Citation: *RS v Canada Employment Insurance Commission*, 2023 SST 527

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Angèle Fricker

Decision under appeal:	General Division decision dated September 2, 2022 (GE-22-1741)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	March 7, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	April 26, 2023
File number:	AD-22-721

Decision

[1] The appeal is allowed. The General Division made a legal error in determining that the appeal had to be summarily dismissed. I am returning the matter to a different member of the General Division for a redetermination.

Overview

[2] The Appellant, R. S. (Claimant), is appealing the General Division decision. The General Division summarily dismissed the Claimant's appeal as it determined that it was "plain and obvious on the face of the record that the appeal [was] bound to fail."[1]

[3] The General Division found that the Claimant chose not to comply with his employer's vaccination policy and that he had been dismissed from his employment for this reason. The General Division also found that the Claimant's employer had informed him that he faced dismissal if he did not comply with the policy.

[4] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors. He denies that there is any misconduct. He says that, under the terms of his collective agreement, he did not have to undergo vaccination, so did not expect his employer to dismiss him. He also says that his employer should have provided him with a religious accommodation. He also says that he has not been fairly treated throughout the Employment Insurance process.

[5] The Claimant argues that the appropriate remedy here is for the Appeal Division to allow the appeal and overturn the General Division decision. He argues that the Appeal Division should give the decision that he says the General Division should have given. He says the Appeal Division should find that he was not disentitled from receiving Employment Insurance benefits. He opposes returning the matter to the General Division for a redetermination. He argues that the General Division is biased and will not treat him fairly, even if the matter is considered by a different member.

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[1] See General Division decision, at para 33.

[6] The Respondent, the Canada Employment Insurance Commission (Commission) agrees that the General Division made a legal error when it determined that the appeal had to be summarily dismissed. The Commission asks the Appeal Division to allow the Claimant's appeal and to return the matter to the General Division for reconsideration.

Issues

[7] The issues in this appeal are as follows:

a) Did the General Division make a legal error by summarily dismissing the Claimant's appeal?

b) If so, what is the appropriate remedy to fix the error?

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[2]

[9] For factual errors, the General Division had to have based its decision on an erroneous finding of the fact that it made in a perverse or capricious manner or without regard for the material before it.

The General Division should not have summarily dismissed the Claimant's appeal

[10] The General Division determined that the Claimant did not comply with his employer's COVID-19 vaccination policy, that he was aware of the consequences of noncompliance, and that his noncompliance led to his suspension and eventual dismissal. The General Division found that this amounted to misconduct. The General Division also found that there was nothing that the Claimant could have added to his appeal to change the outcome.

[2] See section 58(1) of the *Department of Employment and Social Development Act*.

[11] The General Division referred to section 53(1) of the *Department of Employment and Social Development Act*. The section requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[12] The General Division found that it was clear from the record that the Claimant's appeal did not have any reasonable chance of success and that his appeal was bound to fail. For that reason, it summarily dismissed the Claimant's appeal.[3]

[13] The Commission notes that the Federal Court of Appeal has held that an appeal should only be summarily dismissed when it is obvious that the appeal is bound to fail no matter what evidence or arguments might be presented at a hearing.[4]

[14] The Commission cites several examples of appeals that are clearly bound to fail. The Commission argues that, unlike those appeals, misconduct cases are not clearly bound to fail because there could be evidence or arguments submitted at a hearing that could alter the outcome.

[15] The Commission argues that, in effect, the General Division decided the case on the record when it decided that the appeal has no reasonable chance of success. But, the Commission notes, the Employment Insurance Section of the General Division does not have any authority to decide cases on the record. The general rule is that appellants must be given an opportunity to be heard.

[16] The Commission argues that the General Division used the summary dismissal procedure to disguise what it is not permitted to do. The Commission argues that the General Division should not be using the summary dismissal procedure to circumvent the general rule for Employment Insurance cases that appellants be given the chance to be heard.

[17] The Commission submits that, in the context of the summary dismissal procedure, it is not appropriate for the General Division to consider a case on its merits

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[3] See General Division decision, at para 33.
[4] See Commission's representations to the Social Security Tribunal-Appeal Division, filed, at AD 2-3, citing *Lessard-Gauvin v Canada (Attorney Genera)*, 2013 FCA 147.

in the parties' absence and then find that the appeal has no reasonable chance of success.

[18] I accept the parties' arguments that the General Division erred in summarily dismissing the appeal. It was not plain and obvious on the record that the appeal would fail. The Claimant could have had evidence and arguments that could have led to a different outcome. On top of that, by summarily dismissing the matter, the Claimant was deprived of an opportunity to fairly present his case.

Remedy

[19] Under section 59(1) of the *Department of Employment and Social Development Act*, the Appeal Division can give the decision that the General Division should have given, or it can send the matter back to the Employment Insurance Section for reconsideration.

[20] The Commission argues that returning the matter to the General Division for a redetermination is the appropriate remedy in this case. Plus, it would be more advantageous to the Claimant as he would be able to elicit evidence that is not already on file. And the Claimant would also be able to advance his arguments more fully. As the Commission notes, the Appeal Division is restricted to the evidence and to the facts that were before the General Division.

[21] The Claimant opposes returning the matter to the General Division. Apart from concerns of bias, he argues that there is sufficient evidence to enable me to come to my own decision. He also says that the evidence supports his arguments that misconduct did not arise in his case.

– The Claimant's concerns about bias at the General Division

[22] The Claimant is concerned about bias at the General Division. He says that the Employment Insurance process has been unfair throughout. This includes the process at the Service Canada and Commission levels when they focused on his accommodation request.

[23] The courts have consistently held that bias is a very serous allegation. There is a strong presumption of impartiality that cannot be easily rebutted.

[24] In *Committee for Justice and Liberty et al v National Energy Board et al*, the Supreme Court of Canada determined that:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude"[5]

[25] The Federal Court of Appeal set out the test as follows, whether:

> an informed person, viewing the matter realistically and practically—and having thought the matter through--… [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General),* 2015 SCC 25 at paras 20 to 21, 26.[6]

[26] In *Murphy v Canada (Attorney General)*,[7] the Federal Court confirmed that a high threshold is necessary to rebut the presumption of judicial integrity and impartiality. The Court held that the grounds for an apprehension of bias must be substantial and not related to a sensitive conscience.

[27] The Court acknowledged that Ms. Murphy disagreed with the findings of the Associate Justice in that case. But the Court found that that did not justify an allegation of bias. The Court wrote, "the fact that a [decision-maker] clearly disagrees with and rejects the arguments of an applicant is not, in and of itself, bias."[8]

[28] The fact that the General Division summarily dismissed the Claimant's appeal is not evidence of bias. The Claimant's concerns that he cannot receive a fair hearing or

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[5] See *Committee for Justice and Liberty et al v National Energy Board et al,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at pages 394 and 395.
[6] See *Firsov v Canada (Attorney General)*, 2022 FCA 191.
[7] See *Murphy v Canada (Attorney General)*, 2023 FC 57.
[8] See *Murphy*, at para 25.

determination at the General Division has not been substantiated. This concern would not be a basis against returning the matter to the General Division for a redetermination.

[29] I will briefly review the employer's COVID-19 vaccination policy and then set out some of the Claimant's arguments that he says support a finding that there was no misconduct, to determine whether the matter can be appropriately dealt with at the Appeal Division, without returning the matter to the General Division for a redetermination.

– **The employer's COVID-19 vaccination policy**

[30] The employer's vaccination policy stated that the Government of Canada required employees in the federally regulated air, rail, and marine transportation sectors to be vaccinated by the end of October 2021. The policy also stated that it was aligned with the employer's duty under the *Canada Labour Code* and the *Canada Occupational Health and Safety Regulations*.[9]

– **The Claimant's collective agreement**

[31] The Claimant relies on the provisions of his collective agreement. He argues that, under the collective agreement, he could not be compelled to undergo vaccination. As such, he argues that, as he did not have to get vaccinated, he could not have foreseen that his employer would suspend and then dismiss him from his employment when he chose not to get vaccinated. He says that misconduct does not arise in these circumstances.

[32] The Claimant relies in particular on Article 30-1 of his collective agreement. It reads:

> **30 – MEDICAL EXAMINATIONS**
>
> **30-1. TRANSPORT CANADA REQUIRED MEDICAL EXAMINATIONS**
>
> 30-1.01 The medical standards required by the Company to be maintained for continued employment as a Pilot shall be no more restrictive than those

[9] See employer's COVID-19 vaccination policy, at GD 3-36.

> standards set forth in the Transport Canada regulations required to maintain an Airline Transport Pilot License (ATPL), including any waiver policies adopted by Transport Canada.

[33] The hearing file at the General Division did not include a copy of the Transport Canada regulations required to maintain an Airline Transport Pilot License (ATPL). Even so, the Claimant argues that the practical effect of this Article is that he did not have to get vaccinated.

[34] Under the "General" section of the collective agreement, the Claimant's employer reserved the exclusive right "to manage the business and direct its workforce and all the matters that related to it.[10]

[35] Under the same section, under the subheading "Changes to Law or Regulation," the employer, in consultation with the union, is required to make any changes necessary to comply with any regulatory or legislative change.[11]

[36] The Claimant understood from the collective agreement that he could continue his employment, as long as he met certain medical standards. He understood those medical standards would be no more restrictive than those required to maintain an airline transport pilot's licence.

– ***A.L. v Canada Employment Insurance Commission***

[37] The Claimant says that there are similarities in his case to that of *A.L. v Canada Employment Insurance Commission*,[12] a decision of the General Division.

[38] The General Division allowed A.L.'s appeal. The General Division found that there was no misconduct because A.L's employer had unilaterally imposed new conditions of employment with a vaccination policy. The Claimant says that his case is similar to *A.L.*, so argues that the outcome should be the same in his case.

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[10] See Article 2-2 Management Rights, at GD 13-22.
[11] See Article 2-2 Management Rights, at GD 13-23.
[12] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, also at AD 5-3 to AD 5-19. Note: this matter is currently under appeal to the Appeal Division.

– **The Claimant's communications with his employer**

[39] Following his suspension, the Claimant wrote to his employer. He advised that he had filed a grievance. He asked his employer to review the Interim Order Respecting Certain Requirements for Civil Aviation due to COVID-19, No. 43.[13] He wrote that the Interim Order "clearly identifies that the regulatory body Transport Canada does NOT require crew members to be vaccinated."[14]

[40] The Claimant also referred his employer to Article 30-1.01 of the collective agreement.[15] He wrote that the agreement was used to maintain his employment.

– **Interim Order Respecting Certain Requirements for Civil Aviation due to COVID-19, No. 43**

[41] The Interim Order did not form part of the evidence before the General Division.

[42] I located what may be a copy of the interim order. It appears to me that the Interim Order Respecting Certain Requirements for Civil Aviation due to COVID-19, No. 43 was made on October 19, 2021. Section 17.1 of the Interim Order reads:

> **Vaccination or COVID-19 Molecular test—Flights Departing from an Aerodrome in Canada**
>
> Application
>
> - **17.1**(1) Beginning on October 30, 2021 … sections 17.2 to 17.17 apply to all of the following persons: **…**
> - Non-application
>
> (2) Section 17.2 to 17.17 do not apply to the following persons:
>
> .. .
>
> - (b) a crewmember …

[13] See Interim Order Respecting Certain Requirements to Civil Aviation due to COVID-19, No. 43, since repealed, at Repealed - Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43 (canada.ca)
[14] See Claimant's email dated November 3, 2021, at GD 3-72 to GD 3-73.
[15] See Claimant's email dated November 3, 2021, at GD 3-72 to GD 3-73.

Prohibition – person

- **17.4**(1) A person is prohibited from boarding an aircraft for a flight or entering a restricted area unless
    - (a) they are a fully vaccinated person; or
    - (b) they have received a result for a COVID-19 molecular test.

[43] The Interim Order suggests that vaccination or COVID-19 molecular tests do not apply to crew members.

[44] Based on his understanding of the Interim Order, the Claimant states that he believed that he would not be prohibited from boarding an aircraft and from working. He understood from the Interim Order that he did not have to be get vaccinated.

[45] If, as the Claimant says, he understood that he did not have to comply with his employer's vaccination policy because the Interim Order specifically exempted him from getting vaccinated, it would seem that the Claimant would need to have been aware of the Interim Order before the suspension arose.

[46] Even if the Interim Order and Transport Regulations are admitted into evidence at the General Division, that does not necessarily establish that the Claimant could not have, at the relevant time, known nor expected that his conduct could not possibly have led to dismissal.

[47] In other words, there should be some evidence showing that he was aware of the Interim Order. It is unclear whether there was any evidence of this at the General Division. It does not appear that the Claimant mentioned or alerted his employer to the Interim Order (or for that matter, explained to his employer what he understood his obligations to be, particularly those under his collective agreement) until after his employer suspended him.

– **The matter should be returned to the General Division**

[48] The courts have consistently maintained, "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the

performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."[16]

[49] The Claimant's employer communicated its vaccination policy to the Claimant, and the Claimant was aware of it. The Claimant maintains that his employer should have accommodated him for religious reasons. But apart from this consideration, the Claimant essentially denies that he knew or could have known that his conduct was such as to impair the performance of the duties he owed to his employer. He denies that he could have foreseen that dismissal was a real possibility.

[50] Given the nature and volume of some of the evidence, it is apparent that this matter should be returned to the General Division for a redetermination. While from the Claimant's perspective there is sufficient evidence to rule in his favour, the Commission has not had an opportunity to review and address these arguments at a hearing.

[51] The Interim Order, for instance, did not form part of the evidence at the General Division. So, the Commission will not have had the chance to consider it.

[52] At the same time, as the Interim Order is considered "new evidence," the Appeal Division generally would not be considering it. Yet, the Claimant clearly intends to rely on this evidence in support of his case to show that he could not possibly have known that he was expected to comply with his employer's vaccination policy, let alone, know that there could be any consequences for non-compliance.

[53] There may be other pieces of evidence, including the Transport Regulations, upon which the Claimant wishes to rely, and which the Commission should have the chance to challenge or test.

[54] If I were to decide this matter, I would simply be compounding the error that the General Division made in failing to provide the parties with the chance to present or defend their respective positions.

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[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.

Conclusion

[55] The appeal is allowed. The General Division made a legal error in determining that the appeal had to be summarily dismissed.

[56] I am returning the matter to a different member of the General Division for a redetermination. Given the Claimant's concerns of bias, I would also direct that the General Division's summary decision be removed from the record.

Janet Lew
Member, Appeal Division