Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 170

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 9, 2022 (GE-22-2635)

Tribunal member:	Pierre Lafontaine
Decision date:	February 17, 2023
File number:	AD-23-45

Decision

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

Overview

[2] The Applicant (Claimant) was suspended from 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 was suspended from his job because of misconduct, so it was not able to pay him benefits. It also determined that the Claimant was not available for work from February 1, 2022. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended from his job following his refusal to follow the employer's Policy. It found that the Claimant knew or should have known that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was suspended from his job because of misconduct. It also concluded that the Claimant was not available to work from February 1, 2022.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that an employer's Policy does not overrule the law and human and constitutional rights. He had a right to informed consent. The Claimant submits that he could not apply for the employer's competitors and jeopardize is pension by going against a non-competition clause.

[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 an employer's Policy does not overrule the law and human and constitutional rights. He had a right to informed consent. The Claimant submits that he could not apply for the employer's competitors and jeopardize is pension by going against a non-competition clause.

Misconduct

[13] The General Division had to decide whether the Claimant was suspended from 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 suspending the Claimant in such a way that his suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.[1]

[16] Based on the evidence, the General Division determined that the Claimant was suspended because he refused to follow the Policy. He had been informed of the employer's Policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension. The General Division found that the Claimant knew or should have known that his refusal to comply with the Policy could lead to his suspension. The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

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

[17] 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]

[18] 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 Federal Government guidelines for telecommunications providers and 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 suspended.

[19] The Claimant submits that the General Division failed to evaluate the effectiveness and reasonableness of the employer's Policy. The Claimant submits that he had legitimate safety, legal, and moral concerns.

[20] This Tribunal does not have the jurisdiction to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

[21] The Claimant submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer violated his collective agreement and whether the employer's Policy violated his human and constitutional rights.

[22] The question of whether the employer should have accommodated him, or whether the employer's Policy violated his rights under the collective 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.[4]

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 71744, CUB 74884.
[4] 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 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.[5]

[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 breached his duties and had lost his job because of misconduct under the EI Act.[6] 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] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

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

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[5] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[6] The Court refers to *Bellavance*, see above note 2.

[29] 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 suspended from work.

[30] 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.[7]

[31] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[8] 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.

[32] 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 on the issue of misconduct.

Availability

[33] The General Division found that the Claimant wanted to go back to work and that he made sufficient efforts to find a job. However, it found that the Claimant set personal conditions that unduly limited his chances of returning to the labour market. The General Division concluded that the Claimant was not available to work under the law.

[34] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.

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

[8] 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).

[35] Availability must be determined by analyzing three factors:

> (1) the desire to return to the labour market as soon as a suitable job is offered,
>
> (2) the expression of that desire through efforts to find a suitable job, and
>
> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[36] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and unable to obtain suitable employment.

[37] The General Division found that the Claimant's choice not to accept work that may interfere with him returning to his job, and his inability to accept work with employers that had a vaccination policy were barriers that didn't allow him to apply for and accept suitable jobs.

[38] The Claimant admitted before the General Division that he wasn't willing to risk his current employment (which he was suspended from) by accepting a job with a competitor. And he told one employer that if he did get the job, he may have to leave shortly if he was recalled to his work. With these limitations, the Claimant unduly limited his chances of returning to the labour market.

[39] The evidence supports the General Division's conclusion that the Claimant did not demonstrate that he was available for work under the EI Act.

[40] After reviewing the appeal file, the General Division decision, and the Claimant's arguments, I find that the General Division considered the evidence before it and properly determined that the Claimant was not available for work under the EI Act. I find that the appeal has no reasonable chance of success on the issue of availability.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division