Federal Court  Cour fédérale

Date: 20231123

Docket: T-82-23

Citation: 2023 FC 1555

Ottawa, Ontario, November 23, 2023

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

PHILIP DAVIDSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Phillip Davidson, seeks judicial review of the decision of the Social Security Tribunal [SST] Appeal Division [SST-AD] refusing to grant leave to appeal the decision of the SST General Division [SST-GD]. The SST-GD found that Mr. Davidson's employment was suspended due to misconduct and, after a *de novo* review, agreed with the Canada Employment Insurance Commission's [EI Commission]) decision to refuse his application for employment insurance [EI] benefits. The misconduct at issue involved Mr. Davidson's non-compliance with his employer's COVID-19 vaccination policy.

[2] Mr. Davidson's submission on this Application reiterate some of the same arguments he raised with the EI Commission and the SST-GD. Mr. Davidson's arguments stem from his general opposition to his employer's policy that all employees must disclose their vaccination status and be vaccinated, which in his view was irrational and unnecessary, particularly because he worked remotely.

[3] Mr. Davidson argues that the EI officers who were processing claims, and the EI Commission that reviewed the determination of claims, were directed to deny EI benefits to claimants who did not adhere to their employers' vaccination policies. He claims that political interference was at play and seeks to rely on public comments made by the Minister responsible for the Department of Employment and Social Development Canada [ESDC] and an internal memo for EI officers. Mr. Davidson's allegations about a government wide-effort to prevent claimants who opposed their employer's vaccination policies from obtaining EI benefits and his submissions regarding the reasonableness of his employer's vaccination policy, however, are not the subject of this Application. The decision under review is only that of the SST-AD.

[4] For the reasons that follow, Mr. Davidson's Application is dismissed. The decision of the SST-AD bears all the hallmarks of a reasonable decision and there is no evidence of any procedural unfairness. Mr. Davidson's motion for leave to admit new evidence is also dismissed.

I. Background

[5] Mr. Davidson was placed on a leave of absence by his employer, the British Columbia Public Service [BCPS], effective November 24, 2021. The notice from his employer stated "[i]f

you remain unvaccinated, or continue to refuse to disclose your vaccination status within three months from November 24, 2021, your employment may be terminated".

[6] On November 30, 2021, Mr. Davidson applied for EI benefits. His EI application was rejected on March 31, 2022 and again on May 4, 2022 and June 8, 2022 after reconsideration.

[7] Mr. Davidson appealed the EI Commission's decision to the SST-GD. The SST-GD conducted its own *de novo* review to determine whether Mr. Davidson had been suspended due to misconduct. On November 18, 2022, the SST-GD issued its decision, denying the appeal of the EI Commission's decision to refuse Mr. Davidson EI benefits.

[8] Mr. Davidson then sought leave to appeal to the SST-AD. On December 6, 2022, the SST-AD issued their decision refusing to grant leave to appeal on the basis that the appeal had no reasonable chance of success.

[9] Mr. Davidson now seeks judicial review of the SST-AD's decision.

[10] Mr. Davidson also seeks to admit new evidence, by way of motion pursuant to Rules 369 and 312 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*]. He asserts that the new evidence is relevant to the issues on judicial review.

II. Preliminary Issue: Submissions on the Admission of New Evidence

[11] Mr. Davidson seeks, by way of motion, leave of the Court to admit affidavits and exhibits pursuant to Rule 312. The Court considered the motion at the outset of the hearing of the Application.

[12] The Respondent also seeks to strike exhibits included in Mr. Davidson's Application Record that were not before the SST-AD.

A. *Mr. Davidson's Rule 312 Motion to admit new evidence is dismissed*

(1) Mr. Davidson's Submissions

[13] On October 31, 2023, Mr. Davidson filed a motion pursuant to Rules 369 and 312 of the *Federal Courts Rules* to admit additional affidavits and supplementary evidence that he asserts are relevant to this Application.

[14] Mr. Davidson seeks to admit his own affidavit and the affidavit of Mr. Lex Acker (with exhibits). Mr. Acker, a blogger, attached his blog post titled: "Why Your Application For Employment Insurance Regular Benefits Was Denied If You Did Not Comply With A Mandatory Vaccination Policy". The blog post describes an internal memo circulated within ESDC that Mr. Acker obtained through an Access to Information and Privacy [ATIP] request in the context of seeking information about why his spouse was denied EI benefits. The internal

memo dated October 19, 2021, attached as an exhibit, is titled: “EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)” [the BE memo].

[15] Mr. Davidson submits that the Respondent thwarted his past attempts to obtain relevant documents regarding EI claims arising from mandatory vaccination policies. He submits that he only became aware of the BE memo in August 2023 after obtaining a copy from Mr. Acker. He asserts that the EI memo is probative and elucidating, and that its admission will not prejudice the Respondent.

[16] In response to the Respondent’s objection to the admission of the affidavit and exhibits, Mr. Davidson now acknowledges that most of the exhibits do not meet the test for admission of new evidence and that Mr. Acker’s affidavit is primarily for the purpose of providing the BE Memo to the Court. Mr. Davidson submits that the BE memo is relevant to his allegation of bias in decision-making at the EI Commission and his allegations of a breach of natural justice by the SST-GD and SST-AD. He argues that the BE Memo shows that EI officers were directed to deny benefits to claimants who were suspended because they had not complied with their employer’s vaccination policy. He alleges that the EI Commission was not independent; rather, it was required to take direction from the Minister and did so.

[17] In response to the Respondent’s submission that they would be prejudiced by the lack of opportunity to cross-examine the affiant, Mr. Davidson proposed that the Court adjourn the hearing of the Application to permit cross-examination of Mr. Acker.

(2) The Respondent's Submissions

[18] The Respondent submits that the affidavit and exhibits are not admissible given that the documents were not part of the record before the decision-maker. The Respondent adds that the affidavit and exhibits are irrelevant to the issues on judicial review.

[19] The Respondent notes that BE Memo does not meet any of the noted exceptions to the principle that the only evidence to be considered by the Court on judicial review is that which was before the decision-maker (*Bernard v Canada (Attorney General)*, 2015 FCA 263 at paras 13-28 [*Bernard*]; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20 [*Access Copyright*]). The Respondent argues the BE memo does not address whether the SST-AD made any errors of fact and that there are no allegations of bias against the SST-AD.

[20] The Respondent also notes that it is now clear that Mr. Davidson seeks to rely on the BE Memo to make additional arguments on the merits of the Application and this does not fall within the exception of "general background" for the Court (*Bernard* at paras 20-23).

[21] The Respondent adds that it would not be useful to cross-examine Mr. Acker if the only exhibit Mr. Davidson now seeks to admit is the BE Memo. The Respondent notes that Mr. Acker has no personal knowledge about the creation of the memo or how it was used internally by ESDC or the EI Commission. The Respondent submits that there is no reason to adjourn the hearing of the Application.

(3) The Affidavits and exhibits are not admissible

[22] The Court finds that the affidavits and the BE Memo attached as an exhibit do not meet any of the exceptions that would justify granting leave for their admission pursuant to Rule 312.

[23] Rule 312 is an exceptional measure (*Campbell v Canada (Attorney General)*, 2018 FC 412 at para 8 [*Campbell*]). In order for new evidence to be admitted, it must be "admissible on the application for judicial review, and it must be relevant to an issue that is properly before the reviewing Court" (*Lukács v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 55 at para 7). The Court must consider whether the new evidence will assist the Court due to its relevance and probative value; will cause substantial or serious prejudice to the other side; or whether the evidence was available or discoverable by other means through the exercise of due diligence (*Campbell* at para 9, citing to *Tsleil-Waututh Nation v Canada (Attorney General)* 2017 FCA 503, at para 11).

[24] In addition, as a general rule, new evidence is only permitted on judicial review on an exceptional basis (*Access Copyright* at paras 19-20). The jurisprudence recognizes limited exceptions to the general rule; first, when the evidence provides general background information that may assist in understanding the relevant issues but does not add new evidence on the merits; second, when the evidence draws the attention of the reviewing court to procedural defects that cannot be found in the decision-maker's evidentiary record; and third, when the evidence highlights the absence of evidence before the decision-maker on a particular finding (*Access*

Copyright at para 20; *Wieslaw Kuk v Canada (Attorney General)*, 2023 FC 1134 at paras 16-17 [*Kuk*]; *Sharma v Canada (Attorney General)*, 2018 FCA 48; *Bernard* at paras 13-18).

[25] The general background exception does not apply to the evidence at issue. As noted in *Bernard* at para 22:

> But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20; *Delios*, above at paragraph 46.

In the present case, Mr. Davidson is seeking to rely on the Acker affidavit and the BE Memo to make additional arguments about the merits of the Application with respect to his allegation that there has been a breach of natural justice.

[26] Although Mr. Davidson does not seek to rely on Mr. Acker's blog post about how the EI Commission determined EI benefits, Mr. Davidson appears to have adopted the same opinions as Mr. Acker. Such opinions are not relevant to the issues on this Application. The issues on this Application pertain only to the SST-AD's decision regarding Mr. Davidson. Nor does the Acker affidavit provide evidence to fill in gaps in the absence of evidence. The SST-AD had a comprehensive record before it and made its decision on the basis of the record. The Court's role is to determine whether – based on that same record – the SST-AD made a reasonable and procedurally fair decision. The BE Memo does not provide any evidence about the procedure followed by the SST-AD (or by the SST-GD or EI Commission) *vis-à-vis* Mr. Davidson. The admission of the BE memo would not cause serious prejudice to the Respondent, however, it

does not assist the Court in deciding whether the SST-AD made any error in concluding that Mr. Davidson's appeal had no reasonable chance of success.

[27] Although the Court will not admit the BE Memo, the Court has read the Memo in the context of determining its admissibility. As an observation, the Court does not interpret the memo in the same way as Mr. Davidson. Mr. Davidson asserts that this detailed Memo, which provides "information to all staff with regard to the eligibility to Employment Insurance (EI) Regular Benefits for clients who refuse to comply with their employer's mandatory vaccination policy", was a directive to EI agents to deny benefits without considering various circumstances. However, the Court regards the memo as providing guidance to EI officers with respect to the claims they process and describes many scenarios that could arise. The memo provides guidance for each of the scenarios, while repeatedly noting that "EI benefits depend on several factors and all claims for benefits must be adjudicated based on individual circumstances" and other similar statements.

B. *The Exhibits in Mr. Davidson's Application Record that were not before the SST-GD or SST-AD are not admissible*

[28] The Respondent submits that several of the exhibits attached to Mr. Davidson's affidavit in support of this Application were not on the record for the SST-GD or SST-AD and should not be admitted or considered by the Court. The exhibits at issue are:

> **A:** Email from Deputy Minister to the Premier to BCPS re new COVID-19 Vaccination Policy (October 5, 2021)
>
> **B:** Email from Deputy Minister to the Premier to BCPS re update on COVID-19 Vaccination Policy (November 1, 2021)

D: Order of the Lieutenant Governor in Council re Public Service COVID-19 Vaccination Regulation (November 19, 2021)

E: Philip Davidson letter of employment offer from BCPS (March 28, 2018)

F: Excerpt on termination for just cause (June 30, 2017)

G: BCPS Standards of Conduct

I: BCPS email addressed to the Deputy Minister to the Premier with labour relations Q&A on COVID-19 Vaccination Policy (November 15, 2021)

U: Philip Davidson letter re recommendation for dismissal (June 22, 2022)

V: Philip Davidson notice of termination of employment (June 24, 2022)

Z: Email from the Deputy Minister to the Premier re rescinding the COVID-19 Vaccination Policy (not dated)

AA: BCPS Webpage re rescinding COVID-19 Vaccination Policy (March 10, 2023)

BB: CBC news article "Don't expect EI if you lose your job for not being vaccinated, minister says" (October 21, 2021)

CC: BCPS Webpage re COVID-19 Response FAQs (March 29, 2021)

DD: CTV news article "BC lifting indoor mask mandate Friday, vaccine passport to end in coming weeks" (March 10, 2022)

EE: Order of the Lieutenant Governor in Council re repealing Public Service COVID-19 Vaccination Regulation (March 10, 2023)

FF: Email from Philip Davidson to BCPS employees re questions about COVID-19 vaccination policy (October 7, 2021)

GG: Excerpt from video testimony of Dr. Ben Sutherland "National Citizens Inquiry Testimony" (May 3, 3023)

[29] The Respondent submits that Mr. Davidson has failed to demonstrate how any of the exhibits meet any exception to the general rule that no new evidence can be submitted on judicial review (citing *Bernard* at paras 13-18).

[30] As noted above, new evidence may only be admitted on judicial review on an exceptional basis (*Access Copyright* at paras 19-20). Although the exceptions are not finite, there is no other rational basis to admit most of the exhibits (see *Bernard* at paras 13-17).

[31] Exhibits A-B, D, and U-V may provide general background but these documents do not inform or illuminate the issues for the Court on this Application. The other exhibits do not meet any of the recognized exceptions.

[32] Exhibits BB and GG, which are related to Mr. Davidson's submission that the EI decision-making process was not independent or was arbitrary, were not on the record before the SST-AD (or the SST-GD or EI Commission). Exhibit BB predates Mr. Davidson's application; he could have sought to raise it with the SST-AD, but did not. The Respondent adds that there is no context about the creation or veracity of the content in Exhibit GG for it to have any bearing or probative value to this Application.

[33] Allegations of bias and breaches of natural justice should be raised as soon as they become apparent (*Canadian National Railway Company v Canada (Transportation Agency)*, 2021 FCA 173 at para 68; *Taesko Mines Limited v Canada (Environment)*, 2019 FCA 320 at paras 46-47; *Hennessey v Canada*, 2016 FCA 180 at paras 20-21). Mr. Davidson did not advance his allegations of bias or breach of natural justice at the SST-GD or SST-AD. Mr. Davidson's

submissions to the SST-AD claimed that his employer (the BCPS) "implemented a political agenda" to constructively dismiss him and colluded with the EI Commission to have his leave of absence construed as a suspension for misconduct in order to deny him EI benefits. That is not a claim of bias against the SST-GD or SST-AD. Moreover, Mr. Davidson's submission was made in the context of his assertion that the SST-GD made erroneous findings of fact.

III. Issues and Standard of Review

[34] Mr. Davidson argues that the SST-AD's decision refusing to grant leave to appeal is unreasonable and that the SST-AD breached the principles of natural justice by failing to acknowledge that the decision-making by the EI Commission and SST-GD was biased.

[35] The standard of review for SST-AD decisions denying leave to appeal is reasonableness: *Bhamra v Canada (Attorney General)*, 2023 FCA 121 at para 3 [*Bhamra*]; *Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 3; *Kuk* at para 13; *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 20 [*Cecchetto]*.

[36] As the Court noted in *Kuk* at para 14:

> SST-AD will only grant leave in limited situations, and it will not grant leave unless the appellant can demonstrate that the appeal has a reasonable chance of success: *Bhamra* at para 15, citing 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 (the "DESDA").

[37] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85, 102,

105–07 [*Vavilov*]). A decision should not be set aside unless it contains "sufficiently serious shortcomings … such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[38] Issues of procedural fairness require the Court to determine whether the procedure followed by the decision-maker is fair having regard to all of the circumstances. The Court must ask "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). The scope of the duty of procedural fairness owed in the circumstances is variable and informed by several factors (as established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21. Where there is a breach of procedural fairness, no deference is owed to the decision-maker.

[39] As noted more recently by the Federal Court of Appeal in *Brown v Canada (Attorney General)*, 2022 FCA 104 at para 13 [*Brown*]:

> On questions of procedural fairness and natural justice, the Court must assess the procedures and safeguards required, and if there is a breach, the Court must intervene (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54). For want of a better description, the approach is sometimes referred to as the "correctness standard".

[40] As noted above, this Application is a judicial review of the decision of the SST-AD and the issue of procedural fairness focusses on the SST-AD's decision-making process.

IV. The Statutory Provision

[41] The grounds to appeal decisions of the SST-GD regarding EI are set out in subsections 58(1) and (2) of the *Department of Employment and Social Development Canada Act*, SC 2005, c 34 [DESDA]. The reference to the "Employment Insurance Section" refers to a branch of the General Division. The relevant provisions are:

58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**58.2 (1)** La division d'appel accorde ou refuse la permission d'en appeler d'une décision rendue par la division générale.
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès

(Emphasis added]

V. The SST-AD Decision under Review

[42] The SST-AD refused to grant leave to appeal the decision of the SST-GD, finding that it had no reasonable chance of success based on any of the grounds that would permit granting leave. A brief description of the decision of the SST-GD is set out for context.

A. *The SST-GD Decision*

[43] The SST-GD concluded that Mr. Davidson was required to take a leave of absence without pay due to his own misconduct because he did not comply with his employer's COVID-19 vaccination policy. The SST-GD's decision focused on whether Mr. Davidson was dismissed or suspended from his employment pursuant to sections 30-31 of *Employment Insurance Act*, SC 1996, c 23 [EI Act]. The SST-GD concluded that Mr. Davidson was aware of the consequences if he did not disclose his vaccination status as required by his employer's policy, and was suspended because of his own misconduct; therefore, he was not eligible for EI benefits.

[44] The SST-GD found that Mr. Davidson ought to have known that it was a real possibility that he would lose his job if he failed to comply.

[45] The SST-GD acknowledged that questions about whether Mr. Davidson was wrongfully dismissed or whether the BCPS should have made accommodations for him are beyond the scope of the SST-GD's jurisdiction, and that Mr. Davidson could pursue other remedies elsewhere, if available.

B. *The SST-AD Decision*

[46] The SST-AD noted that in order for it to grant leave to appeal, it had to be satisfied that the reasons advanced by Mr. Davidson fell within one of the grounds of appeal set out in section 58(1) of the DESDA, and that at least one of the reasons had a reasonable chance of success.

[47] In his application for leave to appeal the decision of the SST-GD, Mr. Davidson asserted that the SST-GD erred in stating that the leave of absence imposed by his employer was a suspension. He set out other background information, including his disbelief that his employer would dismiss him. He also alleged that his employer was fulfilling a political agenda.

[48] The SST-AD summarized Mr. Davidson's submissions: that the GD did not decide the issues it was required to decide; that the GD erred by not considering the evidence before it; and that the GD erred by concluding that he was suspended because of his misconduct.

[49] The SST-AD noted that Mr. Davidson argued that the SST-GD erred in deciding that his unpaid leave was a suspension because he had offered to return to work remotely, and that BCPS had "constructively dismissed him while falsely characterizing his reasonable response to their Policy as misconduct by colluding with the federal government via the [EI] Commission in order to deny him his EI benefits".

[50] With respect to Mr. Davidson's argument that the SST-GD erred in deciding that his unpaid leave of absence was a suspension, the SST-AD found that the evidence showed that

Mr. Davidson was suspended because he refused to follow the employer's policy, despite being informed of the policy and being given time to comply. The SST-AD also found that the GD did not err in finding that Mr. Davidson's conduct was misconduct. The SST-AD found that despite Mr. Davidson's claim that he did not expect to be terminated and had offered to work remotely, Mr. Davidson was aware that he could lose his job if he did not comply with the Policy.

[51] The SST-AD noted that the jurisprudence has established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act. Accordingly, the SST-GD did not err in deciding the issue of misconduct in accordance with the governing jurisprudence.

[52] The SST-AD noted Mr. Davidson's claim that the SST-GD failed to exercise its jurisdiction to accommodate him, and failed to consider whether the vaccination policy violated his employment contract, however, the SST-AD found that these issues should be addressed in other fora.

[53] The SST-AD found that Mr. Davidson's appeal had no chance of success, concluding:

> In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justices. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard to the material before it, in coming to its decision on the issue of misconduct.

VI. The Applicant's Submissions

[54] Mr. Davidson notes that prior to October 5, 2021, the BCPS had advised employees that mandatory vaccination would not be required. Mr. Davidson submits that this changed following comments made by the Minister responsible for ESDC on October 5, 2021. The Minister's comments were followed by a message from the Deputy Minister to the Premier of BC regarding the new COVID-19 Vaccination Policy [the Policy] and the Order in Council made on November 19, 2021 enacting the Public Service COVID-19 Vaccination Regulation, BC Reg 284/2021 [Regulation]. Mr. Davidson notes that the Regulation made the Policy a term and condition of employment for all BCPS employees subject to section 25 of the *Public Service Act*, RSBC 1996, c 385.

[55] The Policy included an accommodation request process, which required requestors to disclose their vaccination status. Mr. Davidson notes that the Policy did not provide for accommodation based on freedom of conscience and privacy and that he objected to disclosing his personal medical information regarding his vaccination status.

[56] On November 23, 2021, Mr. Davidson received a letter informing him that he would be placed on a leave of absence without pay effective November 24, 2021.

[57] Mr. Davidson notes that on December 8, 2021, the BCPS issued his Record of Employment [ROE] to Service Canada with respect to his application for EI Benefits. The ROE stated that Mr. Davidson was on a "leave of absence".

[58] Mr. Davidson notes that despite being informed of the possibility of termination, he did not believe that his employer would follow through. In his view, the Policy was irrational given that he could have continued to work remotely and that other mask mandates for public spaces were beginning to be lifted.

[59] Mr. Davidson now challenges the SST-AD's decision on three grounds: the failure to observe principles of natural justice; an error in law; and, erroneous findings of fact made in a perverse or capricious manner or without regard to the material on the record.

[60] Mr. Davidson argues that the SST-AD and SST-GD made an erroneous finding of fact when it determined his leave of absence was a suspension due to his misconduct. He points to the ROE provided by his employer to the EI Commission, which was coded "N" – leave of absence and not "M" – dismissal or suspension. He argues that the SST-AD should have found this to be an error warranting leave to appeal.

[61] Mr. Davidson submits that he did not believe that his employer would dismiss him; rather, he expected that the BCPS would rescind their Policy. He notes that he requested to work remotely in January 2022, as he had done in the past; his leave of absence was extended beyond three months; and the Government of British Columbia announced it was dropping its indoor masking and vaccine passport program. He contends that, as a result, he did not know or should not have known that the BCPS would continue to enforce their Policy, which in his view was irrational.

[62] Mr. Davidson also argues that the SST-AD (and also the SST-GD) erred in law by relying on “unsuitable” jurisprudence as binding precedents. He notes that the jurisprudence cited referred to existing employer policies and not new policies implemented in the course of employment.

[63] Mr. Davidson also argues that the SST-AD failed to observe principles of natural justice. He alleges that the decision to deny him EI benefits was predetermined. He cites the provisions of the EI Act, which set out the composition, duties, and functions of the Commission. He notes that the DESDA, subsection 24 (3) provides that “[t]he Commission shall comply with any directions given to it from time to time by the Minister respecting the exercise of powers or the performance of its duties and functions”. He submits that the Commission was acting under direction from the Minister to refuse EI benefits to those who did not adhere to their employers’ vaccination policies, rather than making independent decisions.

[64] Mr. Davidson argues the Minister’s statements, as reported by the media, “at the very least tainted the Commission’s decision-making process, creating a reasonable apprehension of bias that the SST-GD and SST-AD failed to observe as a necessary and natural principle of justice”.

[65] Mr. Davidson also submits that although the EI Commission refused to determine whether the BCPS Policy was fair, it stated that Mr. Davidson did not comply “with a legitimate and reasonable order of instruction”. Mr. Davidson argues that this suggests that the EI Commission did make a finding about the Policy and did not make an independent decision, and that the EI Commission had in fact determined that the Policy was fair.

[66] Mr. Davidson submits that by declining to exercise its authority to grant leave to appeal, the SST-AD ignored "evident and obvious reviewable errors".

VII. The Respondent's Submissions

[67] The Respondent submits that the SST-AD reasonably refused leave to appeal based on its interpretation of subsection 58(1) of the DESDA and in considering that Mr. Davidson's arguments had no reasonable chance of success (required under subsection 58(2)).

[68] The Respondent submits that the SST-GD did not err by applying the legal test for misconduct under the EI Act (citing *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 21 [*Nelson*]; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14).

[69] The Respondent submits that where the employee's action is conscious, deliberate, or intentional, and is causally linked to their employment, this constitutes misconduct (*Nelson* at para 21). The Respondent submits that Mr. Davidson was well aware that he could be placed on unpaid leave and subject to dismissal for failing to comply with the vaccination Policy. The Respondent notes that in January 2022, Mr. Davidson's employer again warned him that his continued non-compliance may lead to his termination. The Respondent notes that Mr. Davidson's disbelief is irrelevant; what matters is that he was informed.

[70] The Respondent adds that whether BCPS defined Mr. Davidson's leave without pay as misconduct or otherwise is irrelevant. The only test that is relevant for the SST is the test for

misconduct under the EI Act. Therefore, the SST-AD reasonably found that the SST-GD did not err.

[71] The Respondent submits that the jurisprudence cited by the SST-GD and SST-AD is relevant, applicable, and binding. The Respondent notes that Mr. Davidson did not argue that the SST-GD relied on "unsuitable" case law in his submissions to the SST-AD.

[72] The Respondent also submits that Mr. Davidson's allegations of collusion between the provincial and federal governments to dismiss him and deny him EI benefits are baseless. The Respondent notes that Mr. Davidson did not raise any objections about the SST-AD's process. The Respondent adds that there is no evidence to support Mr. Davidson's allegation of any bias at any level.

VIII. The Decision of the SST- AD is Reasonable

[73] The SST-AD reasonably found that the appeal had no chance of success. The SST-AD's reasons for this conclusion are transparent, intelligible and justifiable.

[74] The SST-AD may only grant leave to appeal when the appellant can demonstrate that the appeal has a reasonable chance of success: DESDA, subsection 58(2); *Kuk* at para 14; *Cecchetto* at para 23; *Bhamra* at para 15; *O'Rourke v Attorney General of Canada*, 2019 FCA 60 at para 9. In *Osaj v Canada (Attorney General)*, 2016 FC 115, the Court explained at para 12 that "having a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed". Mr Davidson has not established that any of the grounds he

raised as alleged errors by the SST-GD had a reasonable chance of success under subsection 58(1) of the DESDA before the SST-AD.

[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.

[76] In *Nelson,* the Federal Court of Appeal stated that "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" (at para 21). Based on the evidence on the record and Mr. Davidson's own submissions, he was well aware of the Policy and made the voluntary choice not to comply. His view that it was irrational and his disbelief that his employer would follow through has no bearing on the finding of misconduct. He was clearly on notice regarding the consequences of his conduct.

[77] The SST-GD and SST-AD are not the appropriate fora to determine whether the BCPS' Policy or Mr. Davidson's termination were reasonable. Mr. Davidson's emphasis on the EI Commission's statement that his failure to comply with a "reasonable and legitimate order of instruction" constituted misconduct does not mean the EI Commission determined that the Policy was reasonable or fair. Rather, the Commission was acknowledging that it is not within its

authority to assess the reasonableness of employer policies, and all properly enacted policies are considered to be legitimate and reasonable for the purpose of determining an EI benefits claim.

IX. The Decision of the SST-AD is Procedurally Fair

[78] Mr. Davidson's arguments regarding a breach of natural justice or procedural fairness conflate issues that pertain to the initial refusal of EI benefits with the process before the SST-GD and SST-AD. It bears repeating that this Application is only with respect to the decision of the SST-AD. Mr. Davidson does not argue that the SST-AD's process breached the duty of procedural fairness. His arguments focus on his view that there was some predetermined outcome to deny EI benefits to those suspended because they did not comply with their employer's vaccination policy.

[79] The Court interprets Mr. Davidsons's allegations against the "Respondent" as allegations that the SST-AD did not intervene to identify a breach of procedural fairness by other decision-makers. As noted above, Mr. Davidson did not assert a breach of procedural fairness in his application for leave to appeal the decision of the SST-GD. In any event, the Court finds that there was no breach of procedural fairness arising from the decision-making of the SST-GD, and as a result, the SST-AD did not overlook anything.

[80] With respect to Mr. Davidson's allegations of collusion between the federal and provincial governments and in the decision-making process to deny him EI benefits, such allegations of bias are serious and should not be made lightly (*Hughes v Canada (Attorney General)*, 2010 FC 837 at paras 20-21 [*Hughes*]. In *Hughes*, the Court noted:

> [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)*, [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, [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] 3 S.C.R. 484 at para. 112; *Arthur v. Canada (Attorney General)* (2001), 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.

[81] An allegation of bias requires material evidence in support and cannot be made on mere suspicion, conjecture, or impression of an applicant (*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).

[82] As noted above, Mr. Davidson relies on the BE Memo and other documents attached to his affidavit in support of this Application, which the Court has found are not admissible. However, these documents would fall far short of meeting the high threshold to claim bias. Even if Mr. Davidson had raised his allegation of bias more clearly at an earlier stage in the

proceedings, he has failed to meet the evidentiary bar. Any allegation of bias is serious and must be supported by evidence. His allegations are speculative and without merit.

[83] Finally, as previously noted, the decision under review is the SST-AD's decision to refuse to grant leave to appeal. There is no evidence of any breach of procedural fairness on the part of the SST-AD or SST-GD. The SST-AD did not err in not addressing any breach of procedural fairness by the SST-GD.

JUDGMENT in file T-82-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's motion for leave to admit new evidence is dismissed.

2. The Application is dismissed.

3. No costs are ordered.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-82-23
STYLE OF CAUSE:	PHILIP DAVIDSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 15, 2023
JUDGMENT AND REASONS:	KANE J.
DATED:	NOVEMBER 23, 2023

APPEARANCES:

Mr. Philip Davidson	ON HIS OWN BEHALF
Mr. Jordan Fine	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT