



Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 186

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 16, 2022
(GE-22-2081)

Tribunal member: Pierre Lafontaine

Decision date: February 21, 2023

File number: AD-23-60

Decision

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

Overview

[2] The Applicant (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 was not granted 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 Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division ignored the evidence outlining the harmful nature of the mandated medication. He submits that it was essential to safeguard his personal well-being and therefore cannot be construed as misconduct. The Claimant submits that misconduct only applies in cases where deliberate non-compliance is in violation of reasonable policies. He submits that the vaccination requirements were not an employment condition, and the mandate was implemented outside of collective bargaining.

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

[7] I refuse 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 his 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 ignored the evidence outlining the harmful nature of the mandated medication. It was therefore essential to safeguard his personal well-being and therefore cannot be construed as misconduct. The Claimant submits that misconduct only applies in cases where deliberate non-compliance is in violation of reasonable policies. He submits that the vaccination requirements were not an employment condition, and the mandate was implemented outside of collective bargaining.

[13] The General Division had to decide whether the Claimant lost his 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 his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.¹

[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.

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

[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).² 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.³

[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. In the present case, the employer followed the Public Health recommendations to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was dismissed.⁴

[21] The Claimant submits that the General Division failed to evaluate the effectiveness and reasonableness of the employer's Policy. The Claimant submits that the General Division ignored the evidence outlining the harmful nature of the mandated medication. He argues that the Policy was too far reaching and unreasonable.

[22] I note that the General Division did consider the Claimant's arguments regarding the safety of the vaccine.⁵ However, ruling on a public health issue is well beyond the scope of the Tribunal's expertise in EI matters and lies outside its jurisdiction.

[23] I therefore find no reviewable error in the General Division's determination that it has no jurisdiction to decide questions about the vaccine's effectiveness or the reasonableness of the employer's Policy.

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

³ CUB 71744, CUB 74884.

⁴ The employer's Policy indicates: "...in accordance with our obligations under the *Occupational Health and Safety Act...*".

⁵ See General Division decision, para 48.

[24] The Claimant submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer should have accommodated him and whether the employer violated his employment contract and collective agreement.

[25] The question of whether the employer should have accommodated him, or whether the employer's Policy violated his labour rights, 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.⁶

[26] 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.

[27] 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.⁷

[28] 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 owed to the employer and had lost his job because of misconduct under the EI Act.⁸ The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

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.

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

⁸ The Court refers to *Bellavance*, see above note 2.

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

[30] 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.

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

[32] 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.

[33] 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.

[34] 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.⁹

[35] 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.

⁹ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[36] The Claimant submits that he found a General Division decision like his case where the applicant was successful in receiving EI benefits.¹⁰ It is important to reiterate that the General Division decision is not binding on the Appeal Division.¹¹ Those of the Federal Court are binding. Furthermore, the facts are different in that the claimant's collective agreement had specific provisions regarding refusal of any vaccination. The Claimant did not present any such evidence before the General Division. Furthermore, the General Division decision referred to was rendered prior to the Federal Court decision in *Cecchetto*.

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

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

¹⁰ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

¹¹ I also note that the Commission was granted leave to appeal to the Appeal Division of the General Division decision. (AD-23-13).