Citation: *LY v Canada Employment Insurance Commission*, 2023 SST 1085

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 16, 2023 (GE-22-3777)

Tribunal member:	Solange Losier
Decision date:	August 14, 2023
File number:	AD-23-591

Decision

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

Overview

[2] L. Y. is the Claimant in this case. She worked as an ultrasound technician. When she stopped working, she applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits because had been suspended and dismissed from her job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It said that the Claimant was suspended and dismissed from her job due to misconduct.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] She argues that the General Division made an important error of fact.[4]

[6] I am denying the Claimant's request for permission to appeal because there is no reasonable chance of success.

Issue

[7] Is there an arguable case that the General Division based its decision on an important error of fact or made an error of law when it decided that the Claimant's conduct was misconduct?

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[1] See reconsideration decision at page GD3-40.
[2] See General Division decision at pages ADN1A-1 to ADN1A-9.
[3] See application to the Appeal Division at pages ADN1-1 to ADN1-8.
[4] See pages ADN1-3 and ADN1-7 to ADN1-8.

Analysis

The test for getting permission to appeal

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.[5]

[9] I must be satisfied that the appeal has a reasonable chance of success.[6] This means that there must be some arguable ground that the appeal might succeed.[7]

[10] The possible grounds of appeal to the Appeal Division are that the General Division:

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact. [8]

[11] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.[9]

[12] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[10]

[13] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. Not all errors of fact will allow me to

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[5] See section 56(1) of the *Department of Employment and Social Development Act* (DESD Act).
[6] See section 58(2) of the DESD Act.
[7] See *Osaj v Canada (Attorney General)*, 2016 FC 115.
[8] The relevant errors are formally known as "grounds of appeal". They are listed under section 58(1) of the DESD Act. These errors are also explained on the Notice of Appeal to the Appeal Division. See ADN1-3.
[9] See section 58(2) of the DESD Act.
[10] See section 58(1)(c) of the DESD Act.

intervene. An error of fact needs to be important enough that the General Division relied on it to make a finding that impacted the outcome of the decision.

[14] This involves considering some of the following questions:[11]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[15] However, I have also considered whether there was an error of law because some of the Claimant's arguments allege that the General Division made an error when it decided the issue of misconduct.[12]

[16] An error of law can happen when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[13]

I am not giving the Claimant permission to appeal

[17] The Claimant argues that the General Division made several factual errors in its decision by either ignoring, overlooking or making statements of fact that were not substantiated.[14]

[11] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[12] See pages ADN1-7 to ADN1-8.
[13] See section 58(1)(b) of the DESD Act.
[14] See pages ADN1-7 to ADN1-8.

[18] I will summarize the Claimant's main arguments from her application to the Appeal Division:[15]

- The General Division overlooked a case she submitted called *AL v Canada Employment Insurance Commission (CEIC)*, 2022 SST 1428 because the facts are almost identical to her case and that person got EI benefits.
- The General Division ignored the fact that the Claimant works in a unionized job and that there was a collective agreement in place stating that the hospital cannot demand an employee to take any vaccine.
- The General Division overlooked the fact that the employer's mandatory COVID-19 vaccination policy was not part of the collective agreement, so there was no breach of an expressed or implied duty arising out of her employment contract.
- The General Division erred when it decided that the employer's COVID-19 vaccination policy became a condition of her employment.
- The General Division erred when it decided that an employer has a right to develop and implement policies at the workplace.

– **The General Division did not overlook the SST case she referred to**

[19] It is not arguable that the General Division overlooked the *AL v CEIC,* 2022 SST 1428 decision. I will refer to that case as "AL".

[20] The Claimant relies on the AL decision because the facts are similar and that person was allowed to get EI benefits. She argued that the employer discriminated against her and should have accommodated her disability.[16] She told the General division that the employer failed to accommodate her health concerns.[17]

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[15] See pages ADN1-7 to ADN1-8.
[16] See paragraphs 13 and 26 of the General Division decision.
[17] See hearing recording from 16:20 to 17:20 and 22:33.

[21] The General Division considered and addressed the AL case in its decision. In paragraph 34 of its decision, it referred to the AL decision and said:

> I acknowledge the recent decision of the General Division of this Tribunal in 2022-SST-1428. But the courts and the Tribunal's Appeal Division have held, in similar circumstances, that the Tribunal is not the appropriate forum through which a claimant can obtain the remedy they are seeking.

[22] The General Division didn't overlook the AL decision. It acknowledged the AL decision, but was not bound to follow it. Members of the General Division are bound by decisions of the Federal Court and Federal Court of Appeal, but they are not bound by decisions of their colleagues rendered at the General Division.

[23] The General Division also said that this Tribunal was not the appropriate forum to get the remedy she was seeking.[18] More specifically, the General Division's decision said that questions about the effect on occupational health and safety, or collective agreement violations or any breaches of her human rights were not matters that it could decide.[19]

[24] The General Division's conclusion was consistent with the case law from the Federal Court. The Court in *Paradis* said that the question of whether an employer has failed to provide an accommodation under human rights legislation is not relevant to the question of misconduct under the *Employment Insurance Act* (EI Act). It is a matter for another forum. [20]

[25] The General Division also relied on a recent Federal Court case called *Cecchetto* involving similar facts and a COVID-19 vaccination policy.[21] Specifically, the *Cecchetto* case involved an EI claimant's refusal to comply with their employer's COVID-19

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[18] See paragraph 34 of the General Division decision.
[19] See paragraph 35 of the General Division decision.
[20] See *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraph 34.
[21] See *Cecchetto* v *Canada (Attorney General)*, 2023 FC 102.

vaccination policy. This led to his suspension and dismissal. The Court confirmed the Tribunal's narrow role in paragraph 32 of its decision when it said:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[26] So, there is no reasonable chance of success on this because the General Division did not overlook the AL case. It is not arguable that the General Division may have erred by not following a non-binding decision from the General Division. However, it had to follow existing decisions made by the Federal Court as it did.

– **The General Division did not ignore the fact that the Claimant worked in a unionized environment or that there was a collective agreement**

[27] It is not arguable that the General Division ignored that the Claimant worked in a unionized environment and had a collective agreement for the following reasons.

[28] The Claimant says that the General Division ignored that she worked in a unionized environment and had a collective agreement.

[29] The General Division was aware that the Claimant worked in a unionized environment and had a collective agreement. It permitted the Claimant to submit a copy of her collective agreement after the hearing.[22]

[30] However, the General Division decided that it doesn't have to consider how the employer behaved, but rather what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.[23] It said that it has to focus on the EI Act and it

[22] See pages RGD4-2 to RGD4-99.
[23] See paragraphs 21 and 22 of the General Division decision.

could not make any decision about whether the Claimant has other options under other laws.[24]

[31] The General Division relied on case law and its conclusion was consistent with what the Court has already decided.[25] The Federal Court of Appeal in *McNamara* has said that the focus is not on the behaviour of the employer, but rather on the behaviour of the employee. In paragraph 23 of *McNamara,* it said:

> …there are, available to an employee wrongfully dismissed, remedies available to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.[26]

[32] Essentially, the Claimant was asking the General Division to focus on the employer's conduct based on the collective agreement in place, but this was not something it was allowed to do according to what Court has already said.

[33] There is no reviewable error made by the General Division when it decided the issue of misconduct within the parameters set out by the Federal Court and Federal Court of Appeal, which has defined misconduct under the EI Act. The found should be on the behaviour of the employee.

[34] This means that there is no reasonable chance of success that the General Division ignored that she worked in a unionized environment and had a collective agreements because that would have shifted the focus to the employer and be contrary to existing case law.

– **The General Division did not misinterpret the meaning of misconduct**

[35] It is not arguable that the General Division made an error of law by misinterpreting the meaning of misconduct for the following reasons.

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[24] See paragraph 22 of the General Division decision.
[25] See paragraph 21 fop the General Division decision.
[26] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.

[36] The Claimant argues that the General Division erred when it made various findings about misconduct, including that there was no breach of an express or implied duty; vaccination for COVID-19 was not a condition of her employment contract and that the employer has a right to implement policies.

[37] The EI Act provides for disentitlement from benefits where a claimant has been suspended for reasons of misconduct and disqualification from benefits where a claimant has been dismissed for misconduct.[27]

[38] Misconduct is not defined in the EI Act, but the Federal Court of Appeal has provided a definition for misconduct.

[39] The General Division provided a definition of misconduct based on the what the Federal Court of Appeal has said. It said that to be misconduct, the conduct has to be wilful, which means it was conscious, deliberate or intentional conduct.[28] It also said that there doesn't have to be wrongful intent for the behaviour to be misconduct under the law.[29]

[40] The General Division also said there is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties towards her employer and there was a possibility of being let go because of that.[30]

[41] The Court has said that a deliberate violation of the employer's policy is considered to be misconduct.[31]

[42] The General Division decided that the employer had a policy requiring employees to be vaccinated against COVID-19 by a specific deadline.[32] It said that the Claimant was aware of the policy and knew the consequences of not following the

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[27] See sections 30(1) and 31 of the *EI Act.*
[28] See paragraphs 19 and 20 of the General Division decision; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[29] See *Attorney General of Canada v Secours*, A-352-94.
[30] See 20 of the General Division decision and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[31] See *Attorney General of Canada* v *Secours*, A-352-94; *Canada (Attorney General)* v *Bellavance*, 2005 FCA 87 and *Canada (Attorney General)* v *Gagnon*, 2002 FCA 460.
[32] See paragraphs 29, 30 and 31 of the General Division decision.

policy would lead to losing her job.[33] It identified that she did not have a medical exemption and deliberately breached the policy because she was not vaccinated for COVID-19.[34] Because of her conduct, the General Division found that she was suspended and lost her job due to misconduct.[35]

[43] There is no reasonable chance of success that the General Division misapplied or misunderstood the test for misconduct. The General Division properly stated and applied the law. It did not misinterpret what misconduct means under the EI Act. The decision is consistent with the law and its findings about misconduct were supported by the evidence.

Conclusion

[44] I have reviewed the documentary file, and listened to the recording from the General Division hearing. The evidence supports the General Division's decision. I did not find any key evidence that the General Division might have ignored or misinterpreted.[36]

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

Solange Losier
Member, Appeal Division

[33] See paragraphs 31, 37 and 40 of the General Division decision.
[34] See paragraphs 26 and 40 of the General Division decision.
[35] See paragraph 41 of the General Division decision.
[36] See *Karadeolian* v *Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.