[TRANSLATION]

Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 1322

Social Security Tribunal of Canada
Appeal Division

Decision

Applicant:	S. P.
Respondent: **Representative:**	Canada Employment Insurance Commission Anick Dumoulin

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Decision under appeal:	General Division decision dated June 2, 2022 (GE-22-866)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	November 1, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	November 17, 2022
File number:	AD-22-420

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was placed on leave without pay by her employer. She applied for Employment Insurance (EI) benefits. The Respondent found that the Claimant was suspended for misconduct, namely, for 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. The Commission denied her application for benefits. The Claimant appealed to the General Division.

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

[4] The Appeal Division granted the Claimant leave to appeal the General Division decision. It argues that the General Division made an error since it was not reasonable of the employer to impose a vaccination policy when she was teleworking full-time and did not have contact with other employees or the public. It argues that there was no misconduct within the meaning of the law.

[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] 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 have to 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] The Claimant also says that:

1. The General Division did not decide the issue of voluntary leave; the Commission did not meet the requirements of section 32 of the *Employment Insurance Act* (EI Act).

2. The collective agreement does not mention at all the possibility of the employer imposing leave without pay.

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

3. No disciplinary measures set out in the employer's collective agreement were taken against her.

4. It was not the employer's responsibility to impose a policy to protect her health and safety when she was teleworking full-time and did not have contact with other employees or the public.

5. She returned to work on June 20, 2022, following the Treasury Board's June 14, 2022, decision to suspend the vaccine mandate for core federal public servants.

[13] The Claimant argues that the General Division did not decide the issue of voluntary leave under section 32 of the EI Act.

[14] The Claimant recognized not having voluntarily taken a period of leave. She confirmed to the Commission that she was on leave without pay after refusing to comply with the employer's policy.[2] Also, the Record of Employment indicates that the employer placed the Claimant on "[l]eave due to non-compliance with the employer's vaccination policy, please treat as a code M." A Code M means dismissal or suspension.

[15] On reconsideration, the Commission found that the Claimant was suspended from her duties because of her own misconduct and imposed a disentitlement under section 31 of the EI Act. She appealed the reconsideration decision to the General Division.

[16] It is clear that section 32 of the EI Act does not apply in the Claimant's circumstances since it is the employer who, against her will, imposed a leave without pay for violating its policy.[3]

[2] See GD3-17 and GD3-22.

[3] The Claimant provided decision GD-22-1158 to support her position. But, in that case, the issue before the General Division was specifically whether the Claimant had voluntarily taken a period of leave under section 32 of the *Employment Insurance* Act (EI Act). It is not the case for this file.

[17] The General Division had to decide whether the Claimant was suspended (temporary separation from employment) because of 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, 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.

[19] 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.

[20] The General Division found that the Claimant was suspended because she did not comply with 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. The General Division found that the Claimant deliberately refused to follow the policy. She did not get accommodations. This was the direct cause of her suspension.

[21] The General Division found that the Claimant knew that refusing to comply with the policy could lead to her suspension, having been told more than once about the consequences of violating the policy. The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[22] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[4]

[4] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[23] The Claimant argues that it was not her employer's responsibility to impose a policy to protect her health and safety when she was teleworking full-time and did not have contact with other employees or the public.

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

[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 stopped the moment the Claimant started working from home or whether they continued to apply.

[26] I am of the view 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] So, it was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy, which applied to employees teleworking and working remotely.[5]

[28] 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.[6]

[29] The Claimant says that the General Division found there was misconduct even though her employer had not taken any other disciplinary measure against her. She submits that the employer instead put her on administrative leave without pay, when the collective agreement does not mention anything to that effect.

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[5] See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The Court said that there are remedies to penalize an employer's behaviour other than having taxpayers pay for the employer's actions through Employment Insurance (EI) benefits.

[6] 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 EI Act.

[30] It was for the General Division to verify and interpret the facts of this case and to make its own assessment of the issue of misconduct under the EI Act. The reasons given by an employer are never binding on the General Division.[7] Also, the General Division did not have to decide whether the “leave without pay” imposed by the employer was administrative or disciplinary. An employer’s disciplinary procedure is not relevant to determining misconduct under the EI Act.[8]

[31] The evidence shows, on a balance of probabilities, that the employer’s policy applied to the Claimant, even though she was working from home. She refused to comply with the policy. She knew that the employer was likely to suspend her in these circumstances, and her refusal was intentional, conscious, and deliberate.

[32] The Claimant made a **personal and deliberate choic**e not to follow the employer’s policy in response to the exceptional circumstances created by the pandemic, and her employer suspended her because of this.

[33] 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.[9]

[34] Even though the Claimant argues that her employer called her back to work, this does not change the misconduct that initially led to her suspension.[10]

[35] I am fully aware that the Claimant can seek compensation in another forum, if a violation is established.[11] This does not change the fact that, under the EI Act, the

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[7] *JS v Canada Employment Insurance Commission*, 2015 SSTAD 447.
[8] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[9] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[10] *Canada (Attorney general) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.
[11] 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. 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. I also note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed

Commission has proven, on a balance of probabilities, that the Claimant was suspended for misconduct.

Conclusion

[36] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division

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.