Citation: *JW v Canada Employment Insurance Commission*, 2024 SST 109

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated October 13, 2023 (GE-23-2127)

Tribunal member:	Janet Lew
Decision date:	February 6, 2024
File number:	AD-23-1007

Decision

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

Overview

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

[3] The General Division decided that the Claimant was disqualified from receiving Employment Insurance benefits. This was because it found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant lost his job because of misconduct. In other words, it found that he had done something that caused him to lose his job. It found that the Claimant did not have a clean criminal record.

[4] The Claimant denies that he committed any misconduct. He argues that the General Division member made procedural, legal, and factual errors, including applying the wrong legal test to determine whether misconduct occurred. He also says that there was no objective evidence to support the General Division's findings. He also says that the General Division member committed multiple procedural errors.

[5] 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]

[6] 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 the 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

[7] The issues are as follows:

a) Is there an arguable case that the General Division failed to give the Claimant a fair hearing?

b) Is there an arguable case that the General Division failed to provide full disclosure of documents to the Claimant?

c) Is there an arguable case that the General Division was biased or that there was a reasonable apprehension of bias?

d) Is there an arguable case that the General Division failed to apply contract law principles?

e) Is there an arguable case that the General Division failed to apply the B.C. *Law and Equity Act*?

f) Is there an arguable case that the General Division applied the wrong legal test to determine whether misconduct occurred?

g) Is there an arguable case that the General Division made findings of fact without any supporting objective evidence?

I am not giving the Claimant permission to appeal

[8] 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]

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

[9] For these types of 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 failed to give the Claimant a fair hearing

[10] The Claimant does not have an arguable case that the General Division failed to give him a fair hearing. The Claimant says that the General Division did not give him enough time to allow him to present his case. He says the General Division limited him to one hour to make his case when he could have used considerably more time.

[11] The Social Security Tribunal gave a Notice of Hearing to the parties. The Tribunal let the parties know that the hearing could take up to 60 minutes. So, this should not have taken any of the parties by surprise. They had the opportunity to prepare for a 60-minute hearing.

[12] Although the hearing was scheduled for 60 minutes, I note that the hearing went beyond this schedule timeframe, by approximately 12 minutes. So, it was not limited to 60 minutes. More importantly, the Claimant told the General Division member that he had completed his submissions. After giving evidence and arguments, he said, “All right. That’s it for my submissions.”[5]

[13] Following this, the General Division member asked the Claimant whether the Claimant had anything else to say. The Claimant responded that he did not have anything else to present.

[14] The General Division member’s questions and the Claimant’s responses are as follows:

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[4] See section 58(1)(c) of the DESD Act.
[5] At approximately 54:35 of the audio recording of the General Division hearing.

> Q: Is there anything else that you think I need to know that you haven't already told the Commission or that you haven't presented today in your argument?
>
> A: No, that's it.[6]

[15] And a few minutes after that:

> Q: Is there anything else then that you haven't already told me or that you wish to present new arguments?
>
> A: I just believe that the Commission hasn't met the balance of probabilities in my case because I believe they haven't proved impairment of my duties and they haven't proved that I couldn't say, work from home, for example. And they haven't proved that I breached an express or implied duty resulting from my contract of employment and the contingent-upon clause, the [employer] waived that when they had me working for 23 months without a clear criminal record check.
>
> Q: Anything else then?
>
> A: No, that's it.[7]

[16] Given the Claimant's failure to object to the scheduling or allotment of time, his lack of any request for additional time, and his responses at the hearing, the General Division could reasonably conclude that the Claimant had a full and fair opportunity to present his case.

[17] On top of that, the parties were not limited to giving evidence and making arguments at the hearing. The Tribunal also let the parties file any documents to support their respective cases.

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[6] At approximately 1:00:04 to 1:00:23 of the audio recording of the General Division hearing
[7] At approximately1:07:39 to 1:08:42 of the audio recording of the General Division hearing.

[18] For these reasons, I am not satisfied that there is an arguable case that the Claimant did not get a fair hearing or that the process was somehow unfair, such that he was unable to fully present his case.

The Claimant does not have an arguable case that the General Division failed to provide full disclosure of documents

[19] The Claimant does not have an arguable case that the General Division failed to provide full disclosure of documents to him.

[20] The Claimant argues that he did not have any of the documents that the General Division referred to at paragraph 22. There, the General Division wrote that the Claimant's criminal record check showed that he had a criminal record from offences committed in 2008 and November 2022. The Claimant suggests that one can infer from this that the General Division had a copy of his criminal record check.

[21] While one could interpret the General Division's reference to a criminal record check to mean that it had a copy, more likely than not the General Division was simply setting out what it understood the criminal record check contained, in terms of the Claimant's history of offences, based on the information that the employer provided to the Commission.

[22] The hearing file does not include the Claimant's actual criminal record check. It is clear that a criminal record check did not form part of the hearing file. The Claimant's employer did not produce a copy of the criminal record check. Indeed, the employer told the Commission that the provincial Criminal Records program sent an email on February 14, 2023. But, the employer also said that the email did not provide any details of the Claimant's criminal record.[8]

[23] So, if anything, the General Division misstated the employer's statements to the Commission. The employer did not have any details of any offences that the Claimant

[8] See Supplementary Record of Claim dated March 21, 2023, at GD 3-23.

committed. As the employer stated, the criminal record check "didn't give ... detail of the crimes, just that it was sexual abuse to vulnerable adults."[9]

[24] At most, the General Division should have written that, according to the Claimant's employer, it had received notice that the Claimant did not have a clear criminal record. This would have been consistent with the employer's statements. Although the hearing file did not include a copy of the criminal record check, the employer had referred to it and described the outcome. This would have sufficed.

[25] As for the General Division's reference to the offences that the Claimant committed in 2008 and November 22, 2022, this evidence came directly from the Claimant.

[26] The Claimant spoke with the Commission and disclosed that he had a prior offence in 2008.[10] If, as the Claimant states, he had received a conditional discharge, fulfilled the conditions, and subsequently had his record cleared in 2011, then the 2008 offence may not have appeared in the criminal record check. Indeed, the employer mentioned only the November 2022 arrest. [11]

[27] However, the Claimant testified that he had committed and was charged with another offence in November 2022. The Claimant pled guilty to the charge.[12]

[28] I do not find that anything turns on the General Division's characterization of the evidence. The general thrust of the General Division's summary of that evidence was accurate. After all, there was evidence to support the General Division's findings that the Claimant did not have a clear criminal record. There was also evidence (primarily from the Claimant) that he had committed offences in 2008 and in 2022.

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[9] See Supplementary Record of Claim dated March 21, 2023, at GD 3-23.
[10] See Supplementary Record of Claim dated June 13, 2023, at GD 3-68.
[11] See Supplementary Record of Claim dated March 21, 2023, at GD 3-23.
[12] An outstanding charge relating to a relevant offence or specified offence will also appear on a criminal record check. See section 4 of the B.C. *Criminal Records Review Act*.

[29] My review of the hearing file also indicates that the Social Security Tribunal provided both parties with a copy of all records that it received. So, there is no arguable case that the General Division failed to provide full disclosure of documents.

The Claimant does not have an arguable case that the General Division member was biased or that there was a reasonable apprehension of bias

[30] The Claimant does not have an arguable case that the General Division member was biased against him or that there was a reasonable apprehension of bias. The Claimant says that the member was biased against him because she stated that it was, "deemed that he presented a serious risk to vulnerable adults based on his criminal history."[13] He suggests that it was excessive to mention this 11 times in the decision.

[31] The courts have considered when bias arises or when there is an apprehension of bias.

[32] In a case called *Murphy*,[14] the Federal Court reviewed the case law on the issue of bias. The Court noted that bias is a very serious allegation and that there is a strong presumption of impartiality that cannot be easily rebutted. The Court noted the test set out in *Committee for Justice and Liberty et al. v National Energy Board et al*., in determining whether there is actual bias or a reasonable apprehension of bias. There, the Supreme Court of Canada determined that:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude."[15]

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[13] See Claimant's arguments at AD1-2 to 1-3, citing GD 3-61.
[14] See *Murphy v Canada (Attorney General)*, 2023 FC 57.
[15] See *Committee for Justice and Liberty et al. v National Energy Board et al*., 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at pages 394 and 395.

[33] The Federal Court then reviewed the test set out by the Federal Court of Appeal in *Firsov*.[16] The test is whether:

> an informed person, viewing the matter realistically and practically—and having thought the matter through—…[would] think it is more likely than not that the ([decision-maker], whether consciously or unconsciously, would not decide fairly [citation omitted]

[34] In assessing whether there was misconduct, the General Division had to examine the following:

- the terms and conditions of the Claimant's employment,
- whether he fulfilled the conditions of his employment, and
- whether he was aware of the consequences if he did not meet the conditions of his employment.

[35] The Claimant's employer determined that the Claimant did not meet the conditions of employment because he did not have a clean criminal record and because he was "deemed to present a serious risk to vulnerable adults based on [his] criminal history."[17] The Claimant's employer dismissed him for this reason. The employer served a vulnerable population.

[36] So, the General Division had to necessarily examine what led to the Claimant's dismissal from his employment. This involved examining the issue surrounding the Claimant's criminal records history and what it represented.

[37] The General Division determined that the Claimant's criminal record was central to the issue of whether he had committed any misconduct for the purposes of the *Employment Insurance Act*. This was because it found that the Claimant's employer required a clean criminal record check as a condition of the Claimant's employment.

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[16] See *Firsov v Canada (Attorney General)*, 2022 FCA 191.
[17] See employer's letter dated February 14, 2023, terminating the Claimant's employment, at GD 3-61.

[38] The General Division found that a criminal record check showed that the Claimant had committed criminal offences and was deemed a serious risk to vulnerable adults. So, he did not meet one of the conditions of his employment.

[39] If the issue of the Claimant's criminal record check was irrelevant to the Claimant's dismissal, then the General Division would have had no basis to refer to it, let alone discuss the issue. But because the Claimant's dismissal was so rooted in his criminal record check, it was unavoidable for the General Division to have to address the Claimant's criminal record check and whether it meant that he had failed to meet one of the conditions of his employment.

[40] As I have noted above, there was evidence to support the General Division's findings that the Claimant has a criminal record. The Claimant's employer reported this to the Commission and the Claimant subsequently confirmed that he had committed offences.

[41] There was also evidence from the employer that the Claimant was deemed to present a serious risk to vulnerable adults based on his criminal history. The General Division's language was based on the employer's letter of February 14, 2023.[18]

[42] Given these considerations, the test for bias or a reasonable apprehension of bias has not been met. An informed person, viewing the matter realistically and practically—and having thought the matter through—would not think it more likely than not that the General Division member would not decide fairly. The member had to discuss the Claimant's criminal record check and what it represented because that was the basis upon which the employer dismissed the Claimant from his employment.

[43] I am not satisfied that there is an arguable case that the member was biased or that there was a reasonable apprehension of bias.

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[18] See employer's letter dated February 14, 2023, terminating the Claimant's employment, at GD 3-61.

The Claimant does not have an arguable case that the General Division failed to apply contract law principles

[44] The Claimant does not have an arguable case that the General Division failed to apply contract law principles. The Claimant says the General Division should have applied the doctrine of waivers and *contra proferentem* rule from contract law. However, this was simply beyond the jurisdiction or scope of authority of the General Division.

[45] The Claimant says that his employer could not dismiss him on the basis that he was required to have a clean criminal record check, for two reasons:

i. The doctrine of waivers – the Claimant says that, as he had already been working for 23 months for this employer, there was a waiver of the condition precedent that required him to have a clear criminal record check, and

ii. The *contra proferentum* rule – the Claimant says that his offer of employment[19] contained ambiguous requirements. His employer was responsible for drafting the letter. So, he says that, where there is any ambiguity, the letter should be construed against the employer and interpreted in his favour.

[46] The offer of employment reads:

> Please note that this job offer is contingent upon [the employer] receiving evidence prior to your start date of a clear chest x-ray or negative TB test, along with medical clearance indicating your fitness to perform the duties of the position. Your employment is also contingent upon a clear Criminal Record Check so please contact Human Resources to make arrangements for processing your application.[20]

[47] The Claimant says the condition that he have a clear Criminal Record Check could be interpreted two ways: (1) that the job offer was contingent upon a clear criminal record check, or (2) his employment was conditional on having an ongoing clear check.

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[19] See Terms and Conditions of Employment, at GD 2-14 to 2-29, and employer's offer of employment dated March 22, 2021, at GD 2-32 and GD 3-66.
[20] See employer's offer of employment dated March 22, 2021, at GD 2-32 and GD 3-66.

[48] Either way, he says neither interpretation was enforceable against him. In the first interpretation, he says the doctrine of waivers apply. He says the job offer clearly was not contingent upon a clear criminal record check because he had already been working for 23 months. And, he says the second interpretation could be not enforceable either because of the *contra proferentum* rule.

[49] The Claimant is essentially saying that his employer wrongfully dismissed him. But, as the General Court of Appeal held in *Sullivan*,[21] the Social Security Tribunal cannot delve into whether a claimant's dismissal was proper.

[50] Similarly, the Federal Court also found in *Kuk* that the "Tribunal is not obligated to focus on contractual language or determine if a claimant was dismissed justifiably under labour law principles when it is considering misconduct under the EIA [Employment Insurance Act]."[22] The Court stated that the misconduct test focuses on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.

[51] In other words, the General Division did not have any authority to apply any contract law principles.

[52] I am not satisfied that there is an arguable case that the General Division failed to apply contract law principles when determining whether the Claimant had committed misconduct.

The Claimant does not have an arguable case that the General Division failed to apply the *Law and Equity Act*

[53] The Claimant does not have an arguable case that the General Division failed to apply the B.C. *Law and Equity Act*. The General Division simply does not have the jurisdiction or authority to provide any relief under the *Law and Equity Act*.

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[21] See *Sullivan v Canada (Attorney General)*, 2024 FCA 7.
[22] See Kuk v Canada (Attorney General), 2023 FC 1134.

[54] The Claimant says the B.C. *Law and Equity Act* apply in his case. He is seeking equitable relief. In particular, he says that he should be relieved of his employer's requirements that he have a clean criminal record. In other words, he says that the General Division should have waived the condition that he have a clean criminal record check. After all, he says that he worked for 23 months before the issue of his criminal record check became an issue for the employer.

[55] The General Division is a federal statutory creature that derives its powers from statute. It does not have any powers to grant equitable relief, particularly under a provincial statute. The Claimant has not provided any supporting legal authorities to show otherwise. I am not satisfied that the General Division failed to apply the *Law and Equity Act*.

The Claimant does not have an arguable case that the General Division applied the wrong legal test to determine whether misconduct occurred

[56] The Claimant does not have an arguable case that the General Division applied the wrong legal test to determine whether misconduct occurred.

– *Mishibinijima*[23] set out the test for misconduct

[57] The General Division wrote:

> [18] 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 there was a real possibility of being let go because of that. [Reference to *Mishibinjima* decision.] [My emphasis]

[58] The Claimant notes that the actual citation from the Federal Court of Appeal reads:

> [14] Thus, there will be misconduct where the conduct of the claimant was wilful, i.e., in the sense that the acts which led to the dismissal were conscious, deliberate, or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that **his conduct was such as to impair**

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

> **the performance of the duties** owed to his employer and that, as a result, dismissal was a real possibility. [My emphasis]

[59] The Claimant says that there is a significant distinction between the definition set out by the Federal Court of Appeal and the General Division's understanding of that definition from the same case. He says that the actual test requires showing that there is an impairment in the performance of duties. He says that this is a much higher threshold to prove misconduct.

[60] There may well be a distinction between the two definitions, however subtle. But, the difference is entirely academic in this case because the General Division ultimately applied the higher or stricter "*Mishibinijima*" standard.

[61] The General Division determined that the Claimant did not have a clear criminal record and that, according to the Deputy Registrar, the Claimant was deemed to present a serious risk to vulnerable adults based on his criminal history. Because he did not have a clear criminal record, he did not meet one of the conditions of his employment, namely, that he have a clear criminal record check.

[62] In other words, the General Division found that in fact the Claimant's conduct "was such as to impair the performance of the duties owed to his employer." In other words, even if the General Division did not fully and accurately quote the Federal Court of Appeal, it applied the test that the Claimant says it should have.

[63] I am not satisfied that there is an arguable case that the General Division applied the wrong legal test to determine whether misconduct occurred.

– **Impairment of duties**

[64] The Claimant also says that the General Division failed to show how his conduct impaired the performance of the duties that he owed to his employer.

[65] The Claimant says the duties that he owed to his employer were set out in the job description. He says that his job description did not say anything about working with or serving a vulnerable community. He says any interactions with such members were

limited. He also says that, despite the criminal charges, he fulfilled the duties required of him for close to two years. He notes that even his employer said that there were no issues with his performance.[24]

[66] The Claimant is essentially saying that his employment contract and job description set out all the duties that he owed to his employer. However, it is well established that an employer's policies and requirements do not have to be in the employment contract or job description for there to be misconduct. As long as an employer has a policy or requirement—whether express or implied—an employee will be expected to comply with that policy.

[67] For instance, claimants in the string of COVD-19 vaccination cases argued that they should not have to get vaccinated.[25] Their employers required vaccination. Claimants argued that the requirement to get vaccinated was not contained in either their employment contracts or job descriptions.

[68] These claimants, all working within a wide range of industries, argued that they were still able to fulfill their duties even if they were not vaccinated. Even so, the courts found that there had been misconduct when the employees did not comply with their employer's vaccination policies that were not part of the original employment contract or job description.

[69] Here, the Claimant's job description may not have required the Claimant to have a clear criminal record. But, as the General Division determined, the Claimant's employer required him to have a clear criminal record. This was set out as a condition of his employment and was clearly spelled out in the employment offer.

[70] I am not satisfied that there is an arguable case that the General Division failed to show how the Claimant's conduct impaired the performance of the duties he owed to

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[24] See Supplementary Record of Claim dated March 21, 2023, at GD 3-23.
[25] See, for instance, *Matti v Canada (Attorney General)*, 2023 FC 1527, *Kuk v Canada (Attorney General)*, 2023 FC 1134, Cecchetto v Canada (Attorney General), 2023 FC 102, and *Milovac v Canada (Attorney General)*, 2023 FC 1120.

his employer. The General Division explained how the Claimant failed to meet one of the conditions of his employment.

– **Accommodation**

[71] The Claimant says that his employer could have accommodated him if there had been any issues over his criminal record check. For instance, he could have performed his duties under supervision. Or, he could have worked remotely.

[72] The General Division did not have to consider whether the Claimant's employer could have accommodated him. The Federal Court of Appeal has determined that the issue of an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[26]

The Claimant does not have an arguable case that the General Division made errors of fact

[73] The Claimant does not have an arguable case that the General Division made important factual errors. Nothing turned on some of that evidence, or there was supporting evidence to support the General Division's findings.

[74] The Claimant says that the General Division overlooked some of the evidence, or based its decision on an erroneous finding that it made in a perverse or capricious manner or without regard for the material before it. In other words, he says the evidence does not support the General Division's findings.

– **The Claimant says there was no objective evidence that dismissal was a real possibility**

[75] For misconduct to occur, a claimant knew or should have known that his conduct could lead to dismissal or to a suspension. The Claimant denies that he could have foreseen that dismissal was a real possibility. He argues that there was no objective evidence that showed that he knew or should have known that his employer could dismiss him if he did not have a clear criminal record.

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[26] See Mishibinijima, at para 14.

[76] The Claimant argues that he could have not known that he faced dismissal because:

a. He had already been working for close to two years. So, he thought his employer accepted his conduct or tolerated any criminal history he had or would have.[27]

b. His employer did not state that it would dismiss him if a criminal record check disclosed that he had a criminal records history.

c. the *B.C. Criminal Records Review Act* does not say an employee can lose their employment.

d. Section 13(1)(b) of the B.C. *Human Rights Code* says that a person must not discriminate against a person regarding employment or any term or condition of employment because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment of that person.[28]

[77] The General Division found that the evidence did not show that the Claimant's employer tolerated his criminal record or that the Claimant "committed the actions in plain sight with the knowledge of his supervisors without penalty."[29] The General Division explained how it came to this conclusion:

i. The General Division noted that the Claimant had never disclosed his 2008 criminal record. In other words, the employer was unaware of the Claimant's prior record. The evidence showed that it took a considerable period of time for the Claimant's employer to get a criminal records check. So, it could not possibly have tolerated his conduct if it was unaware of it. And, once the

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[27] The Claimant relies on the case of *Canada (Attorney General) v Gagné*, 2010 FCA 237.
[28] See Claimant's arguments at AD 1-7, citing 13(b) of the B.C. *Human Rights Code*. The section states that a person must not discriminate against the person regarding employment or any term or condition of employment because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment of that person.
[29] See General Division decision, at paras 29 to 34.

employer received the Claimant's criminal record check and learned that he had a record, it immediately dismissed him. This suggested that the employer did not tolerate the Claimant's behaviour.

ii. The General Division noted that the Claimant never told his supervisor the nature of the offence with which he had been charged in November 2022.

iii. The General Division noted that the Claimant did not tell the executive director or R.K. in Human Resources that he had been charged in November 2022. The General Division suggested that this was likely because the Claimant knew that there was a chance the Ministry of Public Safety and Solicitor General would deem him a risk of working with vulnerable adults.[30]

[78] The Claimant does not challenge any of these specific findings.

[79] There was also evidence that showed that it took a considerable period of time before the Ministry of Public Safety and Solicitor General provided the Claimant's employer with the results of a criminal records check.

[80] The General Division concluded that the Claimant knew or was wilfully blind to the fact that having a criminal record would result in his dismissal. This was because had readily admitted that he signed and agreed to the terms of employment. By signing the job offer, he agreed that his employment was contingent on a clear criminal record check. So, he had to have known that if he did not have a clear criminal record, he did not meet the conditions of his employment and that that would result in a dismissal.

[81] The evidence supports the General Division's conclusions. The Claimant signed the offer of employment that he acknowledged and agreed to the terms of employment. The offer clearly states, "your employment is also contingent upon a clear Criminal Record Check so please contact … to make arrangements for processing your

[30] See General Division decision, at para 32, citing 1:04:54 of the audio recording of the General Division hearing.

application."[31] It is clear from this that having a clear criminal record was an ongoing obligation to maintain the Claimant's employment.

[82] Additionally, as the General Division noted, the Claimant had signed a consent to a criminal record check and a Vulnerable sector search.[32] Notably, the signed consent also required the Claimant to report any relevant or specified offence(s) to his employer with a new signed consent to a criminal record check, if he were charged or convicted **subsequent** to the criminal record check authorization. This underscored the fact that the employer served a vulnerable population, and that the Claimant's employment was conditional on maintaining a clear criminal record.

[83] The Claimant cites the *Criminal Records Review Act* and the *Human Rights Code*, but these were irrelevant considerations, given the conditions of the Claimant's employment.

[84] If, as the Claimant suggests, his employer wrongfully dismissed him, the General Division did not have any jurisdiction to address this argument. The issue of a wrongful dismissal is not relevant in the context of the Employment Insurance scheme.

[85] The role of the General Division is narrow. The General Division has to focus on whether the act or omission of an employee amounts to misconduct within the meaning of the *Employment Insurance Act*. The misconduct issue is not concerned with whether an employee was wrongfully dismissed. There are other avenues that employees can pursue for a wrongful dismissal.

[86] I am not satisfied that there is an arguable case that the General Division made a perverse finding that the Claimant could not have known that he faced dismissal for not passing a criminal records check. Having a clear criminal record was a condition of his employment, which he had acknowledged and to which he had agreed.

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[31] See offer of employment, at GD 3-38 to 3-39.
[32] See Employee/Applicant – Consent to a Criminal Record Check Cover Page, at GD 3-59, and Employee/Applicant Consent to a Criminal Record Check, at GD 3-60.

– The Claimant says the General Division made factual errors

[87] The Claimant says the General Division made factual errors. At paragraph 12, the General Division set out the facts which it determined were not in dispute. The Claimant challenges two of these findings.

- The General Division wrote that the Claimant commenced his employment on March 24, 2021, before the employer had received the results of the Claimant's criminal record check. The Claimant says that he actually started his employment on March 16, 2021. He says that he worked for eight days without a contract, a point that he says the General Division overlooked.

  I do not find that anything turns on whether the Claimant commenced his employment on March 24, 2021, or on March 16, 2021. This had no bearing on the misconduct issue.

- The General Division wrote that "the Deputy Registrar advised the employer that the [Claimant] had a criminal record and was deemed to present a serious risk to vulnerable adults based on his criminal history."[33]

  The Claimant says that there is no evidence that the Deputy Registrar communicated this to his employer. He says that this represents speculation and supposition by the employer and likely used as a tactic to discourage the Claimant from pursuing his full entitlements against the employer.

[88] The General Division had to base its decision on the evidence before it, even if some of that evidence was based on hearsay. The hearing file did not include any correspondence from the Deputy Registrar to confirm whether the Claimant had a criminal record and was deemed to present a serious risk to vulnerable adults.

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[33] See General Division decision, at para 12.

[89] But, the employer's notice of termination to the Claimant on February 14, 2023, certainly suggested that it had received this information from the Deputy Registrar. The notice reads:

> As you are aware, your employment with the Employer was conditional upon you having a clear criminal record. Although the Employer submitted a request for your criminal records check at the beginning of your employment, the Employer did not receive a complete response to the request until today. The Deputy Registrar of the Criminal Review Act advised us this morning that you were deemed to present a serious risk to vulnerable adults based on your criminal history. Given we work with a vulnerable population, we have determined that you have failed to satisfy the condition of employment with respect to your criminal record and as a result, your employment is being terminated.[34]

[90] The employer also conveyed this information to the Commission.[35]

[91] So, while there was no firsthand account from the Deputy Registrar, there was evidence from the employer about what communications it had received from the Deputy Registrar. This was hearsay evidence. The General Division is not bound by the strict rules of evidence and can accept hearsay evidence. It was up to the General Division to assess and determine the amount of weight to assign to that evidence.

[92] I am not satisfied that there is an arguable case that the General Division made the factual errors that the Claimant says that it did.

Conclusion

[93] 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

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[34] See employer's letter dated February 14, 2023, terminating the Claimant's employment, at GD 3-61.
[35] See Supplementary Record of Claim with employer, dated March 21, 2023, at GD 3-23 to 3-24.