



Citation: *DH v Canada Employment Insurance Commission*, 2023 SST 137

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: D. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 9, 2022
(GE-22-2436)

Tribunal member: Pierre Lafontaine

Decision date: February 10, 2023

File number: AD-23-38

Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

Overview

[2] The Applicant (Claimant) lost her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant her an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant lost her job because of 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 lost her job following her refusal to follow the employer's Policy. The employer did not grant her a medical exemption. It found that the Claimant knew or should have known that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant lost her job because of misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division did not consider that her scary health crisis was the reason for her not vaccinating. The Claimant submits that she could have done COVID-19 tests twice a week, which would have been sufficient. She believes that her decision was not misconduct.

[6] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[7] I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[9] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[12] The Claimant submits that the General Division did not consider that her scary health crisis was the reason for her not vaccinating. The Claimant submits that she could have done COVID-19 tests twice a week, which would have been sufficient. She believes that her decision was not misconduct.

[13] The General Division had to decide whether the Claimant lost her job because of misconduct.

[14] 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.

[15] 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 dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.¹

[16] The General Division determined that the Claimant lost her job because she refused to follow the employer's Policy. She had been informed of the Policy and was given time to comply. She was not granted a medical exemption. The Claimant's doctor did not tell her not to get vaccinated. The medical notes do not say she cannot be vaccinated. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant knew or should have known that her refusal to comply with the Policy could lead to her dismissal.

¹ *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[17] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

[18] It is well-established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act* (EI Act).²

[19] The question of whether the employer should have accommodated the Claimant with COVID-19 testing is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.³

[20] The Federal Court has rendered a recent decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy. The claimant put forward that it was not proven that the vaccine was safe and efficient. He felt discriminated against because of his personal medical choice. The claimant submitted that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.⁴

[21] The Federal Court confirmed the Appeal Division's decision that, by law, this Tribunal is not permitted to address these questions. The Court agreed that by making a personal and deliberate choice not to follow the employer's vaccination policy, the claimant had lost his job because of misconduct under the EI Act. The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[22] In the previous *Paradis* case, the Claimant was refused EI benefits because of misconduct. He argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

² *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

³ 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, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

⁴ *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[23] The Federal Court stated that there are available remedies for a claimant to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Employment Insurance Program.

[24] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[25] The preponderant evidence before the General Division shows that 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 and this resulted in her being dismissed from work.

[26] The Claimant submits that she found a tribunal decision like her case where the applicant was successful in receiving EI benefits. The Appeal Division is not bound by that decision. The facts are also different from the Claimant's case in that the claimant succeeded in demonstrating that the collective agreement specifically allowed her to refuse vaccination.⁵

[27] I see no reviewable error made by the General Division when it decided 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

[28] 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 dismissed because of misconduct.

[29] In her application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. She has not identified errors in law nor identified any

⁵ *AL v Canada Employment Insurance Commission*, 2022 SST 1428. I note that the Commission was granted leave to appeal of that decision by the Appeal Division.

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

erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[30] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of her request for leave to appeal, I find that the appeal has no reasonable chance of success.

Conclusion

[31] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division