Citation: *SR v Canada Employment Insurance Commission*, 2022 SST 1373

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. R.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated June 24, 2022 (GE-22-1243)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	November 15, 2022
Hearing participants:	Appellant
Decision date:	November 22, 2022
File number:	AD-22-490

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) worked as a technical resource officer dealing with GST accounting. She provided support services to X employees, not to the public. The employer suspended the Claimant on December 13, 2021, because she did not comply with the COVID-19 vaccination policy (Policy) at work. The Claimant then applied for EI regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from her job because of her misconduct so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended following her refusal to follow the employer's Policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended from her job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored that she 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.

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

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

Issue

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

Analysis

Appeal Division's mandate

[9] 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,* the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] 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]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, 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 her job because of misconduct?

[12] The Claimant submits that the General Division ignored the evidence before it and made an error in law when it concluded that she was suspended because of her misconduct.

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

[13] The Claimant submits that the employer's Policy was unreasonable considering that the vaccine did not prevent transmission of the virus. She submits that the employer never answered her questions related to the vaccine, so she could not make an informed decision.

[14] The Claimant submits that the Policy unilaterally changed the terms of her contract of employment and that applying it to her was unreasonable considering her workplace context.

[15] The Claimant submits that she worked from home and posed no threat to her working colleagues and the public. She 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. The Claimant submits that she is now back to work and still working from home.

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

[17] 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.

[18] 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 the Claimant in such a way that her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.[3]

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

[19] The General Division found that the Claimant refused to comply with the Policy, and did not ask before the deadline for an allowed exemption. It found that the Policy applied to the Claimant even if she worked from home. The General Division found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her refusal was willful, conscious and deliberate. The General Division concluded that the Claimant was suspended from her job because of her misconduct.

[20] 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 if applying the policy to the Claimant was reasonable, especially taking into account her workplace context. It determined that those matters are to be decided by the appropriate courts.

[21] 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 her was reasonable given her work context.

[22] It is important that I reiterate that the website is an interpretive guide that is not legally binding on the Tribunal. A policy simply reflects the opinion of the administrator who acts under the law. That opinion does not necessarily correspond to the law.[4]

[23] It is not really in dispute that an employer has a legal 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.

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

[24] 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.

[25] 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.

[26] 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]

[27] 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, and was not granted an exemption. She knew that the employer was likely to suspend her in these circumstances and her refusal was willful, conscious and deliberate. The refusal to follow the Policy was the reason for her suspension.

[28] 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 her being suspended from her job.

[29] 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).[6]

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[5] 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 The Court also 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.
[6] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[30] The Claimant argues that the employer refused to accommodate her, discriminated against her, and went against her Human Rights. Those questions are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[7]

[31] 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.

[32] 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.[8]

[33] Although the Claimant argues that her employer called her back to work and that she still works from home, this fact does not change the nature of the misconduct that initially led to her suspension.[9]

[34] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[10] This does not change the fact that under the EI Act,

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[7] 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.

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

[9] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

[10] I note that in a recent decision, the Superior Court of Quebec has ruled that provisions that imposed the vaccination, although they infringed the liberty and security of the person, did not violate section 7 of the *Canadian Charter of Rights*. Even if section 7 of the Charter were to be found to have been violated, this violation would be justified as being a reasonable limit under section 1 of the Charter - *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (Only in French at the time of publishing); 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; See also *Canadian National Railway Company v Seeley*, 2014 FCA 111, the Court stated that the *Canadian Human Rights Act* does not apply to personal choices or preferences.

the Commission has proven on a balance of probabilities that the Claimant was suspended because of her 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