



[TRANSLATION]

Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 208

## **Social Security Tribunal of Canada Appeal Division**

# **Extension of Time and Leave to Appeal Decision**

**Applicant:** M. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
October 19, 2022 (GE-22-1708)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** February 27, 2023

**File number:** AD-23-36

## **Decision**

[1] An extension of time to apply to the Appeal Division is granted. However, permission to appeal is refused. The appeal will not proceed.

## **Overview**

[2] The Applicant (Claimant) was suspended because she refused to follow the employer's COVID-19 vaccination policy (policy). She did not get an exemption. She then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended because of misconduct. Because of this, it decided that she is disqualified from receiving EI benefits. The Claimant asked the Commission to reconsider. It upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer's policy. It found that the Claimant knew or should have [known] that the employer was likely to suspend her in these circumstances and that her non-compliance was intentional, conscious, and deliberate. The General Division decided that the Claimant was suspended because of misconduct.

## **Issues**

[5] The issues are as follows:

- a) Was the application to the Appeal Division late?
- b) If the application was late, should I extend the time for filing the application?
- c) Is there an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success?

## **Analysis**

### **The application was late**

[6] The General Division decision was communicated to the Claimant on October 20, 2022. She filed her application for permission to appeal on January 8, 2023. Her application was late.

### **I am extending the time for filing the application**

[7] When deciding whether to extend the time for filing the application, I have to consider whether the Claimant has a reasonable explanation for why her application was late.<sup>1</sup>

[8] I note that when she received the General Division decision, the Claimant was busy with her role as a caregiver for her mother. She had to regularly deal with the doctor and medical staff in decisions about her mother's health. This had a significant impact on her daily activities. She filed her application as soon as her mother's situation had stabilized.

[9] In the circumstances, the Claimant has given a reasonable explanation for the delay. I should extend the time for filing the application.

### **I am not giving the Claimant permission to appeal**

[10] 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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue it should have decided. Or, it decided something it did not have the power to decide.

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<sup>1</sup> See section 27(2) of the *Social Security Tribunal Rules of Procedure*.

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.

[11] An application for permission 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 at the hearing of the appeal on the merits. At the permission to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success—in other words, that there is arguably a reviewable error based on which the appeal might succeed.

[12] I will give permission to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

[13] The Claimant says that the General Division did not consider her argument that she is subject to a collective agreement and that her employment contract does not say that she has to follow a vaccination policy implemented by her employer. In the circumstances, my [*sic*] employer drastically and illegally changed conditions of employment without consulting the unionized employees.

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

[15] It is well established that I have to rely on the evidence that was before the General Division in deciding the Claimant's application for permission to appeal.<sup>2</sup>

[16] 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.

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<sup>2</sup> *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[17] 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 suspending the Claimant in such a way that her suspension was unjustified. Its role is to decide whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[18] The General Division found that the Claimant was suspended because she did not comply with the employer's policy in response to the pandemic. The Claimant was told about the policy the employer put in place to protect the health and safety of staff and had time to comply with it. The General Division found that the Claimant deliberately refused to follow the policy and that she did not get an exemption. This was the direct cause of her suspension.

[19] The General Division found that the Claimant knew or should have known that her refusal to comply with the policy could lead to her suspension.

[20] 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 *Employment Insurance Act* (EI Act).<sup>3</sup> It is also considered misconduct within the meaning of the EI Act not to follow a policy duly approved by a government or industry.<sup>4</sup>

[22] It is not really in dispute that an employer is legally required to take all reasonable precautions to protect the health and safety of its employees in the workplace. In this case, the Government of Canada implemented its policy for the core public administration to protect the health of all employees during the pandemic. The policy was in effect when the Claimant was suspended.<sup>5</sup>

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<sup>3</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>4</sup> CUB 71744, CUB 74884.

<sup>5</sup> The policy was issued under sections 7 and 11.1 of the *Financial Administration Act*.

[23] It was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy. In other words, the Tribunal does not have jurisdiction to decide whether the employer's COVID-19 measures were effective or reasonable.

[24] The question of whether the employer breached the collective agreement or should have accommodated the Claimant, or whether its policy was unreasonable and abusive, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy that she is seeking.<sup>6</sup>

[25] The Federal Court recently made a decision in *Cecchetto* about misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.<sup>7</sup>

[26] The claimant argued that the safety and efficacy of the vaccine had not been proven. He felt discriminated against because of his personal medical choice. He said that he had the right to control his own bodily integrity and that his rights had been violated under Canadian and international law.

[27] The Federal Court confirmed the Appeal Division's decision that, by law, the 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 toward the employer and had lost his job because of misconduct under the EI Act.<sup>8</sup> The Federal Court said there were other legal avenues through which the claimant's claims could be heard.

[28] In *Paradis*, the claimant applied for judicial review of a decision by the Tribunal's Appeal Division refusing permission to appeal. He argued that there was no misconduct because the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

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<sup>6</sup> I note that the Claimant filed a grievance.

<sup>7</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>8</sup> The Court referenced *Bellavance*. See footnote 2.

[29] The Federal Court confirmed that it was a matter for another forum. It noted that there are remedies to penalize an employer's behaviour other than through the EI program.

[30] The evidence before the General Division shows, on a balance of probabilities, that the employer's policy applied to the Claimant. She refused to comply with the policy. She knew that the employer was likely to suspend her in these circumstances, and her non-compliance was intentional, conscious, and deliberate.

[31] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the unique circumstances created by the pandemic, and her employer suspended her because of this.

[32] I see no reviewable error made by the General Division when deciding the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[33] The Claimant cited a General Division decision in support of her position.<sup>9</sup> I note that the decision is currently under appeal before the Appeal Division and that the facts are different.<sup>10</sup> In this case, the evidence does not show that the collective agreement had a specific provision allowing the Claimant to refuse vaccination. In addition, this General Division decision was made before *Cecchetto*. The General Division decision does not help the Claimant.

[34] I am fully aware that the Claimant may seek relief in another forum if a violation is established.<sup>11</sup> This does not change the fact that, under the EI Act, the Commission has

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<sup>9</sup> *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

<sup>10</sup> The Commission was given permission to appeal the General Division decision to the Appeal Division (AD-23-13).

<sup>11</sup> I 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.

proven, on a balance of probabilities, that the Claimant was suspended because of misconduct.

[35] After reviewing the appeal file, the General Division decision, and the Claimant's arguments in support of the application for permission to appeal, I find that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

## **Conclusion**

[36] An extension of time to apply to the Appeal Division is granted. However, permission to appeal is refused. This means that the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division