Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	Joseph Hickey
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 23, 2023 (GE-22-2365)

Tribunal member:	Janet Lew
Decision date:	May 7, 2025
File number:	AD-24-13

Decision

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

Overview

[2] The Applicant, Joseph Hickey (Claimant), is seeking leave to appeal the General Division decision of November 23, 2023.

[3] The General Division determined that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended from his job because of misconduct. He had not complied with his employer's COVID-19 vaccination policy. As a result, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits for the duration that he was suspended.

[4] The Claimant argues that the General Division made legal and factual errors.[1] In particular, he argues that the General Division misinterpreted and thereby incorrectly applied sections 30(1) and 31 of the *Employment Insurance Act*. These sections deal with whether an applicant is disentitled or disqualified from receiving Employment Insurance benefits because of misconduct.

[5] The Claimant also argues that the General Division failed to consider whether his rights under sections 2 and 7 of the *Canadian Charter of Rights and Freedoms* (Charter) were violated. He argues that, as his rights were violated, he should not have been denied Employment Insurance benefits.

---

[1] The Claimant filed a Request for Leave to Appeal the General Division (see AD1-8 and AD1-30 to 44, filed December 23, 2023) and an Amended Application for Leave to Appeal (see AD22-12 to 45, filed September 27, 2024). The Claimant also filed a request for permission to amend his December 23, 2023, application, which I have granted. The arguments are largely similar in both applications. I am not considering the Claimant's arguments in his first application that the General Division applied the legal test for misconduct to the wrong action, as the evidence does not support the Claimant's arguments that his employer suspended him seeking an accommodation from its vaccination policy. The evidence shows that the suspension related to not complying with the employer's vaccination policy.

[6] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success.[2] This is the same thing as having an arguable case. 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 the appeal.

Issues

[8] The Claimant has identified three overarching issues, as follows:

a) Whether there is an arguable case that the General Division failed to apply *Astolfi*,[4]

b) Whether there is an arguable case that the General Division misinterpreted sections 30(1) and 31 of the *Employment Insurance Act* and

c) Whether there is an arguable case that the General Division failed to address whether his rights under sections 2 and 7 of the Charter were violated.

I am not giving the Claimant permission to appeal

[9] Leave to appeal is refused if the Appeal Division is satisfied that the appeal does not have a 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.[5]

---

[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] Under section 58 2) of the *Department of Employment and Social Development* (DESD) *Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."
[4] *Astolfi v Canada (Attorney General)*, 2020 FC 30.
[5] See section 58(1) of the DESD Act.

[10] 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.[6]

The Claimant does not have an arguable case that the General Division failed to apply *Astolfi*

[11] The Claimant does not have an arguable case that the General Division failed to apply *Astolfi*.

[12] The Claimant argues that when assessing whether an employee has committed misconduct, one has to consider the employer's conduct. In the *Astolfi* case, Mr. Astolfi refused to attend at his employer's office because he was concerned about the employer's harassment. He felt that his employer was not offering him a safe work environment. He had been forewarned and was aware of the consequences of refusing to attend at the office. The issue was whether Mr. Astolfi's refusal to attend at his employer's office amounted to misconduct.

[13] The Court noted that Mr. Astolfi's refusal to attend at the workplace was due to his employer's actions before the alleged misconduct occurred. In deciding whether Mr. Astolfi's conduct had been intentional—which was required for a finding of misconduct—the Court determined that there had to be "some consideration of the employer's conduct prior to the 'misconduct.'"[7] In other words, the Court held that there will be occasions when an employer's conduct may be relevant to whether an applicant committed misconduct.

[14] The Claimant says his employer required vaccination against COVID-19. He says that it is well documented and that there is widespread acceptance that COVID vaccines are dangerous and lead to irreversible adverse effects such as permanent disability or even death. The Claimant also argues that his employer's conduct in requiring vaccination and failing to provide him an accommodation for religious,

---

[6] See section 58(1)(c) of the DESD Act.
[7] See *Astolfi* at para 33.

medical, or human rights reasons amounted to violating his constitutionally protected rights.

[15] The Claimant argues that where an employer's demands are harmful, violate Charter or human rights, or involve any criminality, there is no misconduct. For this reason, he asserts that a decision-maker has to consider an employer's conduct and what it requires of an applicant. He says that if the General Division had considered his employer's conduct in his case—requiring vaccination which he says is harmful and violates his Charter and human rights—it would have concluded that he had not committed any misconduct.

[16] The General Division acknowledged the Claimant's arguments regarding *Astolfi*. It accepted the Claimant's arguments that it had to consider the employer's conduct. It wrote:

> [47] I find that the *Astolfi* case means that I have to look at the employer's conduct to see if it might have affected the wilfulness of the Appellant's conduct. In doing so, **I see nothing in the employer's conduct that would lead me to believe that the Appellant's conduct might not have been intentional.** Looking at the employer's conduct in this way isn't the same as looking into the reasonableness of the policy. (My emphasis)

[17] However, based on the facts before it, the General Division found that there was nothing in the employer's conduct that was responsible for the Claimant's decision. The General Division determined that the Claimant had indeed acted deliberately, consciously, and intentionally. In other words, it found that *Astolfi* did not apply on the facts of the case before it.

[18] In a case called *Quadir*, the Federal Court of Appeal determined that "The application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. In the result, the Appeal Division had no jurisdiction to interfere with the General Division decision."[8] The Court of Appeal affirmed this principle in *Garvey*,

[8] See *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9.

though clarified that, where an error of mixed fact and law discloses an extricable legal issue, the Appeal Division may intervene.[9]

[19] As the General Division determined that *Astolfi* did not apply on the facts, essentially, the Claimant is arguing that his conduct was not wilful under *Astolfi*. But that involves a question of mixed fact and law and does not disclose an extricable legal issue. So, the appeal does not have a reasonable chance of success on this point.

[20] About a month after the General Division issued its decision, the Federal Court decided a case that shares some factual similarities to the Claimant's case. In *Abdo*,[10] the employer gave notice of its vaccination policy to Ms. Abdo. The employer also gave her time to comply with the policy. Exemptions were available for religious or medical reasons, although the employer did not grant Ms. Abdo's request for one. As Ms. Abdo did not comply with her employer's policy, she was terminated from her employment for misconduct.

[21] The Federal Court considered *Astolfi* but found that it did not apply. It found that *Astolfi* was distinguishable from Ms. Abdo's case. The Federal Court ruled that the only relevant question for the General Division was whether Ms. Abdo knew that her voluntary decision not to get vaccinated might result in her termination.

[22] It is clear from *Abdo* that *Astolfi* is distinguishable in cases involving an applicant who is found to have consciously and deliberately chosen not to follow an employer's policies. Another distinguishing feature that the Court found in *Abdo* was that the policy imposed obligations on all of its employees, whereas in *Astolfi*, just one employee was targeted.

[23] Although the General Division could not have known how the Federal Court would decide *Abdo*, its decision is consistent with that case. The General Division found that the Claimant chose not to comply with his employer's vaccination policy, even after his employer turned down his request and appeal for a medical, religious, or human

---

[9] See *Garvey v Canada (Attorney General)*, 2018 FCA 181 at paras 8 to 9.
[10] See *Abdo v Canada (Attorney General)*, 2023 FC 1764.

rights accommodation. The General Division described the Claimant's non-compliance as a "deliberate, intentional and wilful act,"[11] one that he knew would get him suspended under the employer's policy.

[24] The General Division considered but found *Astolfi* distinguishable. For the reasons I have described above, the Claimant's arguments do not squarely fall within any of the grounds of appeal under section 58(1) of the *Department of Employment and Social Development Act*. Therefore, I am not satisfied that there is an arguable case that the General Division failed to apply *Astolfi*.

The Claimant does not have an arguable case that the General Division misinterpreted sections 30(1) and 31 of the *Employment Insurance Act*

[25] The Claimant does not have an arguable case that the General Division misinterpreted sections 30(1) and 31 of the *Employment Insurance Act*.

[26] The Claimant argues that the General Division misinterpreted and then in turn misapplied sections 30(1) and 31 of the *Employment Insurance Act*. He argues that the General Division misinterpreted misconduct by failing to consider:

- the nature of the conduct that was involved. The Claimant argues that misconduct typically involves criminal, morally abhorrent or reprehensible behaviour, such as stealing, consuming alcohol, or taking illicit drugs during working hours.[12] The Claimant says that unless any conduct is of this nature, then that conduct does not qualify as misconduct. He denies that his conduct resembled this type of behaviour. He argues that choosing not to comply with his employer's mandatory policy is of a different nature and that he therefore did not commit any misconduct.

- the merits, constitutionality, legality, and reasonableness of the employer's vaccination policy. The Claimant argues that his employer's vaccination

[11] See General Division decision at para 27.
[12] See Claimant's Amended Application for Leave to Appeal, filed September 27, 2024, at AD22-26.

policy was unjustified and unreasonable, because vaccination is not only ineffective but dangerous as well. He also argues that his employer's policy was unconstitutional and violated several laws. He contends that there were legitimate reasons to refuse his employer's vaccination requirements. So, he argues that he was not and should not have been required to comply with his employer's vaccination policy.

- any "specific and distinguishing circumstances." In the Claimant's case, he worked exclusively from home, so says there was no justification to require vaccination as he did not have contact with others in the workplace. As a data scientist, he says he is eminently qualified to speak about the dangers of vaccination. He provided scientific evidence about the risks, particularly for someone of his profile, in taking the vaccine.

[27] It is now well established that any arguments about the constitutionality, legality, and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. As the Federal Court of Appeal determined in one case, the General Division erred when it focused on the merits of an employer's policy and the employment contract, rather than on the applicant's conduct. The Court of Appeal wrote:

> [The General Division] erred in law in considering whether the hospital's policy was fair, legal, complied with the Charter, violated the employee's human rights or the terms of a collective agreement. The only question that the General Division ought to have asked was whether the employee knew or ought to have known of the policy, the consequences of non-compliance, and voluntarily chose not to comply.[13]

[28] Or, as the Court of Appeal succinctly put in another decision, "An employee's reasons for non-compliance are not relevant to the [misconduct] analysis."[14]

---

[13] See *Lance v Canada (Attorney General)*, 2025 FCA 41.
[14] See *Costea v Canada (Attorney General)*, 2025 FCA 57, citing *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 21 and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.

[29] As for the nature of the Claimant's conduct, misconduct under the *Employment Insurance Act* does not require criminal, abhorrent, or reprehensible conduct.[15] The courts have defined what conduct qualifies as misconduct:

> [T]here will be misconduct where the conduct of a 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 the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.[16]

[30] And it is unnecessary for a claimant's conduct to be blameworthy or to attract any discipline. Misconduct results as long as the applicant engages in conduct with the knowledge that consequences might flow.[17]

[31] The General Division identified this test.[18] It then proceeded to apply this same test. For this reason, I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct is under the *Employment Insurance Act*.

The Claimant does not have an arguable case that the General Division failed to address whether his Charter rights were violated

[32] The Claimant does not have an arguable case that the General Division failed to address whether his Charter rights were violated when his employer required vaccination against COVID-19. (For the purposes of my review of the Claimant's application for leave to appeal, I will sidestep the issue of the sufficiency of any notice of the Claimant's constitutional challenge.)

What is the Claimant challenging?

[33] First, I have to decide what it is that the Claimant is challenging: Is he challenging provisions of the *Employment Insurance Act*, his employer's vaccination policy, or other. This is an important consideration because of the General Division's scope of authority.

---

[15] See *Besley v Canada (Attorney General)*, 2025 FCA 47.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.
[17] See *Zagol v Canada (Attorney General)*, 2025 FCA 40.
[18] See General Division decision at paras 11 to 15.

The General Division has limited jurisdiction and may not have the authority to address the Claimant's arguments. If it does not have the authority to address the Claimant's arguments, then it could not have erred if it did not examine them.

[34] On its face, it appears that the Claimant is literally challenging the Commission's decision as violating his rights. He frames the issue as follows, that the General Division failed to recognize that the "[Commission's] decision to deny [him Employment Insurance] benefits for not being vaccinated violate[d] his rights under sections 2 and 7 of the Charter."[19]

[35] The Claimant provides a social and political context. He writes that,

> i. The state expressed that denial of EI was part of its planned coercion that state employees be injected…
>
> ii. That government's use of EI denial as an instrument to coerce employees to become vaccinated was widely criticized by civil society…
>
> The [Commission's] decision to frame my choice not to be injected with a COVID-19 vaccine as "misconduct" and to thus deny me EI benefits is a violation of my fundamental rights, specifically sections 2 and 7 of the Charter.[20]

[36] While the Claimant seems to be challenging the constitutionality of the Commission's decision, in effect he would have to be challenging the constitutionality of provisions of the *Employment Insurance Act*. This is so because the Commission makes it decisions in accordance with the *Employment Insurance Act*.

[37] As an aside, I note that the Claimant has argued that the term "misconduct" set out in sections 30(1) and 31 of the *Employment Insurance Act* (Act) is unconstitutionally vague and that the sections are therefore inapplicable and inoperative in his particular case. I consider that to be a separate matter. And I addressed that issue in a decision dated April 28, 2025. (Ultimately, I concluded that the General Division did not err when

---

[19] See Claimant's Amended Application for Leave to Appeal, filed September 27, 2024, at AD22-37. See also arguments at AD22-44.
[20] See Claimant's Amended Application for Leave to Appeal, filed September 27, 2024, at AD22-39.

it decided that the Claimant had not fulfilled the notice requirements when he gave notice of a constitutional challenge.)

[38] While the Claimant's language suggests that he is challenging the misconduct provisions in the *Employment Insurance Act* (via the Commission's decision), his arguments as set out in his Amended Application for Leave to Appeal do not identify any specific provisions of the *Employment Insurance Act* that he claims violate his Charter rights. This suggests that the Claimant is not attacking any provisions of the *Employment Insurance Act*.

[39] Besides, as the Federal Court noted in *Sturgeon*,

> [54] On the face of it, the denial of EI benefits where an employee has been terminated for misconduct does not implicate any particular Charter right or value…
>
> [55] Certain restrictions in schemes based on insurance principles, such as restrictions relating to age, gender or prior disability, may give rise to obvious human rights concerning triggering an obligation to consider Charter values in the interpretation of the relevant legislation [citations omitted]. However, the denial of benefits for those whose employment is terminated for misconduct is not, on its face, of the same nature. There is no obvious Charter right or value, or ground of discrimination, that is triggered by such a provision.[21]

[40] Given this, and without anything more from the Claimant, there was no basis for the General Division to consider how the interpretation of misconduct in the Employment Insurance benefits scheme might have affected the Claimant's Charter rights.

[41] The thrust of the Claimant's arguments in fact indicates that the Claimant's complaints are primarily about his employer's vaccination policy.

[42] The Claimant writes that his section 7 Charter rights have been infringed because vaccination was imposed on him by his employer's vaccination policy. He says

---

[21] See *Sturgeon v Canada (Attorney General)*, 2024 FC 1888.

forced vaccination violates his rights to life, liberty, and security. He cites numerous decisions of the Supreme Court of Canada that address section 7 rights.

[43] The Claimant further writes that his section 2 Charter rights have been infringed because vaccination offends his conscientious and religious beliefs against refusing vaccination.

[44] From this, it is clear that the Claimant's arguments are in fact directed at his employer's vaccination policy as the source of his Charter violations, rather than at the *Employment Insurance Act*. It was the employer's policy after all—not the *Employment Insurance Act*—that required vaccination. It is clear from his arguments that he believes his employer's vaccination policy violated his Charter rights and that the General Division should have addressed these arguments.

The General Division has limited jurisdiction

[45] But it is now well established that the General Division simply does not have the jurisdiction to examine the constitutionality of a vaccination policy or to examine whether an employer's vaccination policy is compliant with the Charter, or consistent with Charter values.[22] And for that reason, the General Division did not have to deal with Charter issues in the context of the employer's vaccination policy. The Claimant has other avenues to pursue his grievances.[23]

[46] I am not satisfied that the Claimant has an arguable case that the General Division failed to address whether his Charter rights were violated by his employer's vaccination policy.

---

[22] See for instance *Sullivan v Canada (Attorney General)*, 2024 FCA 7, *Khodykin v Canada (Attorney General)*, 2024 FCA 96, and *Zagol*.
[23] See *Brown v Canada (Attorney General)*, 2024 FC 1544, citing *Boskovic v Canada (Attorney General),* 2024 FC 841. See also *Sturgeon*.

Conclusion

[47] 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