Citation: *GM v Canada Employment Insurance Commission*, 2023 SST 1297

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	G. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 4, 2023 (GE-22-4172)

Tribunal member:	Janet Lew
Decision date:	September 27, 2023
File number:	AD-23-738

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, G. M. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Claimant had been suspended from his job because of misconduct. In other words, it found that he had done something that caused him to be suspended. The General Division found that the Claimant did not comply with his employer's vaccination policy.

[4] As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division member "acted with Extreme Prejudice"[1] towards him. For one, the member denied his request to video record the proceedings. When assessing whether misconduct occurred, the member focused on him, without considering the actions of his employer or the Respondent, the Canada Employment Insurance Commission (Commission). The Claimant also argues that the General Division failed to apply the law and ignored important evidence.

[6] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.[3]

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[1] Application to the Appeal Division – Employment Insurance, at AD 1-3.
[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

[7] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with his appeal.

Issues

[8] The issues are as follows:

(a) Is there an arguable case that the General Division member was biased against the Claimant?

(b) Is there an arguable case that the General Division made a legal error by failing to identify and apply the proper legal test for misconduct?

(c) Is there an arguable case that the General Division made a legal error by failing to apply *Hopp v Lepp*?[4]

(d) Is there an arguable case that the General Division ignored some of the evidence?

I am not giving the Claimant permission to appeal

[9] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or certain type of factual error.[5]

[10] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Is there an arguable case that the General Division member was biased against the Claimant?

[11] The Claimant argues the General Division member was biased against him.

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[4] *Hopp v Lepp*, [1980] 2 SCR 192.
[5] See section 58(1) of the DESD Act.

– The Claimant wanted to video record the proceedings

[12] The General Division did not agree to the Claimant's request to video record the hearing. The Claimant says this proves bias or extreme prejudice.

[13] Tribunal members are masters of their own domain and are given wide latitude in terms of controlling their own processes.

[14] The General Division considered the Claimant's request. It noted that all hearings at the Social Security Tribunal are audio-recorded and that recordings form part of the appeal record. Indeed, the member confirmed that the Tribunal provided the Claimant with a copy of the audio recording after the hearing.

[15] The General Division noted that neither the *Social Security Regulations* nor the *Social Security Tribunal Rules of Procedure* specifically allow (or prohibit) recording of any proceedings by parties, the media, or members of the public. The General Division member determined that this left her with some discretion to decide whether to allow the request.

[16] The member weighed the balance of prejudice. The member decided that there was no prejudice to the Claimant in denying his request as the Tribunal would be recording the proceedings and providing the parties with a copy of the audio recording.

[17] The member noted that her decision was consistent with prevailing procedures in most Canadian jurisdictions and legal forums.

[18] The Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré's dissenting opinion in *Committee for Justice and Liberty et al. v National Energy Board et al.*:

> [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think

> that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[6]

[19] Given that the member considered the harm that would flow if she were to deny the Claimant's request, and the fact that the Tribunal would be providing him with a copy of the audio recording, I do not see that the Claimant has met the test for a reasonable apprehension of bias set out in the *Committee for Justice* decision. The member did not arrive at her decision arbitrarily and demonstrated that she was guided by what she determined to be fair.

[20] I am not satisfied that the Claimant has an arguable case that the General Division member was biased against him simply because she did not agree to his request to video record the hearing.

– The Claimant says paragraph 71 proves bias

[21] The Claimant argues that proof of the General Division member's bias towards him can be found at paragraph 71, which reads:

> [The Claimant] was not forcibly subjected to any medical procedure. He was given the choice whether or not to undergo a medical procedure (COVID-19 vaccination) and made an informed decision not to receive the vaccines. His medical autonomy was not violated.

[22] The Claimant says the paragraph reveals the member's bias and lack of professionalism. He says the statement is nonsensical and represents propaganda, to justify blackmail and coercion. He says the statement is repeated by the Liberal Party of Canada, the Prime Minister, and Cabinet Ministers, so shows the member's bias and corruption.

[23] Clearly, the Claimant has very strong views against vaccination and the implementation of his employer's vaccination policy. The Claimant might have felt that he did not have any real choice or options because the consequences of either option—

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[6] *Committee for Justice and Liberty et al. v National Energy Board et al.,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369.

either getting vaccinated or not—were unacceptable to him. But ultimately, the member could conclude that the Claimant's medical autonomy had not been violated because the Claimant did not get vaccinated.

[24] However, disagreement over the General Division's findings alone does not establish bias. Again, the test set out in the *Committee for Justice and Liberty* decision must be applied. It falls short of showing bias towards him.

[25] Taking into account the test set out by the Supreme Court of Canada, I am not satisfied that the Claimant has an arguable case that paragraph 71 establishes that the General Division member was biased against him.

Is there an arguable case that the General Division member made a legal error by failing to identify and apply the proper legal test for misconduct?

[26] The Claimant argues that when it was assessing whether there was misconduct, the General Division failed to consider (1) whether there was a breach of an express or implied duty and (2) whether any actions or inactions on his part interfered with the performance of his duties.

[27] The Claimant says that these two considerations are key elements of the test for misconduct. He says that if the General Division had considered these two elements, it would have determined that he had not breached any of the duties that he owed to his employer. And he says that it would have then concluded that he had not committed any misconduct.

[28] In fact, the General Division did in fact consider whether the Claimant's actions or inactions interfered with the performance of any duties that he owed to his employer, and whether that breach constituted misconduct.

[29] At paragraph 50, the General Division found that for there to be misconduct, an appellant must know or should know that their conduct could get in the way of carrying

out their duties toward their employer and that there is a real possibility of being suspended or being let go because of that.[7]

[30] The General Division determined that it had to focus on the Claimant's behaviour and actions and whether those behaviours met or failed to meet the conditions of the policy.[8]

[31] In each instance, the General Division cited decisions of the Federal Court of Appeal. In other words, it re-stated the law.

[32] Ultimately, the General Division found that the Claimant was under a duty to comply with his employer's vaccination policy. It found that the Claimant was in breach of that duty. Thus, it concluded that there was misconduct.

[33] I understand that the Claimant may be suggesting that the express or implied duty has to arise out of the contract of employment. He may be relying upon *Lemire,*[9] in which the Federal Court of Appeal wrote:

> [14] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; **the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment**: Canada (Attorney General) v. Brissette, 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684 (C.A.), at paragraph 14; Canada (Attorney General) v. Cartier, 2001 FCA 274, 284 N.R. 172, at paragraph 12; Canada (Attorney General) v. Nguyen, 2001 FCA 348, 284 N.R. 260, at paragraph 5.
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> (My emphasis)

[34] It is now well-established that an employer's policy does not have to form part of the employment agreement for there to be misconduct:

- In *Kuk*,[10] Mr. Kuk chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. The Federal Court found that

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[7] General Division decision, at para 50.
[8] General Division decision, at para 47.
[9] *Lemire v Canada (Attorney General)*, 2010 FCA 314.
[10] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. There was misconduct in that case because Mr. Kuk knowingly did not comply with his employer's vaccination policy, and knew what the consequences would be if he did not comply.

- In *Nelson*,[11] the appellant lost her job because of misconduct. She was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal said it was irrelevant that the employer's policy against consuming alcohol did not form part of her employment agreement. It found that Ms. Nelson had committed misconduct.

- In *Nguyen*,[12] the Court of Appeal found that there was misconduct. Mr. Nguyen harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and did not form part of the employment agreement.

- In another case, called *Karelia*,[13] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Court of Appeal determined that Mr. Karelia had to comply with them—even if they were new—otherwise there was misconduct.

[35] So, contrary to what the Claimant suggests, the duties that arose out of his employer's vaccination policy did not have to be part of his employment contract.

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[11] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[12] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[13] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.

[36] As the courts have consistently stated, the test for misconduct is a very narrow and specific test. It involves assessing whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations.[14]

[37] I am not satisfied that there is an arguable case that the General Division failed to properly identify the test for misconduct under the *Employment Insurance Act*.

Is there an arguable case that the General Division made a legal error by failing to apply *Hopp v Lepp*?

[38] The Claimant argues that the General Division failed to follow *Hopp v Lepp*. The General Division found that the case did not apply to the Claimant's situation.

[39] The General Division found that *Hopp* involved a patient who was subjected to medical procedures without sufficient or any informed consent. The General Division also found that the court concluded that Mr. Lepp had been subjected to medical battery.

[40] At its root, *Hopp* was about medical consent. The General Division summarized the outcome at the Court of Appeal for Alberta. But, the Supreme Court of Canada allowed the appeal of the defendant, Mr. Hopp, an orthopaedic surgeon. The issue before the Court was whether the patient had been sufficiently informed about a procedure to allow him to decide whether to proceed with it. The Court found that Mr. Hopp had met the duty of disclosure and that Mr. Lepp had been sufficiently informed to enable him to decide whether to proceed with surgery.

[41] I agree with the General Division that the facts and issues in *Hopp* are entirely distinguishable from those of the Claimant. But apart from that, the issue of informed consent is altogether irrelevant to the misconduct question.[15] And, on top of that, the General Division did not have any authority to address the issue of consent to medical testing.

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[14] *Kuk* and *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[15] See, for instance, *Kuk* at para 39 and also *Cecchetto*, at para 32.

[42] I am not satisfied that the Claimant has an arguable case that the General Division failed to apply *Hopp v Lepp*

Is there an arguable case that the General Division ignored some of the evidence?

[43] The Claimant argues that the General Division ignored evidence of his employer's and the Commission's criminal wrongdoing. He notes that the General Division did not mention the transcripts and other documents. He says they prove his allegations against his employer. He did not specify what these other documents are, but the hearing file includes the following:

- Notice of Appeal at the General Division - the Claimant pointed out that his employer falsified the record of employment. The Claimant says the record of employment should have shown that he was no longer working because of a lockout. He says that he had provided evidence with his Request for Reconsideration that his employer locked him out of his job.[16]

- Three-page letter with the Claimant's Request for Reconsideration - The Claimant explained why the separation from his employment should be treated as a lockout.[17]

- In an email, the Claimant argued that when assessing his Employment Insurance claim, the Commission should have considered his grievance that he filed against his employer, as well as the Digest of Benefit Entitlement Principles.[18]

- Documents relating to the Claimant's grievance against his employer[19] - The Claimant grieved being placed on an administrative leave without pay and being prohibited from continuing to telework. He argued it was discriminatory based on religious affiliation. The documents include an Affidavit sworn on

[16] Notice of Appeal, at GD 2-5.
[17] Request for Reconsideration, at GD 3-43 to 3-47.
[18] Claimant's email dated January 26, 2023, at GD 7-1.
[19] Document, at GD 9-1 to GD 9-150.

> November 16, 2021. The Claimant signed an affidavit in which he swore that he has a sincerely held religious belief.[20]

[44] A decision-maker is not required to refer to all of the evidence before it. It is generally assumed that they consider all of the evidence.

[45] In this case, the General Division referred to much of this evidence and the Claimant's arguments. For instance, at paragraph 57, it noted that the Claimant gave evidence that the "Commission colluded with his employer to improperly amend his Record of Employment" and that the "benefits officer refused to accept relevant documentation from him (namely a copy of his sworn affidavit and information about the grievance that he had filed)."

[46] The General Division stated that it considered the Claimant's allegations of improper amendments and inaccurate records. Ultimately, it found that the Claimant's arguments relating to his grievance and request for religious accommodation irrelevant to the misconduct question. Determining whether there has been misconduct under the *Employment Insurance Act* has its own test and set of requirements, different from determining whether discrimination has occurred.

[47] The General Division addressed the issue about whether the Claimant's employer locked or suspended him from his job. The General Division noted the Claimant's arguments that the employer and the Commission had colluded to improperly amend the record of employment.

[48] Ultimately, the General Division determined that the record of employment—irrespective of what it said—was not conclusive proof of a suspension, lockout, or other. The General Division, quite properly, did not decide that there was a suspension or leave of absence on the basis of the record of employment. For that matter, the Claimant's three-page letter with arguments also was not conclusive proof.

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[20] Affidavit, at GD 9-20 to 21 (and GD 9-47 to 48, 9-50 to 51 and 9-65 to 66).

[49] Rather, the General Division had to examine the circumstances that led to the Claimant's separation from his employment. But the dispute was not factual or evidentiary. Indeed, the Claimant did not dispute that his employer placed him on an unpaid leave of absence. However, he argued that that amounted to a lockout.

[50] I am not satisfied that the Claimant has an arguable case that the General Division ignored some of the evidence. The General Division did not ignore the evidence before it. However, it found that the evidence either was not conclusive proof (of a lockout) or it found the evidence (relating to the grievance and the Claimant's request for a religious accommodation) simply irrelevant to the misconduct question.

Conclusion

[51] I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division