Federal Court Cour fédérale

**Date: 20240610**

**Docket: T-2248-23**

**Citation: 2024 FC 877**

**Ottawa, Ontario, June 10, 2024**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**LAWRENCE GOULD**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This is an application for judicial review of a decision made by a member [Member] of the Social Security Tribunal Appeal Division [Appeal Division] on October 4, 2023 [Decision], refusing the Applicant leave to appeal the decision of the Social Security Tribunal General Division [General Division] with respect to the Applicant's eligibility for Employment Insurance [EI] benefits.

[2] As explained in greater detail below in these Reasons, this application is dismissed, because the Applicant's arguments have not established that the Decision is unreasonable or established bias or a reasonable apprehension of bias on the part of the Member.

## II. Background

[3] The Applicant, Lawrence Gould, worked seasonally as a concrete finisher for 285319 Alberta Ltd., carrying on business as Proform Concrete Services [Proform]. On September 6, 2022, the Applicant was involved in a single vehicle accident in Proform's truck near Red Deer, Alberta, causing damage to the truck. The Applicant reported the accident to Proform.

[4] Proform has a "Fitness for Duty/Impairment-Free Workplace" policy [Drug Policy], which requires employees to submit to drug and alcohol tests if there is reasonable cause to suspect the employee is unfit for duty. The Applicant had signed a copy of the Drug Policy on May 2, 2022. Section 15 of the Drug Policy states that a refusal to test is considered a violation of the policy and will result in the employee being terminated immediately with cause.

[5] Shortly following the accident, the Applicant was requested to submit to a drug and alcohol test pursuant to the Drug Policy, but the Applicant refused.

[6] On September 7, 2022, the Applicant began a new job at another company at which he worked until the end of the construction season that year. The Applicant then submitted an application for EI benefits on November 4, 2022. The Applicant subsequently received a letter from the Employment Insurance Commission [Commission] dated December 20, 2022,

informing him that the Commission was unable to pay him EI benefits, because he had lost his employment with Proform as a result of his misconduct [Commission Decision].

[7] The Applicant filed a request for reconsideration of the Commission Decision. By letter dated February 6, 2023, the Commission advised the Applicant that it was maintaining its decision [Reconsideration Decision].

[8] The Applicant appealed the Reconsideration Decision to the General Division on February 8, 2023. On July 6, 2023, the General Division dismissed the Applicant's appeal.

[9] On July 8, 2023, the Applicant requested leave to appeal the decision of the General Division to the Appeal Division. On October 4, 2023, in the Decision that is the subject of this judicial review, the Appeal Division refused the Applicant's application for leave to appeal.

## III. Decision under Review

[10] The Appeal Division reviewed the facts of the Applicant's case, including the Commission's determination that he had lost his job as a result of misconduct and was therefore disqualified from receiving benefits. The Appeal Division also explained the General Division's decision, which found the Applicant was dismissed from his job, because he refused to take a drug and alcohol test when requested by his employer, and that the Commission had established this was misconduct according to the *Employment Insurance Act*, SC 1996, c 23 [*EIA*].

[11] The Appeal Division identified the issues raised by the Applicant for its consideration, being whether there was an arguable case that the General Division based its decision on an

important factual error by: (a) failing to consider the requirements of the Drug Policy; (b) failing to consider a previous accident in which the Applicant was involved and no drug test required; or (c) failing to consider that refusing the test was not the only reason the Applicant was denied benefits. The Appeal Division also identified the need to consider whether the Applicant had raised any other reviewable error by the General Division upon which the appeal might succeed. The Appeal Division explained that the test the Applicant needed to meet in order to be granted leave to appeal was whether there was any arguable ground on which the appeal might succeed.

[12] The Appeal Division observed that the General Division was required to decide why the Applicant was no longer working. Although the Applicant argued that he voluntarily left his job after he refused a substance test, the General Division found that the Applicant had been dismissed and did not leave voluntarily, as he did not have a choice to continue working. The Appeal Division also observed that the General Division found the Applicant was dismissed because he did not follow the employer's policy concerning drug and alcohol testing following an accident involving the company vehicle. The Appeal Division noted that the Applicant had refused to take the test because he had concerns that his activities over the preceding weekend would result in a positive test and that the Applicant felt that his employer did not have reasonable grounds for requesting the test.

[13] The Appeal Division also noted that the General Division had applied principles derived from Federal Court and Federal Court of Appeal jurisprudence to find that the Commission had proven that there had been misconduct by the Applicant based on the following: (a) the employer's Drug Policy; (b) the Applicant signed and agreed to be bound by the Drug Policy; (c) the Drug Policy stated that a refusal to take a test would result in termination with cause; (d) the

Applicant was told that he would be terminated if he refused the test; (e) the Applicant knew or should have known that he would be let go if he refused the test; and (f) the Applicant's refusal was deliberate and wilful.

[14] The Appeal Division considered the Applicant's submissions concerning the General Division's failure to consider the employer's conduct in requesting the test or a previous accident in which the Applicant had been involved without the employer requiring a drug and alcohol test, as well as the Applicant's submission that the refusal to take the test was not the only reason for his dismissal. The Appeal Division found the Applicant's arguments did not have a reasonable chance of success, as they pointed to a failure of the General Division to consider conduct by the employer. While the General Division noted the Applicant's position that the employer did not have grounds to request the test, the Appeal Division relied on *Canada (Attorney General) v. McNamara*, 2007 FCA 107 [*McNamara*] in finding that it is the conduct of the employee that is in question in a misconduct analysis, not the conduct of the employer. The Appeal Division noted that employees who are wrongfully dismissed have other remedies available to them.

[15] The Appeal Division found the General Division had applied the proper legal test, explained why it preferred certain evidence, and considered the Applicant's submissions. The Appeal Division found that the General Division did not err in not referring to the Applicant's previous car accident, as the fact that he had been involved in a previous accident in which a test was not requested was not relevant to his dismissal for refusing the employer's request for a test after the 2022 accident. The Appeal Division also found there was no arguable case that the General Division failed to consider whether the Applicant was dismissed for other reasons, as the Applicant did not deny that the Applicant refused to take a drug test and was therefore dismissed.

[16] Finally, the Appeal Division considered other grounds of appeal but found there was no evidence of procedural unfairness or an arguable case that the General Division had made an error of law or an error of jurisdiction.

[17] The Appeal Division therefore refused leave to appeal.

## IV. Issues and Standard of Review

[18] The Applicant's submissions raise the following issues for the Court's determination;

A. whether the Appeal Division's refusal to grant leave to appeal was reasonable; and

B. whether the Decision demonstrates a reasonable apprehension of bias by the Member against the Applicant.

[19] As reflected in the articulation of the first issue above, the standard of review applicable to that issue is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The second issue requires consideration of whether a reasonable and informed person, viewing the matter realistically and practically—and having thought the matter through—would conclude that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394, as cited in *Baker v Canada (Minister of Citizenship and Immigration)*, [1997] 2 SCR 817 at para 46).

[20] As an additional procedural issue, the Respondent's counsel seeks an amendment to the style of cause, in which the Applicant has named the Social Security Tribunal of Canada as the Respondent, to instead name the Attorney General of Canada.

## V. Analysis

### A. *Procedural Issue*

[21] Rule 303(1)(a) *Federal Courts Rules*, SOR/98-106 [Rules] provides that, subject to Rule 303(2), an applicant for judicial review shall name as a respondent every person directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought. Rule 303(2) in turn provides that, where in an application for judicial review there are no persons that can be named under Rule 303(1), the applicant shall name the Attorney General of Canada as a respondent.

[22] In this application for judicial review, the Applicant has named the Social Security Tribunal of Canada as the Respondent. The Respondent's counsel submits that, as the Social Security Tribunal is not directly affected by this application and is the tribunal whose decision is under review, the style of cause should be amended to reflect the Attorney General of Canada as the sole Respondent. The Applicant has taken no position on this procedural issue. I agree with the Respondent's position that the correct Respondent is the Attorney General of Canada, and my Judgment will correct the style of cause in this manner.

### B. *Whether the Appeal Division's refusal to grant leave to appeal was reasonable*

[23] Consistent with his position before the Appeal Division and previous decision-makers, the Applicant's principal submission is that the Decision is unreasonable because it failed to accept his argument that, pursuant to the terms of its Drug Policy and the circumstances and events following his September 6, 2022 accident, his employer was not entitled under the Drug

Policy to require that he submit to a drug and alcohol test. He submits that the Appeal Division erred in relying on *McNamara* to conclude: (a) that whether his employer was entitled to demand the test was irrelevant to whether he was guilty of misconduct that would preclude his entitlement to EI benefits; and (b) therefore that the General Division did not err in applying that principle.

[24] The Respondent argues that *McNamara* is on point and that both the General Division and the Appeal Division followed the law as identified by the Federal Court of Appeal by examining only the Applicant's conduct, and not the employer's conduct, in determining whether he was disqualified from receiving benefits.

[25] *McNamara* involved circumstances in which an applicant had been fired after taking and failing his employer's drug test. When he subsequently applied for and was denied EI benefits, the applicant argued that the timing of the test was not in accordance with the terms under which the employer was permitted to conduct such testing pursuant to the applicable collective agreement.

[26] Sitting in judicial review of the resulting administrative decision as to the applicant's entitlement to EI benefits, the Federal Court of Appeal in *McNamara* held that there was consistent jurisprudence from that Court that the role of administrative decision-makers considering such entitlement was not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the legislation (at para 22). The Court of Appeal explained

that, in the interpretation and application of section 30 of the *EIA* (which section disentitles an employee to benefits), the focus is clearly not on the behaviour of the employer, but rather on the behaviour of the employee (at paras 23).

[27] The Applicant argues that *McNamara* must be interpreted as relieving a decision-maker of an obligation to focus upon the behaviour of the employer only in circumstances where such focus would require a subjective determination, rather than in circumstances where there are objective or undisputed facts that demonstrate employer misconduct. He submits that, in the case at hand, his employer's representative made admissions at earlier stages of the administrative process that objectively establish that his employer was not entitled under the Drug Policy to require that he submit to a test. The Applicant argues that, unless *McNamara* is interpreted as he suggests, the law would be illogical as he cannot be guilty of misconduct under a policy for failing to submit to a test that, under the terms of the same policy, the employer was not entitled to request.

[28] It is clear that *McNamara* reflects the state of the law in this area, as it was recently endorsed in *Sullivan v Canada (Attorney General)*, 2024 FCA 7 [*Sullivan*], in which the Federal Court of Appeal applied *McNamara* and subsequent jurisprudence in holding that it was reasonable for the Appeal Division to have concluded that the test for misconduct under the *EIA* focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies (at paras 4-5). In *Sullivan*, the issue raised by the employee was of the validity of his employer's COVID vaccination policy (see para 3).

[29] I read nothing in the jurisprudence that is capable of supporting the Applicant's position, that the focus on the conduct of the employee and not that of the employer does not apply in circumstances that the Applicant characterizes as objectively demonstrable or admitted employer misconduct. As explained in *Sullivan*, it is not the intention of the applicable legislation that the Social Security Tribunal become a forum to question either employer policies or the validity of employer dismissals (at para 6). In my view, this principle applies regardless of how compelling an employee may consider their arguments challenging the validity of a policy or a resulting dismissal.

[30] I note that in both *McNamara* (at para 23) and *Sullivan* (at para 6), the Court commented on the availability of other avenues for an applicant to pursue allegations of wrongful dismissal. In the case at hand, the Applicant explained that he has not pursued a claim for wrongful dismissal against his employer, because he obtained new employment the day following his dismissal, worked at that new employment until the end of the construction season, and therefore did not lose wages. The Applicant states that the financial repercussions of his dismissal were the loss of EI benefits, for which he is pursuing the claim that has resulted in the matter at hand.

[31] The Respondent does not agree that these circumstances necessarily preclude the Applicant from pursuing a claim for wrongful dismissal, if such a claim was meritorious, and takes the position that such circumstances are irrelevant to the analysis required to be conducted by the Appeal Division. The Court makes no comment on whether the Applicant may have a meritorious claim for wrongful dismissal. However, I agree with the Respondent that the availability of such a claim does not affect the legal analysis required of the Appeal Division or

in this application for judicial review. While both *McNamara* and *Sullivan* referred to other remedies, I do not read the analyses in those decisions as dependent upon the availability of such remedies.

[32] Finally, I note the Applicant's reliance on other authorities, including *Mudjatik Mining Joint Venture v Billette*, 2020 FC 255 [*Billette*], in which the Federal Court addressed a matter in which two employees were terminated for refusal to submit to a drug and alcohol test in accordance with a drug and alcohol policy to which they had previously agreed. The employees filed complaints for unjust dismissal with Employment and Social Development Canada, the complaints were referred to adjudication, and the adjudicator found in favour of the employees. The employer sought judicial review of the adjudicator's finding of unjust dismissal, and the Court held that the adjudicator had reasonably concluded that the employer did not have reasonable cause to test the employees in accordance with its policy (at paras 56-77).

[33] The Applicant refers the Court to *Billette* and other jurisprudence as authorities, in some cases with facts similar to those of his own case, in which the question whether an employer acted in accordance with its policy in requiring drug testing was held to be a determinative issue. However, as the Respondent submits, *Billette* and these other authorities were decided in the context of labour disputes between employees and their employers, not in the context of claims for EI benefits under the *EIA*. As such, these authorities do not assist the Applicant.

[34] In conclusion on the first issue raised by the Applicant, I find that the Appeal Division's reasoning is intelligible as required by the principles of *Vavilov*, that its Decision was made in

accordance with applicable and binding jurisprudence, and that the Decision is therefore reasonable.

C. *Whether the Decision demonstrates a reasonable apprehension of bias by the Member against the Applicant*

[35] The Applicant did not advance bias arguments in his oral submissions at the hearing of this application. However, I will address such arguments briefly, as they appear in his written submissions.

[36] The Applicant acknowledges that, even if the Court were to agree with his submissions that the Member erred in one or more aspects of the Decision, this does not necessarily translate into a conclusion that the Member was biased. However, the Applicant submits that the cumulative effect of several errors can support a finding of bias.

[37] The Court has considered and rejected the Applicant's argument surrounding the terms of his employer's Drug Policy and the jurisprudence upon which the Appeal Division relied. However, the Applicant also notes the Decision's reference to his having stated, in his application for EI benefits, that two senior executives of his employer demanded that he submit to a drug and alcohol test. The Applicant interprets this reference as intended to be relevant to a requirement in the Drug Policy that two on-scene supervisors concur with a request for testing, and the Applicant questions the relevance of this reference in the portion of the Decision which it appears. He also submits that, if this reference is to be interpreted in this manner, then the Appeal Division misunderstood the evidence, as he argues that the timing of the two senior executives'

involvement occurred later than would have been necessary to meet the requirements of the Drug Policy.

[38] The relevant paragraph of the Decision reads as follows:

> 27. The General Division found that the Claimant knew he would be dismissed if he refused the test. The Claimant does not dispute this. The Claimant was advised that refusing the test would result in his dismissal and he wilfully refused. In his application for benefits, the Claimant stated that two senior executives demanded that he submit to a drug and alcohol test.
>
> [Emphasis added.]

[39] I do not disagree with the Applicant's characterization of the sentence highlighted above as somewhat of a non sequitur. With the possible exception of that sentence, the Appeal Division did not engage with the evidence surrounding the Applicant's arguments that his employer did not comply with the pre-conditions under the Drug Policy to request that he submit to a drug and alcohol test, because the Appeal Division concluded that the applicable jurisprudence rendered such evidence irrelevant. If the Applicant is correct in interpreting this sentence to relate to one of these requirements, it appears to be a superfluous observation. However, as such, even if the Court were to find that this observation resulted from a misunderstanding of the evidence, this error would not undermine the determinative reasoning in the Decision and therefore would not render the Decision unreasonable.

[40] Returning to the Applicant's argument that this aspect of the Decision should contribute to a finding that the Member was biased against him, I am conscious that the threshold for establishing bias is a high one (*R v RDS*, [1997] 3 SCR 484 at para 113). As the Applicant acknowledges, an error by an administrative decision-maker does not necessarily translate into a

conclusion that the decision-maker was biased. In my view, this aspect of the Decision does not support a finding either that the Member was biased or (applying the test articulated earlier in these Reasons) a finding of a reasonable apprehension of bias.

## VI. Costs

[41] As the Applicant has not identified a reviewable error on the part of the Appeal Division, this application for judicial review will be dismissed. Although the Respondent has prevailed in this application, it does not seek costs. As such, my Judgment will provide for no order as to costs.

**JUDGMENT IN T-2248-23**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is dismissed.
2. No costs are awarded in this application.
3. The style of cause in this application is amended, as set out above, to substitute the Attorney General of Canada as the sole Respondent.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2248-23 |
| **STYLE OF CAUSE:** | LAWRENCE GOULD v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | SYDNEY, NOVA SCOTIA AND VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 6, 2024 |
| **JUDGMENT AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | JUNE 10, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Lawrence Gould | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Ian McRobbie | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Gatineau, Quebec | FOR THE RESPONDENT |