



Citation: *RG v Canada Employment Insurance Commission*, 2022 SST 990

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: R. G.

Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision under appeal: General Division decision dated March 31, 2022
(GE-22-337)

Tribunal member: Pierre Lafontaine

Type of hearing: Videoconference

Hearing date: September 8, 2022

Hearing participants: Appellant
Respondent's representative

Decision date: October 6, 2022

File number: AD-22-246

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was suspended from his job. The employer said that the Claimant was suspended because he refused to comply with the employer's COVID-19 vaccination policy (Policy). The Policy required employees to disclose their vaccination status, and to be fully vaccinated by a set date. If they did not comply, they could be suspended.

[3] The Claimant refused to comply because he found the Policy unreasonable, particularly in his circumstances. He had been working from home for a number of years, and had signed a contract to continue working from home until December 30, 2022. He posed no risk to co-workers or to members of the public. He is entitled to keep his personal health information private and under no obligation to disclose it to the employer. His suspension was therefore unjustified. The Claimant argued that he should receive EI benefits because he was not suspended because of his misconduct.

[4] The Respondent (Commission) determined that the Claimant was placed on a leave of absence from his job because of misconduct so it was not able to pay him benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[5] The General Division found that the Claimant refused to comply with the Policy. It found that the Policy applied to the Claimant even if he worked from home. It found that the Claimant knew that the employer was likely to suspend him in these circumstances and that his refusal was willful, conscious and deliberate. The General Division concluded that the Claimant was placed on a leave of absence from his job because of his misconduct.

[6] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored that he worked from home and that the Commission's own website specifically mentions that failure to comply with a vaccination policy does not necessarily render you ineligible for benefits if applying the policy to you was unreasonable within your workplace context.

[7] I have to decide whether the General Division made an error when it concluded that the Claimant was suspended from his employment because of misconduct.

[8] I am dismissing the Claimant's appeal.

Issue

[9] Did the General Division make an error when it concluded that the Claimant was suspended from his job because of misconduct?

Analysis

Appeal Division's mandate

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

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

² *Idem*.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, refused to exercise or exceeded its jurisdiction, erred in law, 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 when it concluded that the Claimant was suspended from his job because of misconduct?

[13] The Claimant submits that applying the employer's Policy to him was unreasonable considering his workplace context.

[14] The Claimant submits that he worked from home and posed no threat to his working colleagues and the public. He argues that the Commission's own website specifically mentions that failure to comply with a vaccination policy does not necessarily render a claimant ineligible for benefits if applying the policy was unreasonable within a claimant's workplace context.³

[15] The evidence shows that the Claimant started working for the employer around mid-2018. He worked in the employer's office until the shut down in March 2020 due to the COVID-19 pandemic. From that time to the imposition of the suspension on November 15, 2021, he worked from home without any physical contact with others. In August 2021, the Claimant and the employer made a written Interim Work Agreement (IWA) for the Claimant to work from home. The IWA covered the period from September 10, 2021, to December 31, 2022.

[16] On October 6, 2021, the Claimant's employer implemented a vaccination policy that indicates: "all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19." The deadlines for compliance with the Policy for most employees, including the Claimant, was October 29, 2021. The Claimant refused

³ See GD8-4.

to comply with the Policy. He did not disclose his vaccination status to the employer, nor did he ask for an exemption.

[17] The General Division had to decide whether the Claimant was suspended because of his misconduct.

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

[19] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending a claimant in such a way that their suspension was unjustified, but rather of deciding whether a claimant was guilty of misconduct and whether this misconduct led to their suspension.⁴

[20] The General Division found that the Claimant refused to comply with the Policy. It found that the Policy applied to the Claimant even if he worked from home. It found that the Claimant knew that the employer was likely to suspend him in these circumstances and that his refusal was willful, conscious and deliberate. The General Division concluded that the Claimant was placed on a leave of absence from his job because of his misconduct.

[21] The General Division determined that it did not have the expertise or the jurisdiction to decide questions about the vaccine's effectiveness. It determined that its jurisdiction did not extend to deciding whether applying the policy to the Claimant was reasonable in his workplace context. The General Division decided that those matters are for courts to resolve.

⁴ *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[22] In appeal, the Claimant raises the question of whether the General Division refused to exercise its jurisdiction by not deciding whether applying the employer's policy to him was reasonable given his work context.

[23] It is important to reiterate that the content of the Commission's website is not legally binding on the Tribunal. The opinion of the administrator who acts under the law does not necessarily correspond to the law.⁵

[24] It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace. It is not for the Tribunal to decide whether it was reasonable for the employer to extend this protection to employees working from home during the pandemic.⁶

[25] In other words, the Tribunal does not have the expertise or jurisdiction to decide whether the employer's health and safety obligations regarding COVID-19 ceased the moment the Claimant started working from home or whether they continued to apply.

[26] I agree with the General Division that ruling on a public health issue is well beyond the scope of the Tribunal's expertise in EI matters and lies outside its jurisdiction.

[27] I therefore find no error in the General Division's determination that it has no jurisdiction to decide questions about the vaccine's effectiveness or the reasonableness of the employer's policy that applies to workers working remotely and teleworking.

⁵ *Canada (Attorney General) v Greey*, 2009 FCA 296, *Canada (Attorney General) v Savard*, 2006 FCA 327.

⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The Court stated that there are available 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 vaccine 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.

[28] The preponderant evidence shows that the employer's Policy applied to the Claimant that worked from home. The Claimant refused to comply with the Policy. He knew that the employer was likely to suspend him in these circumstances and his refusal was willful, conscious and deliberate.

[29] The Claimant **made a personal and deliberate choice** not to follow the employer's Policy in response to the unique and exceptional circumstances created by the pandemic and this resulted in him being suspended from his job.

[30] It is well-established case law that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act* (EI Act).⁷

[31] The Claimant argued before the General Division that the employer's policy unilaterally changed the conditions of his employment, discriminated against him, and went against his Human Rights. As stated by the General Division, those questions are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.⁸

[32] I must reiterate that the question submitted to the General Division was not whether the employer was guilty of misconduct by suspending the Claimant such that this would constitute unjust suspension, but whether the Claimant was guilty of misconduct under the EI Act and whether this misconduct resulted in the Claimant being suspended from work.

⁷ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

⁸ In *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 found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, indicating that the employer's duty to accommodate is irrelevant in determining misconduct under the EI Act.

[33] I see no error made by the General Division when it decided the issue of misconduct within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.⁹

[34] I am fully aware that the Claimant may seek relief before another forum, if a violation is established. 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 because of his misconduct.

[35] For these reasons, I have no choice but to dismiss the Claimant's appeal.

Conclusion

[36] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

⁹ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.