Citation: *TB v Canada Employment Insurance Commission*, 2023 SST 130

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	T. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 31, 2022 (GE-22-2523)

Tribunal member:	Janet Lew
Decision date:	February 7, 2023
File number:	AD-22-903

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, T. B. (Claimant), is appealing the General Division decision. The General Division found that the Claimant had stopped working because her employer suspended her for misconduct. The General Division also found that the Claimant left her job without just cause. The General Division found that, as a result, the Claimant was unable to get Employment Insurance benefits.

[3] The Claimant argues that the General Division made several important errors of fact. She denies that she lost her job. She says that her employer—without any right to do so—forced her to take an involuntary leave of absence without pay. Either way, she denies that misconduct even arose in her case. She argues that the General Division failed to understand what misconduct means.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] In other words, is there a chance that the Claimant could win on her arguments at the appeal? If the appeal does not have a reasonable chance of success, this ends the matter.

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

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[1] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act). I am required to refuse permission if I am satisfied, "that the appeal has no reasonable chance of success".
[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Issues

[6] The issues are as follows:

a) is there an arguable case that the General Division made a factual error that the Claimant lost her employment?

b) Is there an arguable case that the General Division failed to consider whether the Claimant's employer had any right to place her on an unpaid leave of absence?

c) Is there an arguable case that the General Division did not properly define misconduct?

Analysis

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional (did the General Division overstep its authority or fail to exercise its authority), procedural, legal, or certain type of factual error.[3]

[8] For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[9] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

[3] See section 58(1) of the DESD Act.

Is there an arguable case that the General Division made a factual error that the Claimant lost her employment?

[10] The Claimant argues that the General Division made a factual error that she lost her employment.[4] She denies that she lost her job. She states that her employer placed her on a leave without pay.

[11] The General Division identified the issues it had to address. It said that it had to identify whether the Claimant lost her job because of misconduct.

[12] The General Division noted the Claimant's evidence that her employer placed her on a leave of absence without pay, even though she did not agree to it.

[13] Since the employer placed the Claimant on a leave of absence, the General Division concluded that the Claimant's employer suspended her. However, the General Division wrote that the Claimant "lost her job":

- At paragraph 20, it wrote that it should treat the Claimant's "loss of employment" as a suspension and that "she lost her job." It referred to the "Claimant's loss of employment."

- At paragraph 21, it wrote that it had to consider which of the Claimant's actions caused "the loss of her job."

- At paragraph 30, it wrote that the Respondent, the Canada Employment Insurance Commission (Commission), had to prove that "the Claimant lost her job because of misconduct" and that it meant showing that it was more likely than not that she "lost her job because of misconduct."

- At paragraph 31, it wrote that the Commission argued that the Claimant should have known that she "could lose her job."

[4] See Claimant's application to the Appeal Division, at AD 1-9.

- At paragraph 37, it concluded that the Claimant should have known that she "could lose her job"

- At paragraph 4, the General Division said that its only role was to decide "if the Claimant lost her job because of misconduct."

[14] Each of these instances suggest that the Claimant lost her employment. If the Claimant had lost her employment, usually that would mean that she was no longer employed in any capacity or doing any work at all.

[15] Yet, the General Division also made it clear that the Claimant remained employed by her employer. Clearly, the General Division accepted that the Claimant continued to be employed because it found that the Claimant quit and left her employment months later, in April 2022. She would not have been in a position to quit her job if she had truly lost her job and was no longer working.

[16] Being suspended from one's employment is different from losing one's job entirely. The General Division's choice of words was inaccurate and unfortunate. But it is clear that the General Division accepted that the Claimant's employer had placed her on an unpaid leave of absence and that she remained employed. There was a separation from her employment, but not a loss.

[17] Despite the General Division's inaccurate description of the Claimant's separation from her employment, I am not satisfied that the appeal has a reasonable chance of success on this point. The General Division's mischaracterization of the Claimant's separation from her employment did not change the outcome.

[18] Had the Claimant lost her job, she would have been disqualified from receiving Employment Insurance benefits. But, as the General Division found that she was suspended from her employment, she was disentitled from receiving Employment Insurance benefits after November 2021, until she quit her employment in April 2022.

Is there an arguable case that the General Division failed to consider whether the Claimant's employer had any right to place her on an unpaid leave of absence?

[19] The Claimant argues that the General Division failed to consider whether the Claimant's employer had any right to place her on an unpaid leave of absence. She says that she did neither wanted nor consented to being placed on an unpaid leave, so says she should not have been forced on an unpaid leave.

[20] This issue is irrelevant to whether there was misconduct under the *Employment Insurance Act*. When examining a claimant's conduct, the General Division's role is to determine whether it amounts to misconduct within the meaning of the *Employment Insurance Act* and not whether the penalty, such as an unpaid leave of absence, is appropriate or too severe.[5]

[21] So, the Claimant does not have an arguable case on this point.

Is there an arguable case that the General Division did not properly define misconduct?

[22] The Claimant argues that the General did not correctly define misconduct. She says that the General Division's definition of misconduct is overly broad. She argues that misconduct arises only in serious cases when it breaches the employment agreement. For instance, misconduct might arise if an employee engages in unlawful behaviour at the workplace.[6]

[23] The Claimant denies that misconduct arose in her case because she says that she was entitled to refuse to comply with her employer's vaccination policy. She says that she did not have to get vaccinated because (1) she has a right to refuse vaccination, (2) she finds the vaccines are ineffective, (3) data on the mortality rates of COVID-19 is unreliable, (4) she was able to perform her job without being vaccinated,

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[5] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[6] See Claimant's application to the Appeal Division, at AD 1-12.

and (5) her employer should have accommodated her. She suggests that the General Division should have addressed these issues.

– **The argument over the definition of misconduct**

[24] The Claimant argues that the General Division failed to recognize that the bar for misconduct is high. She says that misconduct arises when an employee's misconduct is frequent, or if they conduct illegal activities on the work premises. She says the conduct has to be so serious that it constitutes a breach of the employment agreement. She cites the *Metropolitan Hotel and H.E.R.E.*, Local 75 (Bellan) (Re)[7] and *R v Arthurs, Ex Parte Port Arthur Shipbuilding Co.*[8] cases to support her arguments.

- **The *Metropolitan Hotel* case is not relevant**

[25] The *Metropolitan Hotel* decision is a labour arbitration award involving an employee who had been dismissed from his employment. His employer dismissed him after he made serious threats to the Director of Human Resources, and to her family.

[26] The employee then made a claim for Employment Insurance benefits. The Board of Referees (the predecessor to the General Division) denied his claim. The Board found that the employee had been dismissed for misconduct.

[27] The issue before the arbitrator was whether it should accept the decision of the Board of Referees when it decided whether the employee should be reinstated. The arbitrator had to examine whether his employer had unjustly dismissed him. It was an entirely different issue from what the Board of Referees had decided.

[28] The arbitrator did not deal with or make any findings on the issue of misconduct. The arbitrator did not second-guess or attack the Board's decision on misconduct. The

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[7] See *Metropolitan Hotel and H.E.R.E., Loc 75 (Bellan) (Re)* 2002 CanLii 78919 (ONLA).
[8] See *R v Arthurs, Ex Parte Port Arthur Shipbuilding Co*. [1967] 2CanLII 30 (ON CA) at paras 49 to 73. The Claimant refers to the dissenting opinion. Even so, the opinion deals with the circumstances when an employer may summarily dismiss an employee. It does not deal with misconduct under the *Employment Insurance Act*. The decision was overturned on appeal to the Supreme Court of Canada, at *Port Arthur Shipbuilding Co. v Arthurs et al.*, 1968 CanLII 29 (SCC). Neither the Court of Appeal nor the Supreme Court addressed whether there was any misconduct for the purposes of the *Employment Insurance Act*.

arbitrator accepted that the Board's decision was final. So, the case is not relevant to the misconduct issue.

- **The *Arthurs* case is not relevant**

[29] The *Arthurs* decision dealt with whether the employer had just cause for dismissing three employees. The decision did not address the issue of misconduct under the *Employment Insurance Act*. The *Arthurs* decisions also is of no relevance to the misconduct issue.

– **The General Division properly defined misconduct**

[30] The General Division decision determined that for there to be misconduct under the law, the conduct has to be wilful. The General Division found that this means that the conduct is conscious, deliberate, or intentional, and includes conduct that is so reckless that it is almost wilful.

[31] The General Division determined that the Claimant did not have to have wrongful intent. She did not have to mean to be doing something wrong for her behaviour to be misconduct under the law.

[32] The General Division also found that misconduct exists if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.

[33] The General Division cited the legal cases upon which it relied. Those cases were from the Federal Court of Appeal. So, it had no choice but to follow what those cases said about misconduct.

[34] In the *Mishibinijima*[9] case, the Federal Court of Appeal set out when misconduct occurs. The Court of Appeal wrote:

> [14] Thus, there will be misconduct where the conduct of a claimant was wilful, i.e., in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the

[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

> claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[35] The General Division correctly identified the applicable caw law and accurately restated the principles set out in these cases. Notably, none of these cases said there has to be serious, illegal, or frequent conduct (or omissions) for misconduct to exist. I find that the General Division correctly defined what misconduct is.

– **The Claimant had a right to refuse vaccination**

[36] The Claimant argues that she had a right to refuse to get vaccinated. So, she says that if she had a right to refuse vaccination, then by refusing, that should not have qualified as misconduct. So, she says that the General Division should have addressed this issue and accepted that there was no misconduct.

[37] The General Division noted the Claimant's arguments that her employer could not force her to take a vaccine, and that she had the right to make her own decisions about medical treatment.

[38] The General Division did not directly address the Claimant's argument about whether misconduct arises if she has a right to refuse vaccination. But the General Division clearly rejected this argument.

[39] I agree with the Claimant that she had the right to exercise her choice. She could refuse vaccination. However, refusing to comply with an employer's policy does not mean that exercising this choice is without any consequences.

[40] In a case called *Parmar*,[10] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. It did not deal with misconduct. But there were

[10] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

some factual similarities in that Ms. Parmar objected to being vaccinated. She was concerned about the long-term efficacy and potential negative health implications.[11]

[41] The Court in that case recognized that it was "extraordinary to enact a workplace policy that impacts an employee's bodily integrity".[12] The Court went on to say:

> [154] . . . **[Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income** …
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> [155] I note that in *Maddock v British Columbia*, 2022 BCSC 1065, Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para 78, Hinkson C.J. wrote that such policies "[do] not compel or prohibit subjection to any form of medical treatment": para 78. **Rather, individuals remain free to make choices within the bounds of the policy. The [mandatory vaccination policy] did not, in the words of *Maddock*, "[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment**": paras. 78–79. Ms. Parmar retained the choice to remain on unpaid leave.
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> (My emphasis)

[42] So, the Claimant still had a choice between getting vaccinated or remaining unvaccinated, even if she found the consequences of either choice undesirable.

[43] Although the General Division did not directly address the Claimant's argument that she had a right to refuse vaccination, I am not satisfied that the appeal has a reasonable chance of success. The Claimant had a right to refuse vaccination, but that still meant that she did not comply with her employer's policy. And, by the definition set out by the courts, that still met one of the criteria for misconduct.

– **The Claimant's views on vaccines and COVID-19 are irrelevant when it comes to misconduct**

[44] The Claimant says that she should not have had to get vaccinated because her employer's vaccination policy was without any merit. She says that vaccines are

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[11] See *Parmar*, at para 65.
[12] See *Parmar*, at para 65.

ineffective in preventing transmission of COVID-19. She also says that there is a lot of misinformation about COVID-19. She says, for instance, that the risks of getting COVID-19 and falling ill or dying from it are greatly exaggerated.

[45] The General Division acknowledged the Claimant's arguments. It is clear from its decision that the General Division found these arguments irrelevant when it examined whether there was misconduct.

[46] In *Cecchetto*,[13] Mr. Cecchetto challenged the merits, legitimacy, or legality of Directive 6, which was issued by Ontario's Chief Medical Officer of Health. The directive set out rules that required every covered organization to establish, implement, and ensure compliance with a COVID-19 vaccination policy.

[47] Mr. Cecchetto raised the same type of arguments that the Claimant raises. The Court ruled that these types of arguments were beyond the scope of either the General Division or the Appeal Division to address.[14]

[48] In other words, in applying the *Cecchetto* case, the Claimant's views on vaccines and COVID-19 are irrelevant when it comes to examining whether there is misconduct. The Claimant does not have an arguable case on this point.

– **The Claimant says that she was able to perform her job duties**

[49] The Claimant argues that she was able to continue to perform her job duties without getting vaccinated. She says that, as being unvaccinated did not get in the way of carrying out her duties towards her employer, there was no misconduct in her case. The Claimant raised this argument but did not vigorously pursue it at the General Division.

[50] Once the Claimant's employer introduced its vaccination policy, the requirements under that policy formed part of the Claimant's duties and obligations. Her duties and obligations were not confined to the four corners of her job description.

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[13] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[14] See *Cecchetto*, at paras 46 to 48.

– **The Claimant sought accommodation from her employer**

[51] The Claimant argues that her employer should have accommodated her. She says that misconduct did not arise in her case because her employer failed to accommodate her.

[52] I am not making any decision about whether the Claimant's employer should have accommodated her. Again, this is beyond the scope of this application. As the Federal Court of Appeal determined in *Mishibinijima*[15] there was no error when the Umpire in that case (the predecessor to the Appeal Division) decided that the issue of whether the employer should have accommodated the applicant was not a relevant consideration to the misconduct question. I am not satisfied that there is an arguable case on this point.

[53] The question of whether the employer should have accommodated the Claimant, or whether the employer's policy violated her human rights and constitutional rights to bodily autonomy and freedom of choice, is a matter for another forum. The Social Security Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[16]

Conclusion

[54] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

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[15] See *Mishibinijima*, at para 17.
[16] 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.