Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1325

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 12, 2023 (GE-22-3120)

Tribunal member:	Solange Losier
Decision date:	October 4, 2023
File number:	AD-23-432

Decision

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

Overview

[2] J. B. is the Claimant in this case. He worked as an auditor. When he stopped working, he applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that he could not get EI regular benefits from January 23, 2022, because he was suspended from his job due to his own misconduct.[1]

[4] The General Division came to the same conclusion.[2] It determined that he was suspended from work due to his own misconduct. It said that he knew or should have known the consequences of not following the employer's Covid-19 vaccination policy.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] He argues that the General Division made an error of jurisdiction, error of law, an important error of fact and didn't follow procedural fairness when it decided the issue of misconduct.[4]

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.[5]

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[1] See initial decision at page GD3-43 and reconsideration decision at page GD3-82.
[2] See General Division decision at pages AD1-11 to AD1-18.
[3] See application to the Appeal Division at pages AD1-1 to AD1-10.
[4] See page AD1-3.
[5] See section 58(2) of the *Department of Employment and Social Development* (DESD Act).

Issue

[7] Is there an arguable case that the General Division made a reviewable error when it decided the issue of misconduct?

Analysis

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.[6]

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

[10] The possible grounds of appeal to the Appeal Division are that the General Division:[8]

- 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.

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

I am not giving the Claimant permission to appeal

[12] An error law happens 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.[9]

[13] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.[10]

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[6] See section 56(1) of the DESD Act.
[7] See section 58(2) of the DESD Act.
[8] See section 58(1) of the DESD Act.
[9] See section 58(1)(b) of the DESD Act.
[10] See section 58(1)(a) of the DESD Act.

– The legal test for proving misconduct

[14] The General Division had to decide whether the Commission had proven that the Claimant was suspended due to misconduct according to the EI Act.

[15] The law says that a Claimant who is suspended because of misconduct is not entitled to receive EI benefits.[11] This is called a disentitlement.

[16] The law also says that a Claimant who loses their job due to misconduct is disqualified from receiving EI benefits.[12]

[17] Misconduct is not defined in the EI Act. The Federal Court of Appeal (Court) defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[13]

[18] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty owed to the employer and that dismissal (or suspension in this case) was a real possibility.[14]

– The General Division decided that the Claimant was suspended from his job due to misconduct

[19] The General Division found that the employer's vaccination policy required employees to be vaccinated unless they had an accommodation to the policy.[15] It said that the Claimant's request for religious accommodation was denied by the employer.[16]

[20] The General Division decided that the Claimant was aware of the vaccination policy, the deadline to comply and knew or should have known the consequences for not following it.[17]

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[11] See section 31 of the EI Act.
[12] See section 30(1) of the EI Act.
[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[14] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[15] See paragraph 31 of the General Division decision.
[16] See paragraph 26 of the General Division decision.
[17] See paragraph 31 of the General Division decision.

[21] The General Division decided that the Claimant's actions deliberately went against the employer's vaccination policy and led to his suspension.[18]

– There is no arguable case that the General Division made an error of jurisdiction or error of law

[22] The General Division found that it did not have the authority to consider how the employer behaved.[19] It said that it had to focus on what the Claimant did or failed to do and whether that amounts to misconduct according to the EI Act.

[23] The General Division said that it could not make any decisions about whether the Claimant had other options under other laws.[20] This included making determinations on whether the Claimant was wrongfully dismissed or whether the employer should have made other reasonable accommodations for him.

[24] Specifically, the Claimant argues in his Appeal Division application that the General Division erred when it said that it could only focus on the employee's actions and not the employer's actions. He relies on section 30 of the EI Act and section 64(1) of the DESD. He says that the law doesn't limit reviewing misconduct solely on the employee's actions and the Tribunal has the authority to decide any question of fact or law that is necessary for the disposition of the application.

[25] It is not arguable that the General Division made an error of jurisdiction or error of law for the following reasons.

[26] First, the General Division relied on the relevant section of the law.[21] It properly stated and applied the legal test for misconduct based on the EI Act.[22] It only considered the issues it was allowed to consider and did not make any decisions about issues it had no power to decide.

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[18] See paragraph 35 of the General Division decision.
[19] See paragraph 18 of the General Division decision.
[20] See paragraph 19 of the General Division decision.
[21] See paragraph 8 of the General Division decision.
[22] See paragraphs 15-20 of the General Division decision.

[27] Second, the Court has provided a definition of misconduct as set out in various cases involving EI benefits.[23] The decisions from the Court say that the Tribunal has to focus on the employee's conduct, not the employer's conduct. The General Division cannot ignore binding decisions from the Court.

[28] Third, the General Division's conclusion was consistent with binding case law from the Court. It relied on relevant case law that defines misconduct, including recent decisions that are similar and involve other claimants who were suspended and/or dismissed for not complying with Covid-19 vaccination policies.

[29] Specifically, the General Division referred to both the *Paradis* and *McNamara* decisions from the Court to support its conclusions.[24]

[30] 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 EI Act.[25] It is a matter for another forum.

[31] The Court said in *McNamara* 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:[26]

> …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.

[32] The General Division also referred to the *Cecchetto* decision from the Court.[27] The *Cecchetto* decision involved similar facts and a Covid-19 vaccination policy imposed by the employer. He was suspended and dismissed for misconduct because he didn't comply

[23] See *Kuk v Canada (Attorney General),* 2023 FC 1134.
[24] See paragraphs 18 and 19 of the General Division decision.
[25] See *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraph 34.
[26] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.
[27] See paragraph 33 of the General Division decision.

with the employer's vaccination policy. Because of that, he was not entitled to EI benefits. 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.

[33] There are other recent Court decisions as well. In a decision called *Kuk,* the Court said that the only relevant decision before the General Division was whether the Claimant knew that his voluntary decision not to get vaccinated might result in consequences for not following it.[28] It said that the Tribunal is not obligated to focus on contractual language or determine if a Claimant was unjustifiably dismissed under labour principles when it is considering misconduct under the EI Act.[29]

[34] In the *Milovac* decision, the Court confirms that a claimant who is aware of the employer's vaccination policy and the consequences that result from refusing to comply is misconduct and that decision has not been shown to be unreasonable.[30]

[35] This means that misconduct will be found when a Claimant is aware of the vaccination policy and intentionally commits an act or fails to commit an act that is contrary to their employment obligations and knew or ought to have known it would lead to consequences, such as suspension or dismissal.

[36] So, it is not arguable that the General Division made an error of law or error of jurisdiction when it decided the issue of misconduct.[31] Misconduct in the context of EI is not about what an employer does or does not do. Even though the Claimant alleges the employer did not follow its own policy and procedures, EI is not meant to correct

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[28] See *Kuk v Canada (Attorney General),* 2023 FC 1134, at paragraph 27.
[29] See paragraph 37 of the General Division decision.
[30] See *Milovac v Canada (Attorney General),* 2023 FC 1120, at paragraph 29.
[31] See sections 58(1)(a) and 58(1)(b) of the DESD Act.

workplace wrongs because it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct of employers. There are other legal avenues for the Claimant to pursue if he believes the employer's vaccination policy breached or violated any of his rights.

[37] There is no reasonable chance of success on either of these grounds.

– There is no arguable case that the General Division made an important error of fact

[38] 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".[32]

[39] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:

- 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?

[40] Not all errors of fact will allow me to 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.

[41] The Claimant argues that the General Division relied on hearsay evidence because the Commission spoke to an employee and not someone involved in the decision-making process at his workplace.

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

[42] There was evidence before the General Division that the Commission spoke to the employer, specifically, the Human Resources representative, as well as a manager.[33] The notes show the following was discussed:

- The Claimant knew about the policy
- He was in violation of the employer's policy
- He was suspended from his job and put on an unpaid leave on January 18, 2022
- He filed a grievance
- His exemption was denied
- He can return to work at any time when he is vaccinated
- He has since returned to work

[43] It is not arguable that the General Division made an important error of fact for the following reasons.

[44] First, the General Division can accept hearsay evidence. Hearsay evidence is any statement, either written or oral, which was made before the hearing, but is presented to the General Division to prove the truth of that statement. The General Division is not bound by the strict rules of evidence that might be applicable in other courts.

[45] Second, the General Division was free to weigh the evidence and make the findings it did. The evidence supports that the Claimant knew about the policy, did not have an approved accommodation or exemption from the employers and did not comply with the requirement to be vaccinated for Covid-19 by the deadline. This resulted in his suspension from his job for non-compliance.

[33] See pages GD3-23 to GD3-24 and GD3-79.

[46] The Claimant argues that the General Division ignored that there were two ways to compliance. He says he met the requirements for Group B (he also refers to it as "Path B") because he asked for a religious accommodation. He also says his employer admitted he had a sincere religious belief during a meeting but denied his request.

[47] The policy provides for accommodation on a case-by-case basis, and it says that the employer along with labour relations will determine if the duty to accommodate applies or does not apply.[34] This suggests that not every accommodation requested will be approved, but rather it is assessed on case-by-case basis.

[48] The evidence shows that the Claimant's request for accommodation was denied by the employer in writing and that he was given time to comply with the policy.[35] The Claimant testified at the General Division hearing that his employer denied his accommodation request.[36] This is consistent with the General Division's findings that the employer denied his accommodation request, so he was not exempt from the policy.[37]

[49] The General Division didn't ignore the Claimant's testimony about his employer admitting he had a sincere religious belief during their meeting. It specifically referred to that evidence in its decision.[38] However, the General Division had already decided that it could not determine whether the employer should have made reasonable accommodations for the Claimant and relied on binding case law from the Court.[39]

[50] The Claimant's arguments on this ground are focused on the employer's conduct and how they applied the policy in relation to his religious accommodation request. The fact remains that the Claimant did not have an approved religious accommodation from his employer. This means he was not exempt from the policy, and he was still obligated to comply with the policy.

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[34] See pages GD2-68 to GD2-78; GD3-31 to GD3-42.
[35] See pages GD2-40 to GD2-41.
[36] See hearing recording at 15:32 to 15:43.
[37] See paragraphs 25-28 of the General Division decision.
[38] See paragraph 27 of the General Division decision.
[39] See paragraph 19 of the General Division decision.

[51] This is consistent with the General Division's findings that he was aware of the policy, did not comply with it and knew the consequences of non-compliance. In other words, he went against the employer's policy when he wasn't vaccinated for Covid-19 by the deadline, and this led to his suspension on January 19, 2022.

[52] So, it is not arguable that the General Division made an important error of fact.[40] It did not ignore or misunderstand the evidence. There is no reasonable chance of success on this ground.

– **There is no arguable case that the General Division didn`t follow procedural fairness**

[53] The right to a fair hearing before the Tribunal includes certain procedural protections such as the right to an unbiased decision maker. It also includes the right of a party to know the case against them and to be given an opportunity to respond to it.

[54] It is not arguable that the General Division didn't follow a fair process for the following reasons.

[55] The Claimant says that the process was not fair because the claim was limited to what he did. He argues that this principle assumes that the employer is always acting ethically and correctly. He had to violate his own religious beliefs which was contrary to the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*.[41]

[56] As noted above, the General Division has to follow binding case law from the Court. The Court has already said that it is the conduct of the employee that matters, not the employer. There are other ways that the Claimant can pursue his claims against the employer.

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[40] See section 58(1)(c) of the DESD Act.
[41] See *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

[57] The Claimant says that paragraph 13 of the General Division decision is unfounded and appears to be biased because he did not go against his employer's policy.

[58] Paragraph 13 of the General Division decision says:

> I find that it is undisputed that the Appellant lost his job because he went against his employer's vaccination policy.

[59] Bias is concerned with a decision maker who does not approach the decision-making with an open mind. An allegation of bias is a serious allegation. The law says that an allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[42]

[60] The legal test for establishing bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the General Division member, whether consciously or unconsciously, would not decide the case in a fair manner.[43]

[61] The General Division's conclusion in paragraph 13 that the Claimant went against his [employer's] vaccination policy was consistent with the evidence that he wasn't vaccinated for Covid-19 by the deadline set out by the employer.

[62] I also listened to the audio recording of the General Division hearing. The recording shows that the Claimant had a full opportunity to present his case. The Member asked him questions about his case. There is no evidence that the Member did not approach the decision-making in a fair manner or had prejudged the case.

[63] So, there is no arguable case that the General Division breached procedural fairness.[44] A disagreement with the result reached by the General Division is insufficient to amount to bias. There is no reasonable chance of success on this ground.

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[42] See *Arthur v Canada (A.G.),* 2001 FCA 223.
[43] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).
[44] See section 58(1)(a) of the DESD Act.

Conclusion

[64] In addition to the Claimant's arguments, I reviewed the entire record, the General Division decision and listened to the audio recording. I am satisfied the General Division did not overlook or misconstrue any key evidence when it decided the Claimant was suspended from his job due to misconduct.[45]

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

Solange Losier
Member, Appeal Division

[45] See *Karadeolian v Canada (Attorney General),* 2016 FC 615, which recommends doing such a review.