Citation: *KJ v Canada Employment Insurance Commission*, 2023 SST 266

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. J.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated November 7, 2022 (GE-22-2078)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	February 14, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	March 13, 2023
File number:	AD-22-884

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) lost his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). He was not granted an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

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

[4] The General Division found that the Claimant lost his job following his refusal to follow the employer's Policy. He did not get an exemption. It found that the Claimant knew that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant was dismissed from his job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored the evidence that he had agreed with the employer prior to accepting his position that he would not be required to get the COVID-19 vaccine. The employer went against his contract of employment. The Claimant submits that the General Division did not consider the employer's amended *Record of Employment* (ROE) that indicates "end of contract". The employer could not meet their obligations set out in the conditions of employment, so ended the contract. The Claimant submits that an employer cannot implement intrusive policies upon employees as they see fit.

[6] I have to decide whether the General Division made an error of fact or law, when it concluded that the Claimant lost his job because of misconduct.

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

Issue

[8] Did the General Division make an error in fact or in law when it concluded that the Claimant lost his 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 in fact or in law when it concluded that the Claimant lost his job because of misconduct?

[12] The Claimant submits that the General Division ignored the evidence that he had agreed with the employer prior to accepting his position that he would not be required to get the COVID-19 vaccine. The employer went against his contract of employment. The Claimant submits that the General Division did not consider the employer's amended ROE that indicates "end of contract". The employer could not meet their obligations set

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

out in the conditions of employment, so ended the contract. The Claimant submits that an employer cannot implement intrusive policies upon employees as they see fit.

[13] The General Division had to decide whether the Claimant was dismissed 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 his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.

[16] Based on the evidence, the General Division determined that the Claimant was dismissed because he refused to follow the Policy. He had been informed of the employer's Policy and was given time to comply. He was not granted an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his dismissal.

[17] The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his dismissal.

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

[19] 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).[3] It is also considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.[4]

[20] It is not really in dispute that an employer has an 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.

[21] In the present case, the employer followed the Government recommendations to implement its Policy to protect the health of all employees and students during the pandemic. The Policy was in effect when the Claimant was dismissed.

[22] The Claimant submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer failed to respect his contract of employment and whether the employer's policy violated his rights.

[23] The question of whether the employer should have accommodated him, or whether the employer violated his employment rights by changing their initial work agreement, or whether the Policy violated his 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 he is seeking.[5]

[24] 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.[6]

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[4] CUB 71744, CUB 74884.
[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; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.
[6] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[25] The claimant submitted that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct. He put forward that it was not proven that the vaccine was safe and efficient. The claimant 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.

[26] 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 breached his duties and had lost his job because of misconduct under the EI Act.[7] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[27] In the previous *Paradis* case, the claimant was refused EI benefits because of misconduct. He argued that there was no misconduct because the employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[28] 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.

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

[30] As stated previously, the General Division's role is not to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.

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[7] The Court refers to *Bellavance,* see note 3.

[31] 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 him being dismissed from work.

[32] 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]

[33] The Claimant submits that the General Division ignored that the employer submitted an updated ROE that indicates it was issued because of a shortage of work/ end of contract. He submits that the Commission should have contacted the employer following reception of the amended ROE.

[34] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. It is not the General Division's role to investigate the Commission's conduct during the claim process.

[35] The General Division considered that the evidence showed that the employer issued an initial ROE that indicates that the Claimant was dismissed. It considered that the employer stated several times that the Claimant was dismissed because he refused to comply with their Policy. The General Division considered that the Claimant confirmed the employer's version of events during interviews by the Commission.

[36] The employer's updated ROE is not binding on the General Division. I find no error in the General Division's determination that the preponderant evidence provided by the parties during the whole process did not support a conclusion that the Claimant was let go following a shortage of work/end of contract.

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

[37] 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.

[38] For these reasons, I have no choice but to dismiss the appeal.

Conclusion

[39] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division