Citation: *ES v Canada Employment Insurance Commission*, 2023 SST 1665

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 1, 2023 (GE-22-3040)

Tribunal member:	Janet Lew
Decision date:	November 22, 2023
File number:	AD-23-336

Decision

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

Overview

[2] The Applicant, E. S. (Claimant), is seeking permission to appeal the General Division decision.

[3] The General Division dismissed the Claimant's appeal. It found that the Respondent, the Canada Employment Insurance Commission (Commission) had proven that the Claimant was suspended from her job because of misconduct. In other words, it found that she had done something that caused her to be suspended.[1] The General Division found that the Claimant had not complied with her 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 she committed any misconduct. She argues that the General Division made procedural, jurisdictional, legal, and factual errors when it determined that she had committed misconduct.

[6] Before the Claimant can move ahead with her 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]

[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 her appeal.

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[1] The Claimant has resumed working since June 2022.
[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] Under section 58(2) of the *Department of Employment and Social Development Act* (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 failed to observe the principles of natural justice?

(b) Is there an arguable case that the General Division made a jurisdictional error?

(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 an important mistake about any of the facts?

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 or if the Claimant lacks an arguable case. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or a certain type of factual error.[4]

[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.

The Claimant does not have an arguable case that the General Division failed to observe the principles of natural justice

– The Claimant does not have an arguable case that she did not receive full disclosure of documents

[11] The Claimant argues the General Division failed to observe the principles of natural justice by not ensuring that she had copies of the Commission's internal

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

guidelines.[5] These documents related to the Claimant's request for a religious accommodation from her employer's vaccination requirements. She says that the Commission based its initial and reconsideration decision on these documents.

[12] Procedural fairness means the parties are aware of the case that they have to meet, in terms of knowing what the evidence is and what the law requires. This requires disclosure of relevant documents.

[13] The Social Security Tribunal (Tribunal) does not have any control over any documents that the Commission might have in its possession although, from time to time, members will ask the Commission or the parties to provide relevant documents that are clearly missing and should form part of the evidentiary record.

[14] At the outset, once a claimant files an appeal, the Tribunal routinely asks the Commission to provide a copy of its documents that are relevant to the decision being appealed, among other things.[6] The Tribunal in turn produces a copy of these documents to the parties. This is what happened in this case.

[15] The Claimant argues that the Commission's internal guidelines were relevant to the misconduct issue. She says they were important to determining whether any misconduct occurred.

[16] I do not readily see that the Claimant sought production of these documents from the General Division (as opposed to from the Commission). Certainly, there are no written requests made to the General Division or any applications filed with the Tribunal for an order that the Commission produce a copy of its policies relating to misconduct. Or, if she did, it was not apparent in the submissions that accompanied her Notice of Appeal.

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[5] The Claimant refers to the Commission's internal guidelines as policy documents. To distinguish the Commission's policy documents from the employer's vaccination policy, and to avoid any confusion, I will refer to the Commission's policy documents as its internal guidelines.
[6] See section 30 of the *Social Security Tribunal Regulations*, SOR/2013-60.

[17] At most, the Claimant says in her application to the Appeal Division that she "requested this guidance document from the EI officers at the time and expressly referred to it in my Notice of Appeal to the SST."[7] But, requesting documents from the Commission (before even filing an application with the Tribunal) is altogether distinct from seeking disclosure of documents through the Tribunal.

[18] As it is, referring to the fact that the Claimant discussed or may have requested documents from the Commission's agents falls short of making an actual request that the General Division "order" production of these documents.

[19] If the Claimant had sought production of these documents at the General Division, she should have made a formal request or an application to the General Division. That way, the General Division could have considered and addressed her request.

[20] Even so, any internal guidelines that the Commission might have had in guiding its own position were not relevant to the General Division's analysis as to whether the Claimant was suspended from her employment because of misconduct.

[21] As the General Division set out, it had to examine whether the Claimant wilfully did not follow her employer's policy and was aware of the consequences that could result. The General Division found that the Commission's internal policies did not factor into this equation.

[22] The General Division was not bound by and did not base its decision on any aspects of the Commission's internal guidelines. The General Division noted that it had to focus on the Claimant's actions leading to her suspension. The General Division appropriately determined that the Claimant's arguments about the Commission's internal guidelines related to an issue that fell outside the scope of its analysis. For this reason, the Claimant does not have an arguable case that she did not receive full disclosure of documents.

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[7] See Application to the Appeal Division: Employment Insurance, at AD 1-13.

– **The Claimant does not have an arguable case that the General Division was biased and lacked independence**

[23] The Claimant argues that the General Division member was necessarily biased because the "[Social Security Tribunal] reports to the Minister of Employment, Workforce Development and Disability Inclusion."[8] She says that the General Division's failure to provide copies of the Commission's internal guidelines establishes bias.

[24] The Tribunal does report to the Minister of Employment, Workforce Development and Disability Inclusion, but only in terms of reporting its progress. The Social Security Tribunal remains an independent organization. It is not part of Service Canada, the Canada Employment Insurance Commission, or Employment and Social Development Canada.

[25] The Social Security Tribunal is an independent administrative tribunal. Members of both the General Division and Appeal Division are fully independent and impartial decision-makers. Members do not work for or report to the Department or to any of the Ministers. No one can tell or pressure a member how to decide an appeal. Members independently come to their own decisions, without any influence from the Minister, other politicians, the Commission, Employment and Social Development Canada, the Chairperson or any Vice-Chairpersons of the Tribunal, the Tribunal's Legal Services team, or even other Tribunal members.

[26] As an independent decision-maker, generally the General Division does not play any role in identifying and obtaining relevant documents on behalf of the parties (although if it is obvious that relevant documents are missing and are vital to making a decision, General Division members typically will ask the parties to produce those documents).

[27] The parties are expected to produce all relevant documents, though in the case of the Commission, the Tribunal asked it to provide copies of its documents under section 30 of the *Social Security Tribunal Regulations*.[9] Under that section, the

[8] See Claimant's arguments, at AD 1-14.
[9] *Social Security Tribunal Regulations*, SOR/2013-60.

Commission was required to file, among other things, the documents in its possession that were relevant to the decision being appealed.

[28] If the Tribunal or the General Division had received but, for some reason, had intentionally withheld any of the Commission's documents without disclosing them to the Claimant, that would have been another matter. But, as it stands, I do not see any evidence of this. The Tribunal released copies of all the documents that it received to the parties.

[29] In *Committee for Justice and Liberty et al. v National Energy Board et al*., the Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion at the Federal Court of Appeal:

> [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."[10]

[30] The threshold for meeting this test is high. There is no evidentiary support for the Claimant's allegations of bias to meet this test.

[31] I am not satisfied that there is an arguable case that the General Division member lacked independence or was somehow biased against the Claimant.

The Claimant does not have an arguable case that the General Division failed to exercise its jurisdiction

– The Claimant does not have an arguable case that the General Division failed to require the Commission to provide detailed reasons in its reconsideration decision

[32] The Claimant argues that the General Division failed to require the Commission to provide sufficient reasons in its reconsideration decision. The Claimant says the

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

General Division had to compel the Commission to provide reasons that "satisf[ied] the burden of proof for their denial of benefits."[11]

[33] The Commission could have provided more expansive reasons. Doubtless, this could have helped the Claimant understand how the Commission determined that she had committed misconduct.

[34] But the General Division does not have any jurisdiction to compel the Commission to explain its initial or reconsideration decisions. That simply is not part of its role as an independent decision-maker.

[35] The Claimant argues that the General Division should have required the Commission to fully address the cases of *Astolfi*[12] and *Lemire*[13] in its written representations to the General Division. The General Division also does not have any jurisdiction in dictating how a party presents its case or arguments. The Commission has the sole discretion in choosing how it presents its submissions, and in deciding whether to respond to any of the Claimant's arguments.

[36] I am not satisfied that the Claimant has an arguable case on this point.

– **The Claimant does not have an arguable case that the General Division did not consider the Commission's internal documents**

[37] The Claimant argues that the General Division failed to exercise its jurisdiction by not considering that the Commission had denied her application for benefits on the basis of internal guidelines that she says are discriminatory.

[38] For the reasons that I have set out above, the General Division was not bound by any decisions that the Commission made, nor by any internal guidelines upon which the Commission made its decisions. Apart from that, as the General Division identified, this issue simply was not relevant to the misconduct question. As a result, the General Division did not have to address this issue. For this reason, I find that the Claimant does

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[11] See Claimant's arguments, at AD 1-14.
[12] *Astolfi v Canada (Attorney General)*, 2020 FC 30.
[13] *Canada (Attorney General) v Lemire*, 2010 FCA 314.

not have an arguable case that the General Division failed to consider the Commission's internal documents.

– The Claimant does not have an arguable case that the General Division did not consider the Claimant's collective agreement

[39] The Claimant argues that the General Division failed to exercise its jurisdiction by not examining her collective agreement.

[40] The General Division could not have been expected to consider the Claimant's collective agreement if it did not form part of the evidence. But, for the purposes of considering the Claimant's argument, I will set aside the fact that the General Division file did not include a copy of the Claimant's collective agreement.

[41] The Claimant says that the Federal Court of Appeal in *Lemire* established that, for misconduct to arise for the purposes of the *Employment Insurance Act*, the conduct must "constitute a breach of an express or implied duty resulting from the contract of employment." She says that the General Division had to look at her collective agreement in employment contract to determine whether she owed a duty to her employer to get vaccinated. If not, then she argues that her actions could not be viewed as misconduct.

[42] However, the facts in *Lemire* clearly involved the breach of an employer's policy, rather than of the respondent Lemire's employment contract. For instance, the summary of facts reads, "… The employer has a policy on this matter … The claimant was aware of the policy."[14] The Court of Appeal referred to the policy again, at paragraphs 17, 18 and 20. The Court noted that the employer had a policy with which Mr. Lemire chose to disregard.

[14] See *Lemire*, at para 3.

[43] There are other cases that show that an employer's policies do not have to form part of the employment agreement for there to be misconduct:

- In *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 Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The 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.

- In *Nelson*,[17] 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 found 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*[18] (which was referred to in the *Lemire* decision), the Federal 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*,[19] 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 they were new— otherwise there was misconduct.

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[15] *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[16] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[17] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[18] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[19] See *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.

[44] In addition to *Matti* and *Kuk*, the courts have issued two other decisions that address the misconduct issue in the context of vaccination policies. In *Cecchetto*[20] and in *Milovac*,[21] vaccination was not part of the appellant's collective agreement or contract of employment. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[45] So, contrary to the Claimant's arguments, the General Division did not have to examine her collective agreement or employment contract. 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.[22]

[46] Because the Claimant's collective agreement was irrelevant to determining whether there was misconduct, I am not satisfied that there is an arguable case that the General Division failed to examine the collective agreement. Besides, the General Division did not have a copy of the collective agreement to examine.

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

– The Claimant does not have an arguable case that the General Division failed to consider whether the Claimant's collective agreement required vaccination before it could find that there was any misconduct

[47] The Claimant argues that for misconduct to arise, there has to be a breach of the collective agreement or employment contract. She says that her employment contract did not require vaccination. Therefore, she denies that she could have breached her employment contract when she chose not to undergo vaccination.

[48] The Claimant's arguments that the General Division made a legal error overlap with her arguments that the General Division failed to exercise its jurisdiction.

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[20] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[21] *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[22] See *Kuk* and also *Cecchetto*.

[49] The Claimant relies on *Lemire* and on *A.L.*,[23] a decision of the General Division. I have already addressed the Claimant's arguments on *Lemire* above.

[50] In *A.L.*, the General Division found that there was no misconduct because the employer had unilaterally imposed new conditions of employment when it introduced its vaccination policy. The General Division also found that Ms. A.L. had a right to refuse vaccination. So, if she had this right, the General Division questioned how that could be characterized as having done something "wrong" that it could support a finding of misconduct.

[51] The Claimant argues that the General Division should have reviewed her employment contract. She says that the employment contract was relevant to determining whether she breached any of her duties. She denies that misconduct arose if she did not breach any duties under her employment contract.

[52] The Appeal Division has since overturned the General Division's decision in *A.L.*[24] The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract. The Appeal Division also found that the General Division made legal errors, including declaring that an employer could not impose new conditions to the collective agreement and that there was no misconduct if there is no breach of the employment contract.[25]

[53] As I have noted above, an employer's policies do not have to form part of the employment agreement for there to be misconduct. In other words, misconduct can arise when an employee wilfully disregards an employer's policy, knowing what consequences could flow.

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[23] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, at paras 29 to 31 and 75 to 76.
[24] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[25] A.L. is now appealing the Appeal Division's decision of *A.L.* to the Federal Court of Appeal (file number A-217-23).

[54] I am not satisfied that there is an arguable case that the General Division failed to refer to the Claimant's collective agreement before it could decide whether misconduct arose.

– The Claimant does not have an arguable case that the General Division failed to consider her employer's conduct before it could find misconduct

[55] The Claimant argues that the General Division failed to consider her employer's conduct. She says her employer's conduct was relevant to determining whether she had committed misconduct.

[56] The Claimant says that she was entitled to a religious accommodation. However, her employer denied her request. She says her employer wrongfully denied her an accommodation. She says the denial was contrary to her employer's vaccination policy, a directive on the duty to accommodate, other policy instruments, and the *Canadian Human Rights Act* (CHRA).

[57] The Claimant says that her case closely resembles *Astolfi*.[26] In that case, Mr. Astolfi refused to attend work because of workplace harassment and concerns for his safety. The Commission found that Mr. Astolfi's refusal to attend work constituted misconduct, without considering the employer's harassment.

[58] In other words, the Commission found the employer's harassment irrelevant. The General Division and Appeal Division agreed. But the Federal Court of Appeal found that the employer's conduct was in fact relevant.

[59] Based on *Astolfi*, an employer's conduct that may have led to an employee's "misconduct" may be relevant to deciding whether that employee had in fact engaged in misconduct.

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[26] Cited above. See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

[60] The Claimant argues that the General Division should have considered her employer's conduct. This included:

- Her employer's failure to consider the evidence that she had provided with her accommodation request. She says the evidence documented her need for accommodation on religious grounds.
- Her employer's failure to apply the proper test as to whether she should be accommodated.
- Her employer's failure to discharge its duty to accommodate her.

[61] The Claimant says that if her employer had given her a religious accommodation, she would not have been in non-compliance with her employer's vaccination policy.

[62] However, if the Claimant's employer had indeed failed to appropriately accommodate the Claimant, her remedies (including any damages) lie elsewhere. It is beyond the Tribunal's jurisdiction to decide a claimant's entitlement to any accommodation, as the Federal Court of Appeal set out in *Mishibinijima*.[27]

[63] The Claimant points out that there are significant factual differences between her case and *Mishibinijima* (as well as other "accommodation" cases upon which the General Division relied). She says those cases involve claimants who introduced substances into their bodies against their employers' policies, whereas, she says her employer required her to put something into her body.

[64] But, while there are factual differences between the Claimant's case and *Mishibinijima*, that does not somehow thereby confer any authority on the General Division or the Appeal Division to decide the Claimant's entitlement to a religious accommodation under the CHRA. So, *Astolfi* does not apply in the circumstances of this case.

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[27] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[65] I am not satisfied that there is an arguable case that the General Division failed to follow or apply *Astolfi*.

– The Claimant does not have an arguable case that the General Division did not consider whether the Commission failed to uphold human rights legislation

[66] The Claimant argues that the Commission discriminated against her under the CHRA in determining her entitlement to Employment Insurance benefits. She says that the Commission should have considered that her religious beliefs entitled her to an accommodation. She says that human rights legislation is paramount when it conflicts with the *Employment Insurance Act*.

[67] The Commission's application of internal guidelines was not relevant to the General Division's determination as to whether the Claimant had committed misconduct under the *Employment Insurance Act*.

[68] On top of that, the General Division and the Appeal Division do not have any jurisdiction to determine whether the Claimant was entitled to a religious accommodation under human rights legislation. The Claimant's remedies, if any, lie elsewhere.

[69] The Claimant argues that the Commission failed to uphold human rights legislation. But under section 58(1) of the *Department of Employment and Social Development Act*, the Appeal Division is necessarily concerned with any errors by the General Division – not the Commission.

[70] So, I am not satisfied that the Claimant has an arguable case that the General Division failed to consider whether the Commission failed to uphold human rights legislation.

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

[71] The Claimant argues the General Division overlooked important evidence, including the following:

a. Her employer's conduct, which she says led to the misconduct.

b. She was unable to take a COVID-19 vaccine because of her religious beliefs, that she complied with her employer's policy framework for requesting an accommodation, and that her employer denied her request.

c. Her employer placed her on an administrative leave of absence. Her employer did not treat her absence as a disciplinary matter.

d. Her conduct did not interfere with her ability to fulfill her work responsibilities. Since March 2020, she had teleworked without any contact with others.

[72] A decision-maker is not required to refer to all of the evidence before it unless it is of some probative value. A decision-maker is presumed to have considered all of the evidence. As the Federal Court of Appeal has held, a decision-maker expresses only the most important factual findings and justifications for them.[28]

[73] I have addressed the issues regarding the employer's conduct and the Claimant's request for a religious accommodation above.

[74] As for the fact that the Claimant's employer characterized the Claimant's separation from her employment as an administrative leave, as the General Division explained,[29] it considered a suspension, leave of absence, and an unpaid leave to mean the same thing.

[75] The General Division has to examine the evidence through the lens of the *Employment Insurance Act*. So, although the Claimant and her employer characterized

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[28] *Canada v South Yukon Forest Corporation*, 2012 FCA 165.
[29] See General Division decision, at para 2, footnote 1.

the separation as an “administrative leave of absence,” the General Division found that, under the *Employment Insurance Act*, this meant the same thing as a suspension. In other words, it did not overlook the employer’s characterization of the separation.

[76] As for the Claimant’s arguments that she was able to perform her work responsibilities without having to undergo vaccination, the General Division determined that the Claimant’s work obligations extended beyond her original job description of duties. The General Division determined that her work obligations evolved and that she had to comply with the requirements under her employer’s vaccination policy.

[77] I am not satisfied that the Claimant has an arguable case that the General Division made any factual errors by either overlooking or misconstruing any of the evidence.

Conclusion

[78] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not proceed.

Janet Lew
Member, Appeal Division