



Citation: *SD v Canada Employment Insurance Commission*, 2023 SST 138

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: S. D.
Representative: T. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 9, 2022
(GE-22-1881)

Tribunal member: Pierre Lafontaine

Decision date: February 10, 2023

File number: AD-23-35

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 was suspended and lost her job following her refusal to follow the employer's Policy. The employer did not grant her an exemption. It found that the Claimant should have known that the employer was likely to suspend and 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 ignored important facts when it concluded that she lost her job because of 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 she complied with all the employer's policies prior to October 13, 2021. She submits that the Policy of October 13, 2021, was the only policy that indicated she would be put on unpaid leave if not vaccinated. She left on vacation on October 19, 2021, and she had to quarantine for another two weeks. She was unable to obtain a medical appointment to get a medical exemption until December 20, 2021.

[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 that applied to all employees. She had been informed of the Policy and was given time to comply. She was not granted an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant should have known that her refusal to comply with the Policy could lead to her dismissal.

[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

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

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

[19] The General Division found that the Claimant had at least one month to read, understand, and follow the employer's vaccination policy. The Claimant agreed that she got the updated October 13, 2021, vaccination Policy before she left for her vacation on October 19, 2021. The General Division found that the Policy says that employees who don't follow the policy by the deadline of November 15, 2021, will be put on unpaid leave and may face dismissal. The General Division found that the Claimant's vacation did not change the fact that the employer gave her enough time to comply with the Policy. It found that the Claimant only said she did not have enough time to follow the Policy after she appealed to the Tribunal.

[20] I note that when the Commission interviewed the Claimant on February 10, 2022, the Claimant stated that her doctor did not want to provide her with an exemption because he did not believe it was necessary.³ In a second interview held on April 4, 2022, the Claimant reiterated that her doctor would not provide her with an exemption from the vaccine. She further stated that she made the personal choice not to be vaccinated.⁴

[21] it is well established that an appeal to the Appeal Division is not a new hearing where a party can re-present evidence and hope for a favorable outcome. The powers of the Appeal Division are limited by law.⁵

[22] The question of whether the employer's Policy violated her human and constitutional rights, 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.⁶

³ See GD3-23.

⁴ See GD3-48.

⁵ See section 58(1) of the *Department of Employment and Social Development Act*.

⁶ 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.

[23] 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.⁷

[24] 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.

[25] 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.

[26] 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.

[27] 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.

[28] 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.⁸

⁷ *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

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

[29] 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 dismissed because of misconduct.

[30] 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 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.

[31] 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

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

Pierre Lafontaine
Member, Appeal Division

⁹ 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).