Citation: *CT v Canada Employment Insurance Commission*, 2023 SST 1765

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. T.
Representative:	C. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 3, 2023 (GE-23-1686)

Tribunal member:	Janet Lew
Decision date:	December 8, 2023
File number:	AD-23-994

Decision

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

Overview

[2] The Applicant, C. T. (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 Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant was suspended from his job because of misconduct. In other words, it found that he had done something that caused him to be suspended. The Claimant had not complied 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 denies that he committed any misconduct. He argues that the General Division member made procedural, jurisdictional, legal, and factual errors.

[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.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[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.

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[1] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] 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."

Issues

[8] The issues are as follows:

a) Is there an arguable case that the General Division process was unfair?

b) Is there an arguable case that the General Division exceeded its jurisdiction?

c) Is there an arguable case that the General Division misinterpreted what misconduct means?

d) Is there an arguable case that the General Division made important factual errors?

I am not giving the Claimant permission to appeal

[9] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[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.[4]

The Claimant does not have an arguable case that the General Division process was unfair

[11] The Claimant does not have an arguable case that the General Division process was unfair. The Claimant argues that the General Division process was unfair. But he does not identify anything unfair about the actual process itself, such as whether he might have failed to receive full disclosure of documents on a timely basis, or failed to

[3] See section 58(1) of the DESD Act.
[4] See section 58(1)(c) of the DESD Act.

get adequate notice of a hearing. He also does not say that he did not know the case that he had to meet, or that he did not somehow get a fair chance to present his case.

[12] As far as I can determine, the Claimant received all of the file materials on a timely basis. He received adequate notice of the hearing. He had to have known the case he had to meet as the Commission fully set out its position. There is no indication either that the General Division did not give the Claimant a fair hearing or a reasonable chance to present his case. I am not satisfied that there is an arguable case that the General Division process was unfair.

[13] The Claimant says that the General Division acted unfairly by overlooking some of the evidence and by failing to follow binding case law. Those are not typically procedural matters. I will address those arguments under the headings of errors of law and fact.

The Claimant does not have an arguable case that the General Division exceeded its jurisdiction

[14] The Claimant does not have an arguable case that the General Division exceeded its jurisdiction and made a legal error. The Claimant argues that the General Division overstepped its jurisdiction and made a legal error at paragraph 32. There, the General Division wrote:

> I find that the Commission has proven that there was misconduct. The Appellant knew what he had to do under the COVID-19 vaccination policy and what would happen if he didn't follow it. It is well established that a deliberate violation of the employer's policy is considered misconduct under the EI Act. The Appellant made a personal and deliberate choice to not follow the employer's COVID-19 vaccination policy.

[15] Essentially, the Claimant says that the General Division did not have any authority to question and deny that he held any religious beliefs. He says that the General Division member effectively did this by finding that he, "made a personal and deliberate choice."

[16] In this regard, the Claimant argues that the General Division also made a legal error by not following the Supreme Court of Canada's decisions, including *Syndicat Northcrest v Amselem v Syndicat*.[5] He says that the Supreme Court has established that the exercise of religious freedoms is enshrined in the *Canadian Charter of Rights and Freedoms*. The Court in that case also held that, "it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held."[6]

[17] In fact, the General Division was not questioning the Claimant's religious beliefs, or somehow making any findings one way or the other about whether the Claimant sincerely held any religious beliefs. The Claimant's beliefs simply were not relevant to determining whether he had committed any misconduct.

[18] The General Division was concerned about whether the Claimant consciously, deliberately, or intentionally chose not to follow his employer's vaccination policy. That way, it could decide whether the Claimant had committed any misconduct. It was irrelevant to the General Division whether the Claimant did not abide by his employer's policy because of religious or other reasons. The fact that the General Division wrote that the Claimant "made a personal and deliberate choice" in no way suggested that the Claimant did not hold religious beliefs.

[19] Even so, the Claimant denies that he was able to choose whether to comply with his employer's policy. He says that because of his religious beliefs, he felt that he did not have any choice about vaccination.

[20] The Claimant felt that his religious beliefs prevented him from being able to make a choice about getting vaccinated. But, as the General Division pointed out, misconduct is defined as being conduct that is conscious, deliberate, or intentional. It can also include conduct that is so reckless that it is almost wilful. As long as the Claimant was conscious about his conduct and of the consequences that could result from non-

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[5] See *Syndicat Northcrest v* Amselem, 2004 SCC 47. For a complete list of the Claimant's decisions that he is relying on, see his Application to the Appeal Division, at AD 1-24, at para 5.
[6] See *Syndicat Northcrest*, at para 53.

compliance, that would have been sufficient to meet the test for misconduct—even if he felt constrained by his religious beliefs.

[21] I am not satisfied that there is an arguable case that the General Division overstepped its jurisdiction and decided something that it did not have the authority to decide. The General Division simply did not consider whether the Claimant held religious beliefs when it considered whether the Claimant had committed any misconduct.

The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means

[22] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means for the purposes of the *Employment Insurance Act*.

– Misconduct does not require wrongdoing

[23] The Claimant denies that he committed any misconduct. He argues that the General Division misinterpreted what misconduct means.

[24] The Claimant says that misconduct involves serious wrongdoing, whether intentional or not. He denies that he did anything wrong. He says that he was simply exercising his rights and following his religious beliefs. He says that when one is exercising their human rights, that is never misconduct.[7]

[25] The Claimant distinguishes the cases that the General Division cited in finding misconduct. He says that each of those cases involved an employee who did something wrong, such as violating an employer's drug policies, or being frequently absent from work. He denies that he committed any wrongdoing.

[26] The courts have defined what misconduct means for the purposes of the *Employment Insurance Act*. In a case called *Tucker*,[8] the Federal Court of Appeal

[7] See Claimant's Application to the Appeal Division, at AD 1-31, para 16.
[8] *Canada (Attorney General) v Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 FCA 329, at para 4.

examined misconduct under the *Employment Insurance Act*. The majority of the Court agreed that misconduct involves an element of wilfulness. The courts have not required that there be an element of wrongdoing.

[27] The General Division defined misconduct as follows:

> Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law. [Citation omitted]
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> There is misconduct if the Appellant 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 or suspended because of that. [Citation omitted][9]

[28] The General Division adopted the definition of misconduct from several Federal Court of Appeal decisions. The General Division's interpretation of misconduct under the *Employment Insurance Act* is consistent not only with these decisions, but also with *Tucker*.

[29] The General Division did not misinterpret what misconduct means. It accepted that an employee's conduct has to be wilful. There does not have to be wrongdoing.

[30] The Appeal Division has examined this issue. As it set out in *A.L.*,[10] there are many cases where claimants were found guilty of misconduct even though they were doing "no more than engaging in a legal activity or exercising a legal right." The Appeal Division cited some examples, as follows:

- An employee of a Métis settlement was found to have committed misconduct after expressing disagreement with council salaries on social media and posting a bylaw amendment online (information that was already public).[11]

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[9] See General Division decision, at paras 20 and 21.
[10] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[11] See *T.T. v Canada Employment Insurance Commission*, 2023 SST 81.

- A kitchen cabinetry finisher was found to have committed misconduct after taking her phone into a washroom, in violation of a policy explicitly prohibiting such behaviour.[12]

- A machine operator was found to have committed misconduct after disobeying an order from his boss to stop wearing a face mask emblazoned with a Confederate flag (he argued that it was a symbol of pride not hate).[13]

[31] There are some parallels in the Claimant's case to a recent decision issued by the B.C. Hospital Board,[14] although that case does not deal with Employment Insurance claims. Dr. Theresa Szezepaniak sought an exemption from vaccination but the hospital where she worked did not grant her one. The hospital cancelled Dr. Szezepaniak's hospital privileges, so she was unable to work. She argued that the hospital should have respected her exercise of her *Charter* rights.

[32] The Hospital Board wrote:

> The implication is that in order to respect her decision [the hospital] must not take any steps that hold the Appellant accountable for the consequences of that decision. Having the right to make a decision, and your right to do so acknowledged, or respected, is not the same as being held responsible for the consequences. [The hospital] has not challenged the Appellant's right to decline the COVID-19 vaccination or the beliefs that led her to that decision. [The hospital] has, however, held the Appellant accountable for the foreseeable consequences of her decision which adversely impacted [the hospital]. In doing so [the hospital] has not disrespected the Appellant's right to make a health care decision or exercise her *Charter* rights.

[33] That is the situation here. The Claimant says his religious beliefs should be accepted and respected. But he is conflating his right to make a health care decision or to practise his religious beliefs with an entitlement to Employment Insurance benefits, without appreciating that there are consequences with exercising one's rights.

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[12] See *C.S. v Canada Employment Insurance Commission*, 2017 STADEI 406.
[13] See *M.T. v Canada Employment Insurance Commission*, 2021 SST 506.
[14] See *Dr. Theresa Szezepaniak v Interior Health Authority*, 2023 BCHAB 5 (CanLII) at para 98.

[34] I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means by not requiring that there be wrongdoing.

– **Misconduct can arise even if a policy lies outside an employee's employment contract**

[35] The General Division did not have to consider the Claimant`s employment contract when assessing whether there was any misconduct. An employer's policies do not have to form part of the original employment contract for there to be misconduct.

[36] The Claimant suggests that the General Division should have looked at his employment contract to determine whether vaccination was required. If his employment contract did not require vaccination, then he argues that his actions could not be viewed as misconduct.

[37] However, it has become well established that an employer's policies do not have to form part of the employment contract for there to be misconduct. The following cases also show this:

- In a recent case called *Matti*, the Federal Court determined that it was unnecessary for the employer's vaccination policy to be in the initial agreement, as "misconduct can be assessed in relation to policies that arise after the employment relationship begins."[15]

- In *Kuk*,[16] the appellant 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 the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Federal Court found that there was misconduct 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.

[15] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[16] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

- In *Lemire*,[17] the Court of Appeal found that there was misconduct even though Mr. Lemire had not breached any terms of his employment contract. He sold contraband cigarettes on his employer's work premises. He had breached a policy that was not part of his employment contract. This is confirmed where the Court wrote, "… The employer has a policy on this matter… The claimant was aware of the policy."[18] The Court of Appeal referred to the policy again, at paragraphs 17, 18, and 20. The Court noted that the employer had a policy that Mr. Lemire chose to disregard.

- In *Nelson*,[19] the appellant lost her job because of misconduct. The case did not involve vaccination. Ms. Nelson 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 found that there was misconduct. It was irrelevant that the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *Nguyen,*[20] the Federal Court of Appeal found that there was misconduct. Mr. Nguyen had 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 his employment agreement.

- In *Karelia*,[21] 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 Federal Court of Appeal determined that Mr. Karelia had to comply with them—even if the conditions were new—otherwise there was misconduct.

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[17] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[18] See *Lemire, at para 3.*
[19] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[20] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[21] See *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.

[38] In addition to *Matti* and *Kuk*, two other decisions address the misconduct issue. These two decisions are in the context of vaccination policies. In *Cecchetto*[22] and in *Milovac*,[23] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[39] I am not satisfied that there is an arguable case that the General Division failed to consider the Claimant's employment contract. It did not matter that his employment contract did not require vaccination.

– **Misconduct can arise even if an employer changes the terms and conditions of the employment contract**

[40] The General Division did not have to consider whether the Claimant`s employer was allowed to unilaterally change the terms and conditions of the Claimant`s employment by introducing new policies.

[41] The Claimant argues that his employer could not change the terms and conditions of his employment contract. So, if his employment contract did not require vaccination, he would not have to get vaccinated. On top of that, he says that he did not have, "[any] reason to think he would be suspended"[24] for not complying with a policy that did not form part of his employment contract. He argues that misconduct did not arise under these circumstances.

[42] However, this issue simply was not relevant to the General Division's determination of whether the Claimant had committed any misconduct. As I have noted above, the issue regarding the Claimant's employment contract was an irrelevant consideration. An employer may introduce new policies. Those policies do not have to be part of the original employment contract for misconduct to arise, even if an employee disagrees with the new policies and believes he does not have to comply with them.

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[22] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[23] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[24] See Claimant's Application to the Appeal Division, at AD 1-35, para 22.

[43] I am not satisfied that there is an arguable case that the General Division failed to consider whether the Claimant's employer was allowed to unilaterally change the terms and conditions of his employment. It was an irrelevant issue.

– **The legality or reasonableness of an employer's vaccination policy is not relevant to the misconduct question**

[44] The General Division did not have to consider whether the employer's vaccination policy was unlawful or unreasonable.

[45] The Claimant argues that his employer's vaccination policy was unlawful. He argues that because the policy was unlawful, he did not have to comply with it.

[46] However, arguments about the legality and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has held that the General Division and the Appeal Division do not have the authority to address these types of arguments. In *Cecchetto*, the Court wrote:

> As noted earlier, it is likely that the Applicant [Cecchetto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
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> The SST-GD [Social Security Tribunal-General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."…
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> **Despite the Claimant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of [the vaccination policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SSTGD**. [Citation omitted][25]
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> (my emphasis)

[25] See *Cecchetto*, at paras 46 to 48.

[47] Recently, the Federal Court has held that the General Division and Appeal Division, "are not the appropriate fora to determine whether the [employer's vaccination] policy or [the employee's] termination were reasonable."[26]

[48] I am not satisfied that there is an arguable case that the General Division failed to consider the legality or reasonableness of the Claimant's employer's vaccination policy.

– **Misconduct can arise even if an employer does not accommodate an employee**

[49] The General Division did not have to consider whether the Claimant`s employer could have accommodated the Claimant.

[50] The Claimant argues that the General Division failed to consider whether his employer should have accommodated him or given him an exemption, by providing options or alternatives to vaccination. If his employer had accommodated him or given him an exemption, the General Division would have found that he had been compliant with his employer's vaccination policy.

[51] I find that the General Division did not fail to consider this issue because an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[27]

The Claimant does not have an arguable case that the General Division made important factual errors

[52] The Claimant does not have an arguable case that the General Division made important factual errors. The Claimant says that the General Division overlooked some of the evidence, but some of it was irrelevant, and some of it does not support what the Claimant says it does, or the General Division did not base its decision on that evidence.

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[26] See *Davidson v Canada (Attorney Genera)*, 2023 1555 at para 77.
[27] See *Kuk*, at para 36, citing *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 14.

[53] Besides, a decision-maker is not required to refer to all of the evidence before it, unless it is of such significance that it could affect the outcome. A decision-maker is presumed to have considered all of the evidence. As the Federal Court has held, a decision-maker expresses only the most important factual findings and justifications for them.[28]

– **Record of employment**

[54] The Claimant argues that the General Division overlooked his Record of Employment or did not give it appropriate weight. The employer stated that it issued the Record of Employment due to "Other" reasons.[29] The Claimant says that if his employer had suspended him it would have given a different explanation for issuing the Record. He says the General Division should have accepted his employer's characterization of his separation from his employment. In other words, he says that the separation from his employment should not be characterized as misconduct.

[55] The General Division did not refer to the Record of Employment in assessing whether misconduct took place. However, that does not mean that the General Division overlooked this evidence, as neither the Record of Employment nor the employer's characterization of the separation are determinative of whether misconduct occurred.

[56] As the Federal Court of Appeal has held, one must determine the real cause of a claimant's separation from their employment.[30] This involves examining all of the evidence surrounding a claimant's separation. That way, one can properly characterize what happened. In the *Stavropoulos* case, the Court held that it was for the General Division to determine whether the matter before it concerned a dismissal for misconduct or whether the applicant had voluntarily left his employment without just cause.

[57] As for the issue of the weight that the General Division assigned to the evidence, that is not a ground of appeal. As the trier of fact, the General Division is in the best

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[28] *Canada v South Yukon Forest Corporation*, 2012 FCA 165.
[29] See Box 16 on the Records of Employment dated January 28, 2022 (GD 3-16), April 9, 2022 (GD 3-18), and April 22, 2022 (GD 3-20).
[30] See *Stavropoulos v Canada (Attorney General)*, 2020 FCA 109.

position to assess and weigh the evidence. The Appeal Division defers to the General Division on issues of weight. As the courts have consistently held, the issue of weight is a matter for the trier of fact.[31]

[58] I am not satisfied that there is an arguable case that the General Division made a factual error in overlooking the Record of Employment, or in how it weighed the evidence. One presumes that it considered the Record of Employment. But the Record alone was not determinative of whether the Claimant was separated from his employment for reasons other than a suspension.

– **Paragraphs 8 and 39 of the General Division decision**

[59] The Claimant argues that the General Division misapprehended the evidence. It found that the Claimant had a matter before the Ontario Labour Board (OLB). The Claimant denies that he has a matter before the OLB. As a federal government employee, he says that he is waiting for a hearing with the Federal Sector Labour Relations Board.

[60] Even if the General Division misstated the evidence, I am not satisfied that the Claimant has an arguable case on this point. Nothing turned on this point. It was not relevant to the misconduct question. The General Division did not base its decision on which administrative tribunal the Claimant has an active claim, so I am not satisfied that there is an arguable case on this point.

– **Paragraphs 16 and 17**

[61] The Claimant argues that the General Division misstated the evidence at paragraphs 16 and 17. He says that the General Division found that he had refused to comply with his employer's vaccination policy. The Claimant denies that he refused to comply. He maintains "that he could not comply without violating his sincerely held religious beliefs; he was not unwilling or refusing to comply."[32]

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[31] See, for instance, *Hussein v Canada (Attorney General)*, 2016 FC 1417 and *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[32]See Claimant's Application to the Appeal Division, at AD 1-29, para 14.

[62] In fact, the General Division wrote that the "Commission says that the [Claimant] was suspended from his job because he refused to comply with the employer's COVID-19 vaccination policy."[33] The General Division then found that the parties agreed that the reason the Claimant was suspended from his job was because he did not comply with the employer's COVID-19 vaccination policy.[34]

[63] The General Division did not state that the Claimant refused to comply. It was simply restating the Commission's arguments. At most, the General Division stated that the Claimant did not comply with the employer's vaccination policy. However, it is clear that the General Division agreed with the Commission that the Claimant refused to comply. After all, it found that the Claimant's conduct was wilful, in that it found that his conduct was conscious, deliberate, or intentional.

[64] The Claimant says he could not comply because of his religious beliefs. While this explains his non-compliance, that does not mean that his conduct was not conscious. The Claimant was certainly aware of what he was doing. So, the General Division was entitled to conclude that the Claimant's conduct was wilful, and hence, that he refused to comply. I am not satisfied that there is an arguable case on this point.

– **Paragraphs 20 to 23, inclusive**

[65] The Claimant argues that the General Division made both legal and factual errors at paragraphs 20 to 23, inclusive.

[66] I have reproduced paragraphs 20 and 21 above. The General Division set out the definitions for misconduct in these paragraphs. The General Division also determined that the burden of proof to prove misconduct lay with the Commission. The General Division also set out its role and the scope of its powers when assessing misconduct.

[67] The General Division did not make any findings on the evidence within any of these paragraphs. Therefore, the General Division did not make any factual errors. I am

[33] See General Division decision, at para 16.
[34] See General Division decision, at para 17.

not satisfied that the Claimant has an arguable case that the General Division made any factual error in these paragraphs.

– **Findings that the Claimant acted wilfully**

[68] The Claimant argues that the General Division made a factual error in finding that he had acted wilfully in not complying with his employer's vaccination policy. He denies that he acted wilfully. He says that he did not act wilfully because he had a good reason not to comply with his employer's vaccination policy.[35]

[69] The Claimant's arguments actually deal with a legal issue. He is essentially saying that the General Division misinterpreted what wilful conduct means.

[70] The General Division noted the definition for wilful conduct: The conduct has to be conscious, deliberate, or intentional. The General Division referred to the case of *Mishibinijima*.[36] In that case, the applicant argued that his conduct was not wilful because he did not intend and was unable to control his actions because of an alcohol dependency.

[71] The Court of Appeal rejected this argument. It said that conduct is wilful if the acts were conscious, deliberate, or intentional, or "put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of his duties owed to his employer and that, as a result, dismissal was a real possibility."[37]

[72] As I noted above, the Claimant's act was conscious, in that he was aware of what he was doing, and what the consequences were (even if he disagrees that those consequences should have applied to him). Given the evidence before it that the Claimant was conscious of his conduct, the General Division was entitled to conclude

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[35] The Claimant wrote, "The reason for his non-compliance (belief it would lead to eternal damnation of his soul) proves it was not a wilful decision and thus was not misconduct." See Claimant's Application to the Appeal Division, at AD 1-31, para 16.
[36] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[37] See *Mishibinijima*, at para 14.

that the Claimant had acted wilfully. I am not satisfied that there is an arguable case on this point.

Conclusion

[73] The appeal does not have 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