[TRANSLATION]

Citation: *CM v Canada Employment Insurance Commission*, 2022 SST 1097

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated May 3, 2022 (GE-22-552)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	October 3, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	October 25, 2022
File number:	AD-22-325

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was placed on leave without pay (suspended from her job). She applied for Employment Insurance (EI) benefits. The Respondent (Commission) accepted the employer's reason for placing the Claimant on leave. It decided that the Claimant was suspended for misconduct, namely, not following her employer's vaccination policy (policy). Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits. The Claimant asked the Commission to reconsider her application. It denied her reconsideration request. She appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant refused to follow the employer's policy. It found that she knew that the employer was likely to suspend her in these circumstances and that her refusal was intentional, conscious, and deliberate. The General Division decided that the Claimant was suspended because of misconduct.

[4] The Appeal Division granted the Claimant leave to appeal the General Division decision. The Claimant argues that the General Division made an error of law in finding misconduct because she does not meet the criteria set out in the case law for characterizing behaviour as misconduct.

[5] I have to decide whether the General Division made an error of law when it found that the Claimant was suspended because of misconduct.

[6] For the reasons mentioned below, I am dismissing the Claimant's appeal.

Issue

[7] Did the General Division make an error of law when it found that the Claimant was suspended because of misconduct?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[10] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, I must dismiss the appeal.

Did the General Division make an error of law when it found that the Claimant was suspended because of misconduct?

[11] The Claimant says that the General Division made an error of law in finding misconduct because she does not meet the criteria set out in the case law for characterizing behaviour as misconduct.

[12] Before the Appeal Division, the Claimant reiterated the reasons given to the General Division in support of her position that there was no misconduct on her part. She argues as follows:

- There was no conflict with her employer.
- She was not reprimanded, and her employer did not file a complaint.

[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

- Her employer changed her conditions of employment and breached her employment contract.
- The employer's policy was unreasonable and unjustified.
- The employer didn't offer her any accommodations.
- The employer imposed a disproportionate penalty on her.
- She had the right to refuse an experimental vaccine.
- There could be no free and informed consent on her part because her employer refused to answer questions about the side effects of the vaccine.
- Her individual and constitutional rights were violated.
- In the circumstances, she could not have known that her employer would go as far as suspending her. This means that there was no misconduct.

[13] The Claimant works in her employer's administrative services department. The employer implemented a policy to protect the health and safety of workers from the dangers of COVID-19. The Claimant went against the employer's policy. The employer suspended her.

[14] The General Division had to decide whether the Claimant was suspended (temporarily prevented from working) because of misconduct.[2]

[15] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[2] See sections 30 and 31 of the *Employment Insurance Act*. Section 32(1) does not apply in this case.

[16] The General Division's role is not to rule on the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending the Claimant in such a way that her suspension was unjustified. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[17] The General Division found that the Claimant was suspended because she did not follow the employer's policy in response to the pandemic. She had been told about the employer's policy to protect its employees during the pandemic, and she had time to comply with it.

[18] The General Division found that the Claimant deliberately refused to follow the employer's policy, even though the relevant authorities supported it. This directly led to her suspension. The General Division found that the Claimant knew that refusing to follow the policy could lead to her suspension, having been told more than once about the consequences of going against the policy.

[19] The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[20] It is well established that a deliberate violation of an employer's policy is considered misconduct under the *Employment Insurance Act* (EI Act).[3]

[21] The question of whether the employer's policy was unreasonable, abusive, and discriminatory is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[4]

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[3] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[4] See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court decided that that issue was for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court indicated that the employer's duty to accommodate is not relevant to determining misconduct under the *Employment Insurance Act*.

[22] It was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy.[5]

[23] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant. She refused to follow the policy. She knew that the employer was likely to suspend her in these circumstances, and her refusal was intentional, conscious, and deliberate.

[24] The Claimant made a **personal and deliberate choice** not to follow the employer's protection policy in response to the unique and exceptional circumstances created by the pandemic, and her employer suspended her because of this.

[25] I see no reviewable error made by the General Division when deciding the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[6]

[26] I am fully aware that the Claimant may seek relief in another forum, if a violation is established.[7] This does not change the fact that, under the EI Act, the Commission has proven, on a balance of probabilities, that the Claimant was suspended for misconduct.

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[5] See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The Court said that there are remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits. See also *Parmar v Tribe Management Inc*, 2022 BCSC 1675: In a constructive dismissal case, the Supreme Court of British Columbia found that the employer's mandatory vaccination policy was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information that was then available to it.

[6] *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.

[7] See *Canadian National Railway Company v Seeley*, 2014 FCA 111, where the Court indicated that human rights legislation does not apply to an individual's choices or preferences. I also note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights* [*sic*] despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.

Conclusion

[27] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division