General Division was required to proportionately balance his *Charter* values against statutory objectives, to ensure his *Charter* values were limited no more than necessary?

c) If the General Division made any of these errors, what should the remedy be?

Analysis

[12] The Claimant argues that the General Division made errors of law and based its decision on important errors of fact.

[13] If established, any of these types of errors would allow me to intervene in the General Division decision.[6]

The General Division's decision was consistent with the law and the evidence

[14] The EI Act says that a claimant is disqualified from benefits if they lost their employment because of their misconduct.[7]

[15] The Commission disqualified the Claimant from benefits for reason he had lost his job due to his misconduct.

[16] The Claimant appealed that decision to the Tribunal's General Division.

[17] The General Division had to decide whether the Claimant had lost his job due to misconduct.

[18] The Claimant's employer implemented a Covid-19 policy on September 3, 2021. The policy required that all employees, other than those the employer had granted an exemption for medical reasons or for reasons under the *Ontario Human Rights Code*,

[6] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[7] See section 30(1) of the *Employment Insurance Act* (EI Act).

be fully vaccinated and provide documentation confirming that to the employer by October 21, 2021.[8]

[19] There was no dispute before the General Division that the reason the Claimant was terminated on October 22, 2021, was for failing to comply with the employer's vaccination policy.

[20] Misconduct is not defined in the EI Act. However, the Federal Court of Appeal has described the test for misconduct.

[21] The General Division referred to that test. The General Division said that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[9] Misconduct also includes conduct that is so reckless that it is almost wilful.[10]

[22] The General Division pointed out that the Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[11]

[23] The General Division said that there is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of let go because of that.[12]

[24] The General Division also pointed out that the Commission had to prove that it was more likely than not that the Claimant lost his job because of misconduct.[13]

[25] The General Division generally accepted that the employer could choose to develop and impose policies at the workplace. The General Division decided that the

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[8] See paragraphs 42 to 46 of the General Division decision.
[9] The General Division referred to *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[10] The General Division referred to *McKay-Eden v Her Majesty the Queen*, A-402-96.
[11] The General Division referred to *Attorney General of Canada v Secours*, A-352-94.
[12] The General Division referred to *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[13] The General Division referred to *Minister of Employment and Immigration v Bartone*, A-369-88.

Claimant's employer imposed a vaccination policy because of the Covid-19 pandemic, and it became a condition of his employment when the policy was introduced.

[26] The General Division found the policy was communicated to the Claimant, he was aware of the deadline to comply and had time to comply with the policy.

[27] The General Division found that the Claimant was not exempt from the policy as his employer had not accepted his exemption request based on creed.

[28] The General Division found the Claimant willfully chose to not to comply with the policy for his own personal reasons. He consciously chose to breach the employer's policy.

[29] The General Division decided the Claimant knew or ought to have known the consequences of not complying would lead to a dismissal. This was because the Claimant was told at a meeting with his employer on October 13, 2021, that he would be dismissed for not complying with the policy.

[30] The General Division noted that if the Claimant had intended to comply with the policy, he could have told his employer at that meeting and made efforts to do so by October 22, 2021, or asked for an extension if available.

[31] The General Division also rejected the Claimant's argument that the consequences for non-compliance in the policy only provided for an unpaid leave of absence. The General Division found that the policy did identify termination as a possible consequence.

[32] Therefore, the General Division concluded that the Commission had proven that the Claimant's actions amounted to misconduct.[14]

[33] The Claimant says that the General Division made errors of fact and law when it decided the Claimant's conduct was misconduct. The Claimant maintains that:

[14] See paragraph 57 of the General Division decision.

- The General Division failed to consider that the employer changed the conditions of the Claimant's employment by introducing the Covid-19 policy without providing additional consideration to the Claimant, so the policy was void.

- The General Division failed to consider that the Claimant's conduct in not becoming vaccinated had no impact on his job duties as he worked from home.

- The General Division failed to interpret conflicting and/or ambiguous provisions of the policy that described the consequences for failing to comply with the policy in the Claimant's favour, pursuant to the principle of contra preferentem.

- The General Division failed to observe that the Claimant's request for a human rights exemption, based on creed, was never properly considered by the employer.

- The required elements for the finding of "misconduct" were not present in this case.

[34] The General Division applied the correct legal test for misconduct.

[35] The General Division considered whether the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that. These are the relevant factors for consideration, as described by the Federal Court of Appeal.[15]

[36] The General Division's decision was also consistent with the evidence. The evidence was that the Claimant was informed his request for exemption was denied. He chose not to comply with the vaccination requirement in the policy, knowing from the meeting with his employer on October 13, 2021, that the consequence for non-compliance would be termination. This amounts to misconduct under the law.

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

– Duty to follow safety policy

[37] The Claimant argues that the General Division made an error of law when it decided that the Covid-19 policy was a condition of his employment.

[38] He maintains that the policy was void as it was a new term to his employment that was unilaterally implemented without the provision of additional consideration. The Claimant argues it was not misconduct to fail to follow a policy that was never valid in the first place.

[39] The Commission submits that the validity of the employer's policy is outside the General Division's jurisdiction.

[40] The General Division generally accepted that the employer could choose to develop and impose policies at the workplace. The General Division decided that the Claimant's employer imposed a vaccination policy because of the Covid-19 pandemic, and it became a condition of his employment when they introduced the policy.

[41] This conclusion is consistent with the law and the evidence on file.

[42] The employer implemented its Covid-19 policy on September 3, 2021, in response to a Directive issued on August 17, 2021, from the Ontario Chief Medical Officer of Health (Directive 6).[16]

[43] Directive 6 obligated various health care providers, including hospitals to implement a vaccination policy by September 7, 2021. Directive 6 said the policy was to require the employer's employees, staff contractors, volunteers, and students to provide proof of full vaccination, or proof of a medical exemption, or proof of completion of a mandatory educational session. However, Directive 6 permitted employers to remove the option of the educational session. Directive 6 also noted that hospital employers

[16] GD3-32.

were obligated to comply with the *Occupational Health and Safety Act* and its regulations.[17]

[44] The Claimant submitted no evidence in support of his assertion that the employer had to provide him with additional consideration to implement such a policy. The Claimant did not provide his employment contract in evidence so whether it said anything about the employer implementing new policies is unknown.

[45] On the other hand, there was evidence before the General Division that the employer had a lawful basis for implementing the policy. The employer followed the direction of a public health official in order to implement its Covid-19 policy to protect the health of all employees and clients during the pandemic.

[46] So, the General Division had evidence before it upon which to base its conclusion that complying with the Covid-19 policy was a condition of the Claimant's employment.

[47] The Federal Court of Appeal has repeatedly said that deliberately breaching a policy is misconduct under the EI Act.[18]

[48] The two cases the Claimant relies on are distinguishable on their facts.[19] *Braiden v La-Z-Boy Canada Limited* involved the addition of a new term in an employment contract about the notice period required for termination of the contract.[20] *Moffatt v Prospera Credit Union* involved a new termination clause to a contract. These cases were specific to the contracts in question and they did not relate to a situation where an employer has imposed a new safety policy under the directive of a public health official.[21]

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[17] GD3-43.
[18] 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.
[19] See, for example, CUB 80774 and CUB 71744.
[20] See *Braiden v La-Z-Boy Canada Limited*, 2008 ONCA 464 (CanLII).
[21] See *Moffatt v Prospera Credit Union,* 2021 BCSC 2463 (CanLII).

[49] The Claimant relies on the *AL v Canada Employment Insurance Commission* where a member of the General Division concluded that the Commission had not shown that the claimant's collective agreement contained an express duty of vaccination. The member also decided that vaccination was not an implied term of that claimant's employment.[22]

[50] The *AL* case is under appeal. It is also distinguishable on its facts. That case involved a unionized worker and the ruling turned on the specific terms of the collective agreement.

[51] I am not bound by the *AL* decision and, as the Commission points out, the *AL* case is at odds with multiple decisions from the Tribunal that failing to comply with an employer's policy, despite the substance of the policy, is misconduct.[23]

[52] The Federal Court has recently issued a decision noting that the *AL* case was particular to its fact and did not establish any kind of blanket rule that applies to other factual situations.[24]

[53] I am satisfied that the General Division's decision that complying with the Covid-19 policy was a duty owed by the Claimant to his employer was consistent with both the law and the evidence before it.

[54] The Claimant's concern seems to be more with the consequence visited on him by the employer for not complying with the policy. In other words, the choice by the employer to terminate him for non-compliance.

[55] However, as the General Division pointed out, and as the law provides, the question of whether the employer wrongfully terminated the Claimant is not relevant to

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[22] See *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[23] See AD8-2 for a list of cases referred to by the Commission.
[24] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.

the question of misconduct under the EI Act. Such a claim can be pursued in another forum.[25]

– Whether or not the Claimant worked from home is irrelevant

[56] The Claimant submits that the General Division erred in law by failing to consider that his choice not to get vaccinated did not impact his ability to perform his essential job functions.

[57] The Claimant submits he had been working at home for years, without the vaccine, and without any negative impact on his job performance. Even after his formal termination meeting, he was permitted to work at home for an additional week, while unvaccinated, and with no detrimental impact on his job performance.

[58] The Claimant argues that for misconduct to occur, the central duties of employment would have to be impaired by reason of his failure to comply with the policy. He refers to various misconduct cases where essential duties were impaired.[26] However, he says his situation is markedly different because being vaccinated has no bearing on how he performed the central duties of his employment.

[59] Whether it was reasonable for the employer to extend its policy to remote workers is not relevant. There is nothing in the legal test for misconduct that requires the General Division to step behind the policy and decide whether it was reasonable.

[60] I am unaware of any case law from the Federal Court or Federal Court of Appeal saying that the reasonableness of the policy is a relevant consideration. The Federal Court has recently confirmed that the role of the General Division is narrow and specific. It involves determining why the individual was dismissed from their employment and whether that reason constituted misconduct. [27]

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[25] See paragraph 53 of the General Division decision. The Federal Court of Appeal has said this in cases such as *Canada (Attorney General) v Mario*n, 2002 FCA 185 (CanLII) and *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107 (Can LII).
[26] See AD 2-211 for the cases cited by the Claimant.
[27] See *Cecchetto v Attorney General of Canada*, 2023 FC 102 at paragraph 47.

– The General Division did not base its decision on an error of fact that the Claimant knew or ought to have known his conduct could result in termination

[61] The Claimant submits that the General Division made an incorrect finding of fact that he knew or ought to have known that his conduct could result in termination.

[62] The Claimant argues that he was not given any warning of his termination. He says the jurisprudence contains many instances where claimants were giving warnings so that they were aware that termination was a real possibility.[28]

[63] He also argues that the General Division failed to consider that the employer's policy was unclear and ambiguous as to the consequences of termination.

[64] He points out that, on the one hand, the policy provided that those persons who wished to remain unvaccinated without a valid exemption would be placed on unpaid leave until such time as those persons became vaccinated.

[65] On the other hand, the policy also provided that persons who failed to comply with "this policy" might be subject to discipline, up to and including termination:

> Failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline up to and including termination of employment or revocation of privileges. [Emphasis added.][29]

[66] The Claimant submits that the policy is ambiguous as to whether the words "this policy" mean the entire policy, or only refer to that portion of the policy dealing with self-administered testing.

[67] He says that if the words "this policy" only referred to the portion of the policy dealing with self-administered testing, that means the policy provided that he should only have been placed on an unpaid leave for refusing vaccination. If, however, the

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[28] See AD2-210 for the examples of cases the Claimant refers to where individuals were given warnings before termination.
[29] GD3-33.

words, “this policy” referred to the entire policy, then the policy was ambiguous as to the consequences for failing to comply.

[68] The Claimant argues that the “contra preferentem” principle in law mandates that contractual ambiguities ought to be resolved against the party that drafted the contract, which is his employer.

[69] The Claimant maintains that the General Division did not appreciate the ambiguity in the policy and that no one reading the policy would be aware they would be terminated for failing to become vaccinated.

[70] The Appeal Division can only intervene on certain types of factual errors. This is where the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[30]

[71] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[31]

[72] Factual findings being made without regard to the evidence would include circumstances where there was no evidence to rationally support a finding or where the decision-maker failed to reasonably account at all for critical evidence that ran counter to its findings.[32]

[73] It was not necessary for the General Division to consider whether warnings were given to the Claimant. Warnings aren’t required under the legal test for misconduct. It was sufficient for the General Division to find, on the evidence, that the Claimant knew or ought to have known that his conduct could put his employment at risk.

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[30] See section 58(1)(c) of the DESD Act.
[31] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).
[32] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII) at paragraph 41.

[74] The General Division was satisfied the Claimant knew or ought to have known, from the meeting he had with his employer on October 13, 2021, that the consequences for not complying with the policy could be dismissal.[33]

[75] The General Division considered the Claimant's argument that the policy was ambiguous but concluded that the policy did identify termination as a possible consequence. The General Division noted that the policy said that a failure to comply with the terms of policy might result in discipline, up to an including termination of employment. The General Division member decided that meant a failure to comply with any of the terms in the policy and was not limited to rapid testing breaches only.

[76] The General Division acknowledged the Claimant's testimony that he did not know he would be dismissed for not complying with the policy and that he thought that he would be put on an unpaid leave of absence and eventually be called back to work. However, the General Division relied on the Claimant's testimony that he agreed that after the October 13, 2021, meeting, he understood that he was being dismissed on October 22, 2021, for his conduct.[34]

[77] The General Division decided that if the Claimant had intended to comply with the policy, he could have told his employer at that meeting and made efforts to do so before October 22, 2021, or asked for an extension if available.

[78] The General Division's finding of fact was consistent with the evidence. Whether or not the policy was ambiguous, the evidence was clear that the Claimant understood from the meeting on October 13, 2021, that the consequences for non-compliance would be termination, yet he continued to refuse to comply.

[79] I cannot interfere with how the General Division weighed the evidence. The General Division was entitled to find, on the evidence before it, that the Claimant knew or ought to have known that his conduct could result in termination.

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[33] See paragraphs 40 to 43 of the General Division decision.
[34] See paragraph 25 of the General Division decision.

– The employer's conduct in denying the Claimant's request for an exemption based on "creed" was not relevant to whether the Claimant's conduct was wilful

[80] The Claimant submits that the General Division erred in law by failing to consider that his employer's failure to investigate or grant his request for an exemption from vaccination meant he was "unable" to comply with the policy.

[81] The employer's Covid-19 policy provided for accommodation for medical exemption or other exemption under "Human Rights." The policy required that an application for exemption be made to the employer.

[82] The policy provided that staff who were deemed not to be vaccinated may be accommodated per the policy due to a confirmed medical contradiction from an attending physician or nurse practitioner reviewed by the employer or a reason that is verified as applicable under the Ontario Human Rights Code.[35]

[83] On September 22, 2021, the Claimant submitted a request for exemption from the policy based on creed. He provided the employer with an affidavit explaining that he was requesting accommodation as providing documentation of all required vaccination doses conflicted with his sincerely held convictions based on "creed and conscience."[36]

[84] On October 5, 2021, the employer responded to the Claimant's request explaining that at that time it was not considering any exemptions other than medical exemptions or Human Rights exemptions as per the Covid-19 Vaccination Policy.

[85] The employer referred to a statement from the Ontario Human Rights Commission (OHRC) that said that a person who chooses not to be vaccinated due to personal preference does not have to be accommodated. The statement also said that even if a claimant could meet a creed-based belief against vaccination, the duty to accommodate does not necessarily include exemption from vaccine mandates and the

[35] GD3-32.
[36] GD3-44.

duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship, such as in a pandemic.[37]

[86] The General Division acknowledged that the Claimant had made a request for an exemption based on creed, but it was denied. The General Division also acknowledged the Claimant's testimony that he was Catholic and pro-life, but he did not raise that with his employer as they were not considering religious exemptions.[38]

[87] The General Division decided that the Claimant had not proven he was exempt from the policy. While he had submitted an exemption from the policy based on creed, it was not accepted by the employer.[39]

[88] The General Division decided it didn't have authority to consider whether the Claimant's employer had failed to accommodate him and provide him with alternatives. The General Division said that was because it had to focus on the conduct of the Claimant, not the employer. It only had to decide whether the Claimant was guilty of misconduct, which it had decided he was. The General Division also pointed out that the Claimant's recourse was to pursue an action in court, or any other Tribunal that may deal with these particular arguments.[40]

[89] The Claimant acknowledges that the focus in the misconduct test is not on the employer's conduct, but he maintains the employer's conduct is still relevant to whether his conduct was wilful.

[90] The Claimant says he did all he could to comply with the policy by submitting his request for exemption. However, he was unable to comply with the policy. He argues that the employer violated its own policy by denying his request for a human rights exemption and by failing to even investigate his request. He says it was incumbent on

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[37] GD3-46.
[38] See paragraphs 26 to 29 of the General Division decision.
[39] See paragraph 47 of the General Division decision.
[40] See paragraphs 52 to 55 of the General Division decision.

the employer to investigate his request. The Claimant submits that the employer's response to him implies they hadn't considered his specific situation.

[91] The Claimant argues being unable to do something is not the same thing as freely choosing not to that thing. He says he had no real choice. He says this is especially true in religious matters.

[92] The Claimant relies on *DL v. Canada Employment Insurance Commission* as persuasive authority.[41] He submits, like the claimant in that case, he did not deliberately fail to comply with the policy. He tried to comply and when his human rights code exemption was refused, he was unable to comply.

[93] The Claimant maintains that the decisions from Federal Court and Federal Court of Appeal in *Paradis v Canada (Attorney General)* (*Paradis), Mishibinijima v Canada (Attorney General)* (*Mishibinijima*) and *Canada (Attorney General) v McNamara* (*McNamara*) are distinguishable from his case.[42]

[94] The Claimant says in those cases, the claimant was asking the Tribunal to rule on whether the employer was right or wrong in failing to accommodate him or terminating his employment—in other words, the claimant was asking the Tribunal to focus on the employer's conduct. He agrees that is the wrong focus.

[95] However, the Claimant says he is not arguing that the General Division should have decided whether the employer was right or wrong in failing to accommodate him or by terminating him. But he says the employer's conduct is still relevant.

[96] The Claimant relies on *Mishibinijima* in support of the notion that the employer's conduct is still relevant to the question of misconduct: [43]

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[41] See *DL v Canada Employment Insurance Commission,* 2022 SST 281.
[42] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 (CanLII); See also *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 (CanLII); See also *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[43] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 (CanLII) at paragraph 23.

> "[…] the measures which an employer takes or could have taken with respect to an employee's alcohol problem may be relevant to the determination of whether there is misconduct […]"

[97] The Claimant maintains that, unlike *Paradis, Mishibinijima* and *McNamara* his conduct was directly and inextricably linked to his request for accommodation under the policy.

[98] The Claimant points out that in *Mishibinijima*, the claimant was ultimately terminated due to his drinking problem which resulted in serious absenteeism. In that case, misconduct was found, even though the claimant argued the employer ought to have accommodated him.

[99] Similarly in *Paradis* and *McNamara,* the claimants were terminated due to drug abuse. They were found to have engaged in misconduct even though they argued that they ought to have been accommodated or had been wrongfully terminated.

[100] However, the Claimant submits, none of these cases involved an assertion that the employer's policy violated (or even engaged) the claimants' human rights or *Charter* rights or values.

[101] In those cases the claimants' conduct was completely independent of the employer's conduct. The employer did not force the claimants in those cases to take drugs or drink excessively. So, the Claimant argues, it was proper to divorce the employer's response from the claimant's conduct in the misconduct analysis.

[102] However, the Claimant points out that he did not unilaterally disregard the policy. Rather, he did all he could to comply with the policy, including making a request for accommodation under the policy, which was denied out of hand by the employer with no justification or explanation.

[103] The employer's behaviour, the Claimant argues, while not the focus, is still relevant because it directly led to his inability to comply with the policy. If the employer

had granted the request, the Claimant submits, he would have remained in compliance with the policy.

[104] The Commission argues that there is no difference between the Claimant's situation and the claimants in *Paradis*, *Mishibinijima*, and *McNamara.* In those cases, the claimants made a choice (either due to alleged dependencies or otherwise) to consume alcohol or drugs leading to a violation of their employers' policies. Similarly, the Claimant was aware that he was required to get the Covid-19 vaccine and chose not to, knowing it would violate his employer's policy.

[105] The Commission submits that *Paradis, Mishibinijima*, and *McNamara* all say that it is not the conduct of the employer that is being assessed but the conduct of the employee.

[106] The Commission points out that although the Claimant agrees the focus is not the conduct of the employer, his argument is that the General Division should have reviewed the employer's refusal of the Claimant's request for accommodation. The Commission says this is directing focus on the employer's behaviour.

[107] The Commission submits that the Claimant labels the employer's rejection of his request for an exemption as "out of hand" and "without justification or explanation" but justification was provided to the Claimant who still chose not to comply with the policy despite being informed that his employer was not considering his exemption request, in line with the direction from the Ontario Human Rights Commission.

[108] The Commission says the Claimant's argument presumes that his employer's rejection of his accommodation request was incorrect, or improper but such a determination is properly made by his union or through the appropriate venue to challenge his employer's refusal.

[109] The Commission points out that even if the Claimant's reproaches against the employer are well founded, the Federal Court has stated it is not the responsibility of

Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits.[44]

[110] The Commission submits that the General Division's finding that the Claimant's conduct was misconduct was consistent with the law and evidence before it.

[111] I find the General Division did not make an error of law by not considering whether the employer improperly investigated or denied the Claimant's request for an exemption, when it decided the Claimant's conduct was wilful.

[112] Wilful, as defined by the Federal Court of Appeal means, deliberate, intentional, and conscious.[45]

[113] The policy allowed the employer to determine the validity of the request for exemption. The policy referred to a reason "that is verified as applicable under the *Ontario Human Rights Code*." The employer considered and refused the Claimant's request. That refusal was communicated to the Claimant.

[114] The Claimant was aware his request had been refused and was aware of the consequences of failing to comply with the vaccination requirement. Despite that, he chose not to follow the vaccination requirements of the policy. That is deliberate and, therefore, wilful behaviour.

[115] I do not disagree that there may be situations where an employer's conduct which may have led to the misconduct is relevant to the wilfulness of an employee's behaviour.[46] For example, the conduct of an employer such as whether the policy was communicated to an employee or whether the employer gave the employee time to comply with the policy or communicated the consequences of violating that policy would all be relevant. That type of behaviour could prevent an employee from complying.

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[44] The Commission refers to *Dubeau v Canada (Attorney General),* 2019 FC 725 at paragraph 36.
[45] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII).
[46] See Astolfi v Canada, 2020 FC 30.

[116] But the way the employer investigated the Claimant's request for accommodation, or the refusal of that accommodation is not relevant in this case because the policy specifically gave the employer the authority to decide on the validity of the exemption request. A disagreement about that decision falls outside the terms of the policy and outside the legal test for misconduct.

[117] I agree with the Commission that the Claimant's argument presumes that the employer made an incorrect decision about whether he qualified for an exemption based on creed. But, to come to such a conclusion, necessitates deciding whether the employer failed to properly accommodate the Claimant under the *Ontario Human Rights Code*.

[118] However, both *Mishibinijima* and *Paradis*, say that is not something the Tribunal should decide. These cases make the point that the question of accommodation is not relevant to the question of misconduct and the Tribunal is not the appropriate forum to decide this question.

[119] The Claimant relies on *DL v Canada Employment Insurance Commission*.[47] I am not bound by decisions of the Tribunal's General Division and in any event, this case is distinguishable for several reasons. In the *DL* case, the employer's policy simply required provision of a letter from a religious organization to substantiate a request for exemption. The policy provided employees not vaccinated for religious reasons would not be disciplined.

[120] The claimant in that case complied with the policy and provided the religious letter so she had no reason to contemplate she might be disciplined.

[121] In the Claimant's case, the policy required that the reason for exemption be verified by the employer as applicable under the *Ontario Human Rights Code*. In other words, submitting the request alone was not sufficient to comply with the policy. The employer had to verify it as applicable under the *Ontario Human Rights Code*.

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[47] See *DL v Canada Employment Insurance Commission*, 2022 SST 281.

[122] Further, in the *DL* case, the General Division was satisfied the claimant could not have contemplated discipline for her actions. However, in the Claimant's situation, the General Division found as a fact that the Claimant knew or ought to have known that a possible consequence for failing to comply with the policy was termination.

– The General Division did not make an error of law by failing to consider the elements of misconduct

[123] The Claimant submits that his conduct was not wilful because the policy was void for lack of consideration and even so, his conduct was not deliberate given he tried to comply with the policy as best he could. His employer's failure to investigate or accept his request for exemption meant he was unable to comply with the policy due to his religious and other beliefs.

[124] He also maintains he did not know or ought to have known that termination was a possibility as the policy itself was ambiguous and he was never given any warnings before his termination. As well, not following the policy did not impair his essential job duties.

[125] I have dealt with these separate arguments above. The General Division considered all the required elements of the misconduct test. The General Division's decision is consistent with the legal test for misconduct, as described by the Federal Court of Appeal.[48]

The parties agree that the General Division overlooked the Claimant's Charter-based argument

[126] The Claimant argues that the General Division made an error of law by overlooking his Charter-based argument. He says he raised the argument that the General Division, when deciding whether his conduct was misconduct, was required to proportionately balance his *Charter* values against statutory objectives, to ensure that his *Charter* protections were limited no more than necessary.

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

[127] The Claimant also argues that the common law test for misconduct ought to be revised. He maintains this common law test for "misconduct" is incomplete, to the extent that it does not expressly require decision-makers to consider whether a claimant's *Charter* rights are engaged in a given set of circumstances.

[128] The *Charter* is typically advanced to challenge a law itself. However, the *Charter* also applies to discretionary administrative decisions. When raised in the context of a discretionary administrative situation, the *Charter* is being used, not to challenge the law itself, but the manner in which the decision-maker exercised their discretion.

[129] This principle comes from a decision of the Supreme Court of Canada in *Doré v Barreau du Québec* (*Doré*).[49] There, a bar association had exercised its discretion to suspend a lawyer's licence, based on a code of ethics, due to a letter Mr. Doré had written to a judge after a court proceeding. Mr. Doré did not advance a *Charter* challenge to the code of ethics but rather argued that the disciplinary body's decision to suspend his licence violated his freedom of expression under the *Charter*.

[130] The Court decided that where discretionary administrative decisions engaged *Charter* protections, the decision-maker was required to proportionately balance the relevant *Charter* protections against the applicable statutory objectives, to ensure the *Charter* protections are limited no more than necessary.

[131] The Claimant submits he raised this argument before the General Division, but the General Division overlooked it.

[132] I agree that, although the Claimant's argument before the General Division was not entirely clear, the Claimant did raise this argument before the General Division.

[133] The Claimant provided written submissions to the General Division that he was exercising his rights under sections 2, 7, 8 and 15 of the *Charter* when he refused to comply with the policy. He said that the Tribunal must interpret and apply legislation and

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[49] This analysis was described by the Supreme Court of Canada *in Doré v Barreau du Quebec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395 and in *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 (CanLII).

policy in a manner that gives maximum effect to *Charter*. He said his refusal to comply with the employer's policy cannot form the basis for refusing him EI benefits because that interpretation is not consistent with upholding his *Charter* rights.[50]

[134] The Claimant also explained during his hearing that he was relying on section 2(a) and section 7 of the *Charter*. He said these provisions included the right to make his own decisions over his own body, his bodily integrity and not to be deprived thereof except in accordance with the principles of fundamental justice and a combination of those rights. He added that the Commission was not able to exercise their *decision* in a way that violates the *Charter*. He said the Commission did not grapple with the rights he raised or give proper reasons.[51]

[135] I take the Claimant to have meant "discretion" when he used the word "decision" as noted above.

[136] I am satisfied that by asking the Tribunal to interpret and apply the legislation in a manner that gives maximum effect to the *Charter*, the Claimant was asking the General Division to apply the *Doré* analysis in deciding whether his conduct was misconduct.

[137] The General Division did not respond to this argument in its decision.

[138] The General Division noted the Claimant had raised some other arguments. It listed some of these arguments and referred to others in a footnote to pages where those arguments were located. The General Division said it had no authority to decide these arguments. The General Division said the Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with these particular arguments.[52]

[139] Both parties agree the General Division made an error of law by not addressing the Claimant's *Charter*-based argument.

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[50] See GD15-16 to GD15-17.
[51] See transcript of General Division hearing at AD1-51 to AD1-52.
[52] See paragraphs 52 to 54 of the General Division decision.

[140] The Commission submits that the General Division also denied procedural fairness to the Claimant when it did not initiate the *Charter* appeals process prescribed in subsection 20(1) of *the Social Security Tribunal Regulations* (SST Regulations).

[141] Respectfully, I find that the General Division made an error of law by providing insufficient reasons.

[142] The General Division is not required to address every argument that is canvassed before it.[53] However, the reasons must be sufficiently clear to explain why a decision was made and provide a logical basis for that decision. The reasons must also be responsive to the parties' key arguments.[54]

[143] The General Division clearly explained why it decided the Claimant's actions amounted to misconduct. However, the General Division's reasons did not respond directly to the Claimant's *Charter* based argument.

[144] Given the argument was grounded in the *Charter,* it was an important argument for the General Division to respond to. The General Division could have either addressed the argument directly or explained why it was not addressing it.

[145] Since the General Division made an error of law, I can intervene in the decision.[55]

[146] Before I do, I will address the Claimant's secondary argument that the common law test for misconduct ought to be revised to expressly require decision-makers to consider whether a claimant's *Charter* rights are engaged in a given set of circumstances.

[147] I see no evidence that the Claimant raised this specific argument before the General Division.

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[53] See *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII).
[54] See *Canada (Attorney General) v Hoffman*, 2015 FC 1348 (CanLII).
[55] Section 58(1)(c) of the DESD Act says an error of law is one of the grounds of appeal.

[148] The Appeal Division is looking for errors the General Division might have made, having regard to the evidence before it and the arguments made to it. It is not a forum to argue the case again, taking a different tact, in the hope of a different outcome. So, the General Division cannot have erred in law by failing to consider an argument not made to it.

[149] Even so, it was not an error to not consider *Charter* values as part of the common law test for misconduct. The Federal Court has recently decided that the common law test for misconduct is very narrow and that questions regarding fundamental rights and freedoms under the *Charter* and the factual basis for imposing vaccine and/or mask or face covering requirements are properly advanced in other forums.[56]

Remedy

[150] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.[57]

[151] The parties disagree on the remedy.

[152] The Commission asks that this matter be returned to the General Division. The Commission submits that the Appeal Division cannot consider the Claimant's *Charter*-based argument as the Claimant must first follow the Tribunal's *Charter* process which requires an initial step of filing a *Charter* notice under section 20(1)(a) of the SST Regulations.

[153] The Commission also maintains that it has not had an opportunity to provide evidence or submissions about this issue, so the record is not complete.

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[56] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.
[57] See section 59(1) of the DESD Act.

[154] The Claimant submits that since he is not challenging the "constitutional validity, applicability or operability of any provision of the EI Act" he is not required to file a *Charter* notice under section 20(1)(a) of the SST Regulations.

[155] He says the Commission is not prejudiced if the Appeal Division were to consider the *Doré* analysis because the Claimant raised this argument before the General Division and the Commission could have provided evidence and submissions at that point. He submits that the record is complete. He also points out that both parties have made submissions to the Appeal Division concerning the Claimant's *Charter*-based argument.

[156] I recognize that the Claimant is not challenging the constitutionality of the legislation. However, the Supreme Court of Canada has pointed out that this type of analysis, which involves the balancing of *Charter* protections against statutory objectives is a highly contextual exercise.[58]

[157] Since the General Division did not consider this argument, there were no specific findings of fact made relating to this argument.

[158] Although the Claimant raised this argument before the General Division, it was not entirely clear. As well, this is a novel argument in the EI context. It is not surprising the Commission would anticipate the filing of a notice under section 20(1)(a) of the SST Regulations for such an argument to proceed. As such, I am not satisfied that the Commission had the opportunity to present any evidence or submissions it might have wanted to at the General Division concerning the Claimant's *Charter* argument. I find the Commission could be prejudiced if I were to consider this *Charter* analysis now on the existing record. The Appeal Division cannot accept new evidence to resolve this problem.[59]

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[58] See *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 (CanLII) at paragraph 41.
[59] See *Sharma v Canada (Attorney General),* 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157 which explain the rule against new evidence and the limited exceptions to it.

[159] Leaving aside the question of whether a notice is required under section 20(1)(a) of the SST Regulations, if the *Doré* analysis applies to the question of misconduct, the matter will have to be returned to the General Division for reconsideration.[60]

[160] However, there is no point in sending this matter back to the General Division for reconsideration if the *Doré* analysis does not apply.

[161] The Court in *Doré* made repeated references to this analysis applying in the context of an exercise of statutory discretion.[61] As the Federal Court of Appeal has said, "a close reading of Doré shows that an administrative decision-maker's obligation to enforce Charter values arises only if it is exercising statutory discretion."[62]

[162] This means that a preliminary question is whether a decision about misconduct is an exercise of statutory discretion. If it isn't then the *Doré* analysis does not apply.

[163] I have the authority under section 59(1) of the *Department of Employment and Social Development Act* to consider potentially two remedies. So, I have decided to substitute my decision in part on a preliminary issue and then return the matter to the General Division if necessary.

[164] I am going to decide the preliminary issue of whether the question of misconduct is an exercise of statutory discretion to which the Doré analysis applies. I think it is fair to the parties if I decide this issue. It is a pure question of law, and the parties were given an opportunity to make arguments about this issue before me. Deciding this issue does not require the filing of evidence and the record is complete on this issue.

[165] If I decide that the Doré analysis applies to the question of misconduct, the matter will have to be returned to the General Division for reconsideration and section 59(1) of the DESD Act gives me the authority to do so.

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[60] Section 59(1) of the DESD Act gives me that authority.
[61] See *Doré v Barreau du Quebec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395 at paragraphs 42 and 43 and 45, 47, and 55.
[62] See *Singh v Canada (Citizenship and Immigration),* 2016 FCA 96 (CanLII), [2016] 4 FCR 30.

The *Doré* analysis does not apply to a decision about misconduct

– Claimant's position

[166] The Claimant submits that the General Division is exercising statutory discretion when deciding whether a claimant's conduct amounts to misconduct.

[167] The Claimant relies on *Baker v. Canada (Minister of Citizenship & Immigration)*, where Justice L'Heureux-Dubé, for the majority, commented on the concept of "discretion" as follows:[63]

> "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."

[168] The Claimant submits that this definition was cited by approval by the Federal Court in *Goodrich Transport Ltd. v Vancouver Fraser Port Authority*.[64] It was also cited with approval by the Saskatchewan Court of Appeal in *Strom v Saskatchewan Registered Nurses Association*.[65]

[169] The Claimant submits, following *Baker*, the question of misconduct clearly involves the exercise of discretion, in the sense that Tribunal Members are asked to make decisions and are "given a choice of options within a statutorily imposed set of boundaries."

[170] The Claimant argues further that the Tribunal has acknowledged the *Doré* analysis as being applicable in some of its decisions.

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[63] See *Baker v Canada (Minister of Citizenship & Immigration),* 1999 SCC 699 at paragraph 52.
[64] See *Goodrich Transport Ltd. v Vancouver Fraser Port Authority*, 2015 FC 520 (CanLII), at paragraph 45.
[65] See *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII).

[171] In *PC v Minister of Employment and Social Development*, this analysis was applied when deciding whether a claimant met the statutory requirements for an Old Age Security pension.[66]

[172] In *J.L. v Canada Employment Insurance Commission*, the issue was whether a Claimant was "available for work" within the meaning of s. 18 of the EI Act. The member noted one of the issues as being whether the Commission respected *Charter* values as per the principles established in *Doré v Barreau du Québec*. This issue was not decided as the case was decided on other grounds.[67]

[173] Further, in *M.D. v Minister of Employment and Social Development*, the Member, citing *Doré*, granted leave to appeal the issue of whether a decision about a claimant's eligibility for Canada Pension Plan benefits, violated the appellant's *Charter* rights. [68]That case was returned to the General Division and settled without mention of the application of *Charter* values, as per Doré.

[174] The Claimant maintains that whether a claimant is entitled to a pension and whether a claimant was "available for work" are narrow questions which, like the question of whether a claimant engaged in "misconduct," require the Tribunal to assess the evidence tendered by the parties and apply that evidence to a set of principles, ultimately arriving at a decision. The Claimant points out that in many cases, the ultimate decision by the Tribunal will amount to a "yes" or "no." However, that does not mean that the Tribunal is not exercising its discretion along the way in order to arrive at whichever answer it considers to be appropriate.

[175] The Claimant maintains that the Tribunal is required to consider all the Claimant's circumstances and assign weight to those circumstances during a "misconduct" analysis. So, he submits, this decision clearly involves the exercise of significant discretion.

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[66] See *PC v Minister of Employment and Social Development*, 2016 SSTGDIS 99.
[67] See *J.L. v Canada Employment Insurance Commission*, 2017 SSTGDEI 189.
[68] See *M.D. v Minister of Employment and Social Development*, 2017 SSTADIS 553.

– Commission's position

[176] The Commission argues that the *Doré* framework does not apply to a decision about misconduct. The Commission submits that its initial and reconsideration decisions denying benefits are not discretionary decisions, nor is the General Division decision.

[177] The Commission argues that the finding of misconduct is a specific outcome dictated by the common-law test, and the language of the EI Act. Either there is misconduct, or there is not. The decision-maker does not have the discretion to choose between a range of outcomes. When misconduct is found, the decision-maker does not have the option to choose to award EI benefits despite the presence of misconduct.

[178] The Commission refers to the language of section 30(1) of the EI Act which provides: "A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause…"

[179] The Commission points out that section 30 has no permissive language that grants the discretion when determining misconduct.

[180] This is in contrast, the Commission points out, to other sections of the EI Act where the legislature explicitly granted discretion. For example, section 52 of the EI Act gives the Commission a discretionary authority to reconsider past decisions by using the phrase "may" reconsider.

[181] The Commission says most other decisions under the EI Act are not discretionary and are an application of clear statutory criteria to the facts.

[182] In particular, the Commission submits that the qualifying criteria are not discretionary. The Commission refers to section 7 of the EI Act which provides that if an individual does not have an interruption of earnings, and enough qualifying insurable hours they are not able to receive benefits.

[183] The Commission maintains there is no discretionary authority to award benefits if the qualifying criteria have not been met. Similarly, if misconduct is found, the individual

is disqualified. The decision-maker does not have the discretion to award benefits despite there being misconduct present.

[184] The Commission added that the EI Act is a contributory social insurance scheme with the purpose of providing protection "to workers who lose their employment involuntarily, not those who find themselves jobless by their own fault."[69]

[185] The Commission explains that if there was discretionary authority to choose among a range of outcomes when applying statutory entitlement criteria, then this would result in individuals who do not meet the requirements for entitlement receiving benefits, which is contrary to the purpose of the EI Act.

[186] It would also mean, in the context of benefit conferring legislation, inconsistent decisions concerning entitlement. For this reason, the Commission submits, decisions are made by applying clear statutory requirements to determine benefit entitlement.

[187] The Commission argues that *Baker* doesn't stand for the proposition that *all* administrative decisions are discretionary.

[188] The Commission points out that the decision being considered in *Baker* was a discretionary decision under subsection 114(2) of the *Immigration and Refugee Protection Act* (IRPA). That provision provided:

> 114(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay. [emphasis added].

[189] The Commission notes the inclusion of the words "is of the opinion," and "the Minister may re-examine" is indicative the legislature intended to grant the Immigration Minister a discretionary power to cancel or stay a removal order.

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[69] The Commission refers to *Canada (Attorney General) v Kaba,* 2013 FCA 208 at paragraph 6.

[190] The Commission submits there is no such permissive authority in section 30 of the EI Act providing discretion to cancel or stay a finding of misconduct. If misconduct is present, then the claimant is disqualified. The General Division does not have the authority to step outside the EI Act or interpret it contrary to its plain meaning.

[191] The Commission maintains that the Tribunal need to look no further than the language of the legislation to determine if a decision on misconduct is a discretionary decision.

[192] The Commission submits that none of the Supreme Court of Canada cases where the *Doré* analysis was applied involved benefit eligibility.

[193] For example, *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations*) (*Ktunaxa Nation*) involved a discretionary decision to allow the building of a resort on treaty territory. There were multiple stakeholders with a myriad of possible outcomes, unlike the question of misconduct which can only have one outcome.[70]

[194] *Law Society of British Columbia v Trinity Western University* (*Trinity Western*) also concerned a discretionary decision.[71] The decision was made by the benchers of the Law Society of British Columbia following a referendum to declare that Trinity Western's proposed law school was not an approved faculty.

[195] The Commission points out that the decision was borne out of a broad discretion afforded to the Law Society of British Columbia to regulate the profession. This was not simply applying statutory criteria to determine benefit eligibility.

[196] The Commission maintains that in all of these cases, the decision in issue was a broad discretionary decision, not simply applying statutory criteria to determine eligibility.

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[70] See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 (CanLII), [2017] 2 SCR 386.
[71] See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII).

[197] The Commission submits further that none of the Tribunal's decisions referred to by the Claimant support the position that a decision about misconduct requires a statutory exercise of discretion.

[198] The decision granting leave to appeal in *M.D. v Minister of Employment and Social Development* is not assistive as leave was granted only on the basis that it was arguable that the individual could argue *Charter* values.[72] Similarly, in *J.L. v Canada Employment Insurance Commission*, the *Doré* framework was not applied but only mentioned as "an interesting argument."[73]

[199] Further, the Commission says the decision in *PC v Minister of Employment and Social Development* is distinguishable having regard to the type of decision being made.[74] At issue in that case was a provision under the Old Age Security legislation that provided that "if there is sufficient reason to believe that a birth certificate is not available, the Minister shall determine the age and identity of an applicant on the basis of any other evidence and information with respect to the age and identity of an applicant on that is available from any source."

[200] The Commission argues that there is a flexible approach under the Old Age Security legislation to waive the requirement that age, and identity be verified by solely a birth certificate. This is not the same as a misconduct decision under the EI Act which provides no flexibility.

– My finding

[201] I find that a decision about misconduct under section 30 of the EI Act is not an exercise of statutory discretion. Therefore, the *Doré* analysis does not apply.

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[72] See M*.D. v Minister of Employment and Social Development*, 2017 SSTADIS 553.
[73] See J*.L. v Canada Employment Insurance Commission*, 2017 SSTGDEI 189.
[74] *PC v Minister of Employment and Social Development*, 2016 SSTGDIS 99.

[202] The Court in *Baker* pointed out that the concept of discretion refers to decisions where the law does not dictate a specific outcome, or whether the decision-maker is given a choice of options within a statutorily imposed set of boundaries.[75]

[203] However, it is important to consider that comment in context. In that case, the Court was considering what the standard of review on judicial review should be for discretionary decisions. The Court noted the standard of review was on a spectrum with certain decisions being entitled to more deference and some less.

[204] The Court pointed out that there is a distinction between discretionary decisions and those involving the interpretation of rules of law. The Court noted it is not easy to distinguish between interpretation and the exercise of discretion as interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.

[205] The Court decided that the standard of review should consider the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. The Court noted factors such as whether a decision is "polycentric," and the intention revealed by the statutory language should also be considered. The Court also said the amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis.[76]

[206] The Court said that although discretionary decisions will generally be given considerable respect, discretion had to be exercised in accordance with, among other things, the principles of the *Charter.*

[207] On the facts of that case, the Court decided that deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the

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[75] See *Baker v Canada (Minister of Citizenship & Immigration),* 1999 SCC 699 at paragraph 52.
[76] See *Baker v Canada (Minister of Citizenship & Immigration),* 1999 SCC 699, at paragraph 55.

fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language.

[208] The *Baker* case precedes *Doré* and therefore doesn't address the *Doré* analysis. But it does give an indication of factors that are relevant to deciding whether a decision has more of the hallmarks of a discretionary decision than not. So, I will consider these factors.

[209] The first factor to consider is whether the Tribunal has specialized expertise. To a certain extent, the Tribunal has special expertise. Decisions made by the Commission about EI matters all go to the General Division when an appeal is filed. However, the decision-maker does not employ any special expertise in making a decision about misconduct. The decision involves applying a settled common law test to the facts.[77]

[210] Secondly, the text of the provision does not suggest that a decision about misconduct is a discretionary decision.

[211] Section 30(1) provides:

> "A claimant is disqualified from receiving any benefits if the claimant lost their employment because of their misconduct or voluntarily left their employment without just cause."

[212] The text is not ambiguous. It is clear and plain that disqualification occurs if a claimant lost their job due to misconduct. It is not permissive language.

[213] This is in contrast to other provisions in the EI Act where the legislature specifically indicated an intention to provide discretion.

[214] For example, the word "may" is used in section 52 of the EI Act, suggesting a discretion to reconsider a claim. As well, in section 112(1)(b), the Commission has been

[77] This test was set out by the Federal Court of Appeal in *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 (CanLII).

given discretion to perform a reconsideration if it is late, within “any further time it will allow.”

[215] The lack of permissive language in section 30(1) of the EI Act compared to other provisions in the EI Act tells me the legislature did not intend discretion to be exercised under section 30(1) of the EI Act.

[216] Further, the nature of the decision itself does not suggest discretion. It is not a polycentric decision. A decision about misconduct is strictly a decision about whether one claimant will be disqualified from benefits or not. The outcome is dictated by the common law test applied to the facts.

[217] Section 7 of the EI Act makes clear that the qualifying requirements for EI benefits are mandatory.

[218] A discretionary decision about disqualification would be inconsistent with the notion that claimants must meet mandatory requirements to qualify.

[219] Additionally, if there was a discretionary authority to pay benefits, despite a finding of misconduct, this could result in individuals who do not meet the requirements for entitlement receiving benefits, which is contrary to the purpose of the EI Act.

[220] As the Commission stated, the EI Act is “a contributory social insurance scheme with the purpose of providing protection ’to workers who lose their employment involuntarily, not those who find themselves jobless by their own fault.”[78]

[221] These factors all point to a decision about misconduct not being an exercise of statutory discretion.

[222] None of the court decisions that the Claimant relies on involve a decision like misconduct which involves applying a settled legal test to the facts. Rather, each of

[78] See *Canada (Attorney General) v Kaba*, 2013 FCA 208 at paragraph 6.

these cases involved a broad discretion which was evident either from the language of the legislation being applied, or from the nature of the decision being made.

[223] None of the Tribunal decisions the Claimant cited are binding me. The *Doré* analysis was commented on but not applied in either *J.L. v Canada Employment Insurance Commission or M.D. v Minister of Employment and Social Development*. [79] So, these do not assist.

[224] The *Doré* analysis was applied in *PC v Minister of Employment and Social Development.* [80] However, the statutory language there involved some discretion about establishing age. I would note as well that there was no consideration in that case about whether the decision under consideration was a statutory exercise of discretion. So, I don't find the decision to be persuasive.

[225] A decision about misconduct involves a weighing of evidence, making findings of fact and applying the test, as described by the Federal Court of Appeal, to the facts. It is not a discretionary decision just because one member might weigh the evidence differently than another. That is the nature of all legal decisions which require findings of fact.

[226] The Claimant has not proven that a decision about misconduct involves an exercise of statutory discretion to which the *Doré* analysis applies.

[227] Given my conclusion on this preliminary issue, there is no need for this matter to be returned to the General Division for reconsideration. The Doré analysis does not apply.

[228] As above, the General Division did not make any other reviewable errors. So, there is no reason to disturb the General Division's finding of misconduct.

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[79] See *J.L. v Canada Employment Insurance Commission*, 2017 SSTGDEI 189; See also *M.D. v Minister of Employment and Social Development*, 2017 CanLII 81163 (SST).
[80] See *PC v Minister of Employment and Social Development*, 2016 CanLII 104594 (SST).

Conclusion

[229] The appeal is dismissed. The General Division made an error of law by not providing adequate reasons about an argument raised by the Claimant.

[230] However, this error doesn't affect the outcome.

[231] The Claimant lost his job due to misconduct.

Charlotte McQuade
Member, Appeal Division