

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20231102**

**Docket: A-83-23**

**Citation: 2023 FCA 217**

**CORAM: WOODS J.A.  
LASKIN J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**ROBIN FRANCIS**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on November 2, 2023.

Judgment delivered from the Bench at Toronto, Ontario, on November 2, 2023.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**WOODS J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on November 2, 2023).**

**WOODS J.A.**

[1] Robin Francis has filed an application for judicial review of a decision of the Appeal Division of the Social Security Tribunal (2023 SST 185). The Appeal Division determined that the applicant's request for employment insurance benefits was properly denied by the General Division.

[2] The benefits were denied pursuant to s. 30 of the *Employment Insurance Act*, S.C. 1996, c. 23. This section provides that an employee is disqualified from receiving employment insurance benefits if the employee loses employment due to misconduct.

[3] The applicant was dismissed by his employer on the ground that he refused to comply with the employer's mandatory policy to obtain a COVID-19 vaccination. The applicant had requested an exemption from the policy based on creed but the employer denied this request.

[4] In this application, the Court is not to consider the Appeal Division's decision afresh. Many of the submissions made by the applicant at the hearing appeared to suggest that the Court take a fresh approach. But the Court is only to decide whether the Appeal Division's decision is reasonable. For this purpose, the Court must consider whether the decision is justifiable and whether the Appeal Division in fact justified it. It is not correctness review.

[5] There may be caveats to reasonableness review with respect to issues of procedural fairness and whether the framework from *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 should apply. On these issues, our conclusions are the same regardless of which standard of review is applied.

[6] We are all of the view that the Appeal Division's decision satisfies these standards of review. The Appeal Division grounded its decision on reasonable interpretations of the law and gave appropriate deference to the facts as determined by the General Division. With respect to factual determinations, it is important to note that section 58 of the *Department of Employment*

*and Social Development Act*, S.C. 2005, c. 34 limits the Appeal Division's authority to intervene in the General Division's factual findings to circumstances in which the General Division makes a finding of fact "in a perverse or capricious manner or without regard to the material before it." In addition, we are satisfied that the applicant's rights to procedural fairness were not violated.

[7] We now briefly address a few of the applicant's arguments.

[8] The applicant submits the Appeal Division erred by failing to consider Charter values in accordance with the Supreme Court's decision in *Doré*. We disagree. The Appeal Division concluded that the *Doré* framework was not applicable because "a decision about misconduct ... is not an exercise of statutory discretion." (Appeal Division at para. 201). We see no reason to interfere with this conclusion on this particular record.

[9] The applicant also submits that the Appeal Division erred in its interpretation of the employer's policy. We disagree. The Appeal Division reasonably determined and applied the evidence and the law with respect to this issue.

[10] With respect to the policy, the applicant referred to an unreported decision of the General Division in which the facts, according to the applicant, are identical to his own. In that decision, the General Division decided that there was no misconduct. The applicant sent the unreported decision to the Social Security Tribunal after the hearing and before the Appeal Division issued its decision. The decision was not referred to in the Appeal Division's reasons.

[11] The applicant submits that failing to mention the unreported decision renders the Appeal Division's decision unreasonable and demonstrates a lack of procedural fairness because the unreported decision is not mentioned in the reasons.

[12] We disagree that the Appeal Division was obliged to refer to this decision. We note in particular that the facts in that decision are significantly different from the facts in this case.

[13] The applicant submits further that it was unreasonable for the Appeal Division to determine that the applicant deliberately failed to comply with the employer's policy. This determination was adopted from the General Division's findings of fact. This was reasonable, especially since the Appeal Division has a limited scope to interfere with these findings of fact.

[14] Finally, the applicant submits that the Court should revise the test for misconduct. This is not open to us on a reasonableness review.

[15] In conclusion, we are all of the view that there is no reason to interfere with the decision of the Appeal Division. The application will be dismissed, without costs.

“Judith Woods”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-83-23

**STYLE OF CAUSE:** ROBIN FRANCIS v.  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 2, 2023

**REASONS FOR JUDGMENT OF THE COURT BY:** WOODS J.A.  
LASKIN J.A.  
MONAGHAN J.A.

**DELIVERED FROM THE BENCH BY:** WOODS J.A.

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