



[TRANSLATION]

Citation: *GL v Canada Employment Insurance Commission*, 2022 SST 1382

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: G. L.
Representative: Myriam Bohémier

Respondent: Canada Employment Insurance Commission
Representative: Dani Grandmaître

Decision under appeal: General Division decision dated
June 21, 2022 (GE-22-966)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference
Hearing date: November 3, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: November 18, 2022
File number: AD-22-458

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was let go by his employer. He applied for Employment Insurance (EI) benefits. The Respondent (Commission) decided that the Claimant lost his job because of misconduct—that is, for not complying with his 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 its decision. It denied his reconsideration request. He appealed the reconsideration decision 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 let him go in these circumstances and that his refusal was intentional, conscious, and deliberate. The General Division decided that the Claimant lost his job 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 because it was unreasonable for his employer to impose a vaccination policy when he was working from home full-time and was not in contact with other employees or the public. He argues that there was no misconduct under the law.

[5] I have to decide whether the General Division made an error of law when it found that the Claimant lost his job 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 let go 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 let go because of misconduct?

[11] The Claimant argues that the General Division made an error of law when it found that there was misconduct because he does not meet the jurisprudential criteria that qualifies a behaviour as misconduct.

[12] Specifically, the Claimant argues the following:

- He worked from home during the pandemic. Therefore, the employer's policy was not proportional in the circumstances because other employees and clients were still protected. Even when he worked at the office, he connected remotely to his coworkers' computers.
- Refusing an experimental vaccine does not amount to misconduct under the law.

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

- The efficacy of COVID-19 vaccines has never been proven. Furthermore, they do not prevent the transmission of the virus.
- The employer's vaccination policy constitutes extortion of consent to a medical procedure forcing the Claimant to get vaccinated. This pressure on the Claimant did not allow for valid consent.
- The employer offered him no accommodations.
- When an employer abuses its right to manage with an illegal policy, the Claimant cannot be accused of misconduct for refusing to follow it.
- The Claimant's behaviour was not likely to undermine or seriously compromise the employer's trust in their relationship.
- The employer's mandatory vaccination policy violates the *Quebec Charter of Human Rights and Freedoms*.
- Imposing a medical treatment violates the Claimant's constitutional rights.
- He filed an action for dismissal without cause against his employer.
- Section 29(c) of the *Employment Insurance Act* (EI Act) should have been applied to the Claimant.

[13] The Claimant argues that section 29(c) of the EI Act applies to his situation.

[14] In support of his EI application, the Claimant said he was let go by his employer after he refused to follow the company policy. The Claimant's Record of Employment indicates that it was filed because of a dismissal. The Claimant told the Commission several times that he was let go. He also filed an action for wrongful dismissal before the Quebec Labour Court.

[15] The evidence clearly shows that the Claimant did not voluntarily leave his job. He is not the one who chose to end his job. Section 29(c) of the EI Act therefore does not apply in this case.

[16] The General Division had to decide whether the Claimant lost his job because of misconduct.²

[17] 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.

[18] 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 dismissing the Claimant in such a way that his dismissal was unjustified. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.

[19] The General Division found that the Claimant was let go because he did not comply with the employer's policy in response to the pandemic. The Claimant was told about the employer's policy to protect its staff during the pandemic and had time to comply with it. The General Division found that the Claimant deliberately refused to follow the policy. He did not get an accommodation. This directly led to his dismissal.

[20] The General Division found that the Claimant knew that his refusal to comply with the policy could lead to his dismissal because he had been told about the consequences of not following the policy. The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[21] It is well established that a deliberate violation of an employer's policy is considered misconduct under the EI Act.³

² In accordance with sections 29 and 30 of the *Employment Insurance Act* (EI Act).

³ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[22] The Claimant argues that it is not his employer's role to impose a policy to protect his health and safety when he is working from home full-time and is not in contact with other employees or the public.

[23] It is not disputed that an employer has a legal obligation 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 this protection to employees working remotely or from home during the pandemic.

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

[25] 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 working remotely and from home.

[26] The Claimant argues that the employer refused to accommodate him, that the employer's policy was unreasonable, and that it violated his fundamental and constitutional rights. These issues are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.⁴

[27] In *Paradis*, the claimant asked for judicial review of a decision of the Tribunal's Appeal Division refusing leave to appeal. He argued that the Appeal Division had not considered that the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

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. 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 taxpayer by way of unemployment benefits. 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.

[28] The Federal Court decided that that issue was for another forum. The Court noted that there are available remedies to sanction the behaviour of an employer other than by way of EI benefits.⁵

[29] It is also well established that the *Canadian Charter of Rights and Freedoms* applies to government action. The Claimant disagrees with the policy of his employer—a private company. The Charter does not apply to private interactions between individuals or private companies.⁶

[30] The Claimant completely disagrees with the Commission's position qualifying the refusal to accept an experimental vaccine as misconduct. But the General Division's role was to verify and interpret the facts of the case and make its own assessment on the issue of misconduct under the EI Act.

[31] As the General Division noted, the Claimant committed when he was hired to follow all employer policies—not just those he agreed with.⁷

[32] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant, even though he was working from home. He refused to comply with the policy despite a planned return to the office. He knew that the employer was likely to let him go in these circumstances, and his refusal was wilful, conscious, and deliberate. The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the exceptional circumstances created by the pandemic, which resulted in his dismissal.

[33] I see no reviewable error by the General Division when it decided the issue of misconduct within the parameters established by the Federal Court of Appeal, which has defined misconduct under the EI Act.⁸

⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 34.

⁶ See section 32(1) of the *Canadian Charter of Rights and Freedoms*.

⁷ See GD2-11.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[34] I am fully aware that the Claimant may seek relief before another forum if a violation is established.⁹ This does not change the fact that, under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was let go because of misconduct.

Conclusion

[35] The appeal is dismissed

Pierre Lafontaine
Member, Appeal Division

⁹ See *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 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.