Federal Court Cour fédérale

Date: 20240604

Docket: T-888-23

Citation: 2024 FC 841

Ottawa, Ontario, June 4, 2024

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ZORAN BOSKOVIC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of two decisions of the Social Security Tribunal (SST) Appeal Division (SST-AD), dated March 28, 2023, which refused to grant the Applicant leave to appeal the decisions of the General Division (SST-GD). The SST-GD decisions in question found that the Applicant was terminated for misconduct from his job and that he

restricted his availability for work. The misconduct at issue involved the Applicant's intentional voluntary choice not to comply with his employer's COVID-19 vaccination policy.

[2] The SST-GD upheld the decision of the Canada Employment Insurance Commission (the Commission), which denied the Applicant employment insurance (EI) benefits.

[3] The Applicant, who is self-represented, very ably presented his arguments on judicial review. He informed the Court that he had an "unblemished work record with exemplary performance reviews." The SST-GD found that the Applicant was "very credible" and had "no doubt that [he] was a valuable employee."

[4] However, for the reasons set out below, I find that this judicial review should be dismissed.

II. Facts

[5] The Applicant previously held a position with the British Columbia Public Service (BCPS). The BCPS employed the Applicant for over 20 years in various roles. He last worked with the BCPS as a senior manager of major projects with the Mountain Resorts Branch of the Ministry of Forestry and Natural Resource Operations.

[6] On October 5, 2021, the BCPS advised its employees of the requirement to provide proof of full vaccination by November 22, 2021. On November 1, 2021, the BCPS shared its COVID-19 policy. The requirements became effective on November 8, 2021.

[7] Under the policy, employees could seek an exemption based on a medical reason or another protected ground, as defined under the province's *Human Rights Code,* RSBC 1996, c 210 [*Code*]. However, if employees did not receive an exemption and did not show proof of full vaccination, they would be placed on unpaid leave for three months. If employees did not show at least partial vaccination by the end of the suspension period, and they did not have an exemption, they were subject to termination.

[8] On November 22, 2021, the Applicant requested an exemption, as he contracted COVID-19 during the summer. He claimed that this provided him with immunity.

[9] On November 23, 2021, the BCPS allowed the Applicant to work from home, pending an assessment of his exemption request.

[10] On January 17, 2022, the BCPS refused to provide the Applicant with an exemption. The Applicant was placed on unpaid leave, effective January 23, 2022, for three months. The BCPS informed the Applicant that he would maintain his employer-paid benefits during this time.

[11] The BCPS advised the Applicant that he would be subject to termination if he did not become vaccinated within the three-month period. If the Applicant became partially vaccinated, the BCPS indicated that he could obtain an alternative return to work arrangement, and that he could receive an additional 35 days to become fully vaccinated.

[12] At the start of his suspension period, the Applicant applied for regular EI benefits, which are governed by the *Employment Insurance Act*, SC 1996, c 23 [*EIA*]. Under section 18(1) of the

EIA, claimants are not entitled to benefits if they fail to establish that they were capable of, and available for work, and were unable to obtain suitable employment. Additionally, pursuant to section 30(1) of the *EIA*, claimants are disqualified from receiving EI benefits if they voluntarily leave their position without just cause or due to their own misconduct.

[13] On March 7, 2022, prior to the end of his suspension period, the BCPS asked the Applicant whether he would like to provide any further information.

[14] On March 21, 2022, the Applicant expressed his inclination to return to work. He did not provide any proof of vaccination.

[15] In May 2022, the Commission denied the Applicant EI benefits under section 30 of the *EIA*, because he lost his employment due to his own misconduct. The Commission also determined that the Applicant was unavailable for work pursuant to section 18 of the *EIA*.

[16] On June 20, 2022, the BCPS terminated the Applicant's employment.

[17] The Applicant appealed the Commission's decision. On January 10, 2023, the SST-GD released two decisions dismissing the Applicant's appeal on the grounds of misconduct and availability for work.

[18] On March 28, 2023, the SST-AD refused to grant the Applicant leave to appeal the decisions of the SST-GD.

[19] The Applicant asks this Court to quash the decisions of the Commission, the SST-GD and the SST-AD. The Applicant requests an order approving his claim for EI benefits and seeks costs for this application.

III. Issue

[20] There are two issues in this application:

A. Did the SST-AD reasonably deny the Applicant leave to appeal the SST-GD's decisions?

B. Did the SST-AD breach the duty of procedural fairness or the principles of natural justice?

IV. Standard of Review

[21] The standard of review to be applied to an SST-AD decision denying leave to appeal is reasonableness: *Kuk v Canada (Attorney General)*, 2024 FCA 74 at para 5 [*Kuk FCA*]; *Bhamra v Canada (Attorney General)*, 2023 FCA 121 at para 3 [*Bhamra*].

[22] The Court is not to decide the decision afresh: Francis v Canada (Attorney General), *2023 FCA 217* at para 4 [*Francis*]. To assess the reasonableness of a decision, the Court must determine "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*].

[23] When assessing procedural fairness, this review exercise is "best reflected" on a correctness standard: *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The Court must decide whether the decision-maker followed a fair procedure having regard to all of the circumstances (*Canadian Pacific Railway* at para 54).

[24] The duty of procedural fairness is variable and "its content is to be decided in the specific context of each case" (*Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 21). In *Davidson v Canada (Attorney General),* 2023 FC 1555 [*Davidson*], Justice Kane noted that, within the context of the SST-AD, "the issue of procedural fairness focusses on the SST-AD's decision-making process" (at para 40).

V. The Law

[25] Pursuant to section 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], the SST-AD can only grant leave to appeal a decision if the applicant demonstrates that an appeal has a reasonable chance of success: *Kuk v Canada (Attorney General),* 2023 FC 1134 at para 14 [*Kuk*] citing *Bhamra* at para 15.

[26] The applicant must demonstrate that the SST-GD failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner without regard to the material before it: see *Cecchetto v Canada (Attorney General),* 2023 FC 102 at para 22 [*Cecchetto*], citing *Cameron v Canada (Attorney General),* 2018 FCA 100 [*Cameron*] at para 2.

VI. Analysis

[27] On judicial review, the Applicant raised numerous issue with the reasonableness of the SST-AD decisions, along with whether the SST-AD rendered their decisions in a procedurally fair manner. During the course of oral submissions, he also presented additional arguments to the Court, which were not previously raised before the SST-AD. Although I have not summarized the Applicant's concerns in their entirety, I have addressed the key points below.

A. *Employment Law Issues*

[28] The Applicant contends that his employment contract did not permit the BCPS to: require mandatory vaccination; mandate a leave of absence without pay; suffer a loss of employment pursuant to the policy. Nor he argued did his employment contract allow for unilateral changes without fresh consideration, advanced reasonable working notice or termination without severance based on his vaccination status.

[29] Regarding the policy, the Applicant claims that COVID-19 vaccinations do not prevent transmission or hospitalization, making such policies unjustifiable and irrational. The Applicant contends that the policy tried to force him to take medical treatment against his will, without offering any alternatives. The Applicant argues that his employer's policy did not provide details on obtaining an exemption. The Applicant highlighted that the policy applied to all employees working for BCPS, regardless of whether they worked remote or onsite. The Applicant claims that he did not receive consideration, nor consent to the new terms and conditions of employment

introduced by the policy. The Applicant states that his employer committed to providing policy updates, but did not deliver one before March 2023, at which time the policy was rescinded.

[30] I note that the Applicant previously raised similar arguments before the SST. However, a large number of the Applicant's concerns, which include the reasonableness of the policy, fall outside of the tribunal's jurisdiction. Therefore, it was not unreasonable for the SST to fail to address these issues. As Justice Pentney concluded in *Cecchetto*:

> [46] [I]t is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
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> [47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct." That is exactly what they did, and the Applicant has not put forward any legal or factual argument that persuades me that the Appeal Division's decision is unreasonable.
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> [Emphasis added.]

[31] In *Palozzi v Canada (Attorney General),* 2024 FCA 81 [*Palozzi*], an applicant raised similar concerns regarding a vaccination policy. The applicant claimed that his failure to comply with the employer's policy did not constitute misconduct, as the policy was unreasonable and it did not allow for alternatives to vaccination. The applicant argued that the policy was not a part of his employment contract (since it was introduced at a later date). The Federal Court of Appeal found that the SST-AD's decision was reasonable:

> [5] The Appeal Division decided that an employee who deliberately breaches an explicit policy set by his employer may be found to have committed misconduct under the Act whether or not compliance with the policy is expressly required by his employment contract, a conclusion consistent with decisions of this Court: *Nelson v. Canada (Attorney General)*, 2019 FCA 222 at paras. 25–26; *Lemire* at paras. 17, 19–20 […]
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> [6] In our view, the Appeal Division's decision is reasonable. It is supported by the evidentiary record and, as this Court has observed in recent decisions involving similar circumstances, by the applicable jurisprudence: see e.g. *Kuk v. Canada (Attorney General)*, 2024 FCA 74 at paras. 8–9; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 at paras. 4–6; *Lalancette v. Canada (Attorney General)*, 2024 CAF 58 (CanLII), 2024 FCA 58 at para. 2; and *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240 at para. 5. The Appeal Division reasonably found that, in determining whether the applicant committed misconduct under the Act, it cannot assess the reasonableness of the employer's vaccination policy that led to his dismissal. We note that the applicant can raise that issue by way of other avenues, such as a wrongful dismissal action or a human rights complaint.
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> [Emphasis added.]

[32] Accordingly, the majority of the Applicant's arguments relating to these issues, particularly those concerning the reasonableness of the BCPS's policy, are best addressed in another forum. I would also add that, in relation to the policy being included at a later date, the jurisprudence shows that a policy does not need to form part of the original employment contract to ground misconduct (see *Kuk* at para 34).

B. *Misconduct*

[33] The Applicant raises several arguments in relation to this SST-AD decision.

[34] First, the Applicant argues that the SST and the Commission erred by relying on an overbroad definition of "misconduct." The Applicant contends that Service Canada, the Commission, and the SST "twisted the meaning of misconduct and criteria for proving availability to include Covid-19 vaccination status as a personal restriction only for the purpose of denying the EI benefits."

[35] The Applicant claims that the SST-GD and the SST-AD did not consider the proper legal test. On this point, he refers the Court to *McKinley v BC Tel,* 2001 SCC 38. The Applicant argues that the wrong jurisprudence was relied upon, as the SST considered authorities which did not draw "accurate parallels" or serve as "sufficient legal precedent to the extraordinary circumstances of [his] employer suddenly implementing a new mandatory workplace policy and term and condition of employment, without consent or consideration, and contrary to his existing employment contract terms." The Applicant contends that this reasoning is consistent with an Employment and Social Development Canada (ESDC) internal memorandum.

[36] I do not agree with the Applicant.

[37] First, I find that the SST-AD reasonably followed applicable jurisprudence from this Court. In particular, the SST-AD considered *Cecchetto,* which was recently upheld on appeal (see *Cecchetto v Canada (Attorney General),* 2024 FCA 102 [*Cecchetto FCA*]). In *Cecchetto*, the SST-GD found that an applicant was dismissed from his position for misconduct, after he refused to comply with the vaccination requirements at his workplace. The SST-AD denied the applicant leave to appeal, and the Court dismissed the judicial review application.

[38] At the Federal Court of Appeal, Justice Biringer agreed with the Federal Court that the SST-AD's decision was reasonable. The Court of Appeal observed that the SST-AD referred to the "well-established test for misconduct" and that their decision was "consistent with many recent decisions of this Court in similar circumstances" (*Cecchetto FCA* at para 10).

[39] The Federal Court of Appeal has upheld a number of cases with similarities to *Cecchetto FCA*, including *Kuk FCA*, *Francis*, *Sullivan v Canada (Attorney General)*, 2024 FCA 7 [*Sullivan*] and *Zhelkov v Canada (Attorney General)*, 2023 FCA 240. In each of these decisions, the applicants were denied EI benefits due to misconduct, after failing to comply with their employers' COVID-19 vaccination policies.

[40] In this case, like in *Cecchetto*, the Applicant was dismissed from his position because he knowingly failed to comply with his employer's vaccination policy, and this constituted misconduct. The SST-GD made two key findings in their decision: 1) that the Applicant lost his position because he did not comply with the BCPS's vaccination policy, and 2) that his actions constituted misconduct.

[41] The SST-GD found that the BCPS communicated the policy to the Applicant. The Applicant knew about the policy requirements and made a deliberate voluntary choice not to comply. The Applicant was also aware of the consequences of noncompliance. The SST-GD supported this finding with both the Applicant's testimony and his exemption request. When the Applicant asked for an exemption, he indicated that he was submitting the request, "under duress and threat of losing my job." Therefore, the Applicant was aware that the policy could lead to disciplinary action, despite claiming the opposite in his submissions before this Court.

[42] The Applicant also had the opportunity to remedy his situation prior to being terminated. He was aware that the BCPS previously refused his request for an exemption. His voluntary decision not to comply with the policy, which resulted in him being suspended from work, constituted misconduct. This position is supported by *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. In that decision, the Federal Court of Appeal found that an employer's failure to accommodate was irrelevant when determining whether misconduct occurred under the *EIA*.

[43] Upon reviewing the evidence, the SST-AD reasonably agreed with the SST-GD, determining that the Applicant made a "personal and deliberate choice" not to follow the vaccination policy, which "resulted in him being suspended from work."

[44] Second, turning to the meaning of the term "misconduct," I do not agree that the SST-AD applied an overbroad definition. It appears the Applicant is confusing the term "misconduct" as it is used in the *EIA* setting, with its meaning in other areas of law. In *Canada (Attorney General) v Lemire*, 2010 FCA 314 [*Lemire*], the Federal Court of Appeal explained that there is a difference between the legal test for misconduct under the *EIA*, as compared to the labour law context. This distinction is important, as several of the Applicant's arguments relate to the latter, and should be raised in a different forum. Notably, in *Lemire*, the Court stated that:

> [14] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment […]
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> [15] <u>However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather,</u>

> of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal: *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at paragraph 2.
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> [16] This legal test established in the case law to circumscribe the notion of misconduct set out in section 30 of the Act must be viewed within the general context of the Act. Indeed, this Act seeks, above all, to protect Canadian workers from involuntary job losses related to the financial difficulties of the businesses they work for or economic troubles. That is the primary purpose of this legislation, to which were added, as time went by, certain additional employment-related programs. Thus, employment insurance contributors need not bear the burden of those who leave their employment voluntarily without just cause or lose their employment because of their misconduct. That is the specific legislative framework within which the notion of misconduct must be considered.
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> [Emphasis added.]

[45] In *Sullivan*, the Federal Court of Appeal clarified the reason for this distinction:

> [6] We would add that the court jurisprudence makes sense. Were the applicant's submissions to be upheld, the Social Security Tribunal would become a forum to question employer policies and the validity of employment dismissals. Under any plausible reading of the legislation that governs the Tribunal, it is a forum to determine entitlement to social security benefits, not a forum to adjudicate allegations of wrongful dismissal. We note that the applicant in fact has pursued remedies elsewhere for wrongful dismissal and has made a human rights complaint.

[46] Therefore, as discussed in the jurisprudence, the SST does not need to determine whether a claimant was dismissed justifiably under labour law principles when considering misconduct within the context of the *EIA*. Instead, as outlined above, the test for misconduct focuses on

whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.

[47] Third, the Applicant argues that the SST and the Commission erred by finding that his leave of absence was an employer-imposed suspension due to misconduct. The Applicant claims that the BCPS did not put code "M", dismissal or suspension, on his record of employment; instead, they put code "N", meaning leave of absence. The Applicant argues that his employer never communicated to him or Service Canada that he was suspended or that he committed misconduct. He claims that the policy was not disciplinary, and it did not call for suspension. To the best of his knowledge, he believes that his record of employment still shows code "N." He claims that the Commission and the SST ignored this fact.

[48] In *Davidson*, the Court considered this exact issue. The applicant, who also worked with the BCPS, had a leave of absence on his record of employment. He claimed that the SST made an erroneous finding of fact. Justice Kane disagreed, stating that:

> [75] Mr. Davidson's submissions to the SST-AD do not establish that the SST-GD erred in law in its decision-making or based its decision on an erroneous finding or fact as he alleged. The SST-GD was not required to determine whether Mr. Davidson had met the statutory requirements for EI benefits because his ROE was coded as a leave of absence. Rather, the SST-GD was required to determine whether Mr. Davidson was suspended due to his own misconduct, and therefore ineligible for EI benefits under the EI Act.

[49] In the same way, although the Applicant argues that the Commission and the SST failed to consider a leave of absence on his record of employment, as noted in *Davidson*, it was not the

proper basis for determining his EI eligibility. Rather, the SST-GD was required to assess whether the Applicant's suspension was due to misconduct, which, as discussed above, it did.

[50] Fourth, the Applicant indicates that he provided additional arguments on the finding of misconduct at different stages of this "long and protracted" process. He notes that the SST-AD is not limited to specific grounds of appeal raised by a self-represented party, and that the SST-AD can grant leave if the SST-GD overlooked certain evidence. However, I do not find that significant evidence has been disregarded or misconstrued. Moreover, I note that this reasoning does not mean that a tribunal can step into the shoes of a litigant and supplement their arguments.

[51] In conclusion, as it relates to this decision, I find that a large majority of the Applicant's arguments concern his misunderstanding of "misconduct" within the meaning of the *EIA*, as he believes it is akin to wrongful dismissal or other labour law disputes. For instance, in his submissions, the Applicant claims that he expected his employer to act rationally, that he repeatedly requested to return to work remotely, and that he was shocked when his employer denied his accommodation request. The Applicant also believed that his employer would drop the vaccine mandate and bring him back to work.

[52] However, misconduct in the *EIA* context holds a very distinct meaning. The jurisprudence shows that an employee who refuses to become vaccinated, contrary to a workplace policy, and who knew (or ought to have known) that their noncompliance could lead to dismissal, will have their actions constitute misconduct under the *EIA*.

[53] Therefore, I find it was reasonable for the SST-AD to conclude that the Applicant had no reasonable chance of success on appeal.

C. *Availability for Work*

[54] In relation to this decision, the Applicant raises a number of constitutional issues. I note that the Applicant sets out these concerns under the "Availability for Work" portion of his memorandum, although these issues are addressed in the misconduct decision.

[55] Previously, in his submissions before the tribunal, the Applicant argued that the BCPS's vaccination policy violated his rights under the *Canadian Charter of Rights and Freedoms* [*Charter*]. Additionally, in his arguments to the SST-AD, the Applicant claimed that the SST-GD could have considered his *Charter* arguments, but failed to do so.

[56] On judicial review, the Applicant asserts that the Commission is improperly qualifying his vaccination status as a personal restriction. He contends that his rights under the *Charter* were engaged when his claim for EI benefits was rejected. The Applicant argues that the SST-GD decision was grossly disproportionate, and that it did not accord with the principles of fundamental justice. The Applicant claims that the Government of Canada has an obligation to "accommodate and protect [the] basic freedom to choose or refuse medical treatment consistent with one's inherent human dignity and bodily autonomy protected under the Charter."

[57] I disagree with the Applicant's assertions. The SST-AD did address whether the SST-GD considered the *Charter* issues, and reasonably found that the question of whether the policy violated the Applicant's human and constitutional rights was a matter for another forum (again,

as noted, this issue was addressed in the misconduct decision, although the Applicant raises it under his arguments for "Availability for Work"). This reasoning from the SST-AD is supported by the jurisprudence. In *Khodykin v Canada (Attorney General)*, 2024 FCA 96, the Federal Court of Appeal acknowledged that the SST does not have the authority to consider the constitutionality of a vaccination policy.

[58] Moreover, in *Sullivan*, at paragraph 12, the Court noted that, "Charter values cannot be used to invalidate legislative provisions that administrative decision-makers must follow, such as, in this case, section 30 of the *Employment Insurance Act*. … [T]he Social Security Tribunal was reasonable in holding that the applicant was precluded under that section and related court jurisprudence from questioning the appropriateness of the termination of his employment." Therefore, I do not find that the SST-AD erred in considering these issues.

[59] The Applicant asserted that the SST relied on an overbroad definition of "availability for work," and misconstrued the criteria for proving availability. He asks how "being healthy (and willing to work) [could] be interpreted as placing undue restrictions on his availability."

[60] I am not persuaded that the SST-AD made any errors in this regard. The SST-AD agreed with the SST-GD that the Applicant could have accepted suitable positions, if not for his personal choice to refuse vaccination. By the Applicant's own admission, most positions in his field or in other government roles required vaccination. The SST-AD found that the evidence supported the SST-GD's conclusions on this point, and that the SST-GD properly applied the factors from *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA), A-56-96 and A-57-96.

[61] Therefore, regarding the Applicant's availability for work, I find that the SST-AD's decision was reasonable.

D. *Procedural Fairness*

[62] The Applicant submitted that there was a breach of procedural fairness. However, similar to *Davidson*, I find that the Applicant's arguments concerning procedural fairness and natural justice tend to conflate issues involving the initial refusal of EI benefits with the procedure before the SST-GD and SST-AD. At this point, the judicial review application "is only with respect to the decision of the SST-AD" (*Davidson* at para 78).

[63] In particular, the Applicant raises issues with Service Canada, claiming that an agent suggested that there are two classes of Canadians: vaccinated and unvaccinated. He argues that this statement was not included in the transcript of her notes. However, it appears that the SST-AD addressed a similar concern from the Applicant, as he previously raised his negative experience with Service Canada, including a lack of impartiality. In reviewing this issue, the SST-AD addressed the role of the SST-GD, noting that it considers the evidence from the parties, determines the relevant facts and articulates its own decision. The SST-AD held that "it is not the General Division's role to investigate the claim or to rule on the Commission's conduct during the claim process." I find that the SST-AD did not overlook this issue, and reasonably decided that the SST-GD rendered a decision based on the evidence from the parties.

[64] Additionally, the Applicant refers to the *Digest of Benefit Entitlement Principles* [*Digest*], which he indicates is relevant to this matter. He argues that the Commission and the SST did not

follow several principles from the *Digest*, particularly section 10.4, including "…warning claimants whose availability may be restricted in some way…" The Applicant asserts that he did not receive a warning, nor was he advised about the interpretation of restrictions under the law.

[65] Similar to his concern about Service Canada, the Applicant is raising an issue regarding the initial refusal of his EI benefits. As stated in *Davidson*, at this point, the emphasis is on the SST-AD's decision-making process. Based on the record, it does not appear that the Applicant presented this concern, specifically section 10.4 and 10.5 of the *Digest*, to the SST-GD or the SST-AD. In any event, as stated earlier, is not the role of the SST-GD to decide on the Commission's conduct. Moreover, while the *Digest* is important, it is not binding on the Commission (see *T-Giorgis v Canada (Attorney General)*, 2024 FCA 47 at para 59).

[66] Finally, the Applicant raises serious allegations concerning bias. Specifically, he points to an ESDC memorandum, titled "BE 2021-10 Subject: Refusal to comply with an employer's mandatory vaccination policy and EI Eligibility" (dated October 19, 2021). The Applicant claims that this memorandum substantiates a reasonable apprehension of bias, undue influence and political interference with Service Canada, the Commission and the SST.

[67] The Applicant states that, "Implementation of the arbitrary policy and directives from the ESDC's BE Memo (dated October 19, 2021) is not in accordance with the law, jurisprudence and as such their actions are *ultra vires*." The Applicant claims that, during the written cross-examination stage, he submitted a number of questions about the BE Memo. He notes that none of these questions have been answered.

[68] The Applicant refers to a public statement by the Minister responsible for EI benefits. Around October 2021, the Minister announced that employees who failed to comply with vaccination policies would be denied EI benefits. The Applicant argues that this statement unduly influenced the Commission and the SST, creating a reasonable apprehension of bias.

[69] In *Hughes v Canada (Attorney General),* 2010 FC 837 at paras 20-21 [*Hughes*], this Court noted allegations of bias are serious, stating that:

> [20] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259 at paragraph 74.
>
> [21] The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decision-maker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 112; *Arthur v. Canada (Attorney General)* (2001), 2001 FCA 223 (CanLII), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S*, at para. 113.

[70] In *Davidson*, the Court stated that, "An allegation of bias requires material evidence in support and cannot be made on mere suspicion, conjecture, or impression of an applicant" (at para 81 citing *Alvarez v Canada (Public Safety and Emergency Preparedness),* 2022 FC 185 at para 49; *Right to Life Association of Toronto v Canada (Employment, Workforce and Labour),*

2021 FC 1125 at para 110; *Ernst v Canadian National Railway Company*, 2021 FC 16 at para 50; *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8).

[71] In this case, the Applicant's arguments relating to bias, undue influence, political interference are allegations unsupported by evidence. (As an aside, the Applicant's arguments concerning the policy in the ESDC memorandum are outside the jurisdiction of the tribunal and should be dealt with in another forum). At this point, the ESDC memorandum and the public statement from the Minister are insufficient to establish bias, and the Applicant's allegations are speculative: see *Davidson* at para 82.

[72] Therefore, I do not find there has been any breach of procedural fairness in this case.

VII. Conclusion

[73] I am not persuaded that the SST-AD made any errors which would justify granting this application for judicial review. In denying the Applicant leave to appeal, the SST-AD reasonably considered whether the appeal had a reasonable chance of success and whether the Applicant raised any reviewable errors pursuant to subsections 58(1) and (2) of the *DESDA*.

[74] In this case, I mention that both the SST-GD and the SST-AD have taken the time to respond to many of the Applicant's arguments; the majority of which were not relevant.

[75] I will not address all of the Applicant's submissions, which, as Justice Pentney concluded, may be frustrating to the Applicant. In particular, I will not address the Applicant's arguments about a number of health laws and standards, such as whether he acquired natural

immunity. These arguments are not relevant. Neither the SST-GD nor the SST-AD had to consider such issues when deciding the reason for the Applicant's dismissal. I will also not make any determinations regarding the Applicant's alleged participation in a class action, as those arguments are beyond the scope of this decision.

[76] This application for judicial review is dismissed.

[77] The Respondent did not seek costs and none are awarded.

JUDGMENT in T-888-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-888-23
STYLE OF CAUSE:	ZORAN BOSKOVIC v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 28, 2024
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JUNE 4, 2024

APPEARANCES:

Zoran Boskovic	FOR THE APPLICANT (SELF-REPRESENTED)
Sandra Doucette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT