



Citation: *ZF v Canada Employment Insurance Commission*, 2023 SST 324

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: Z. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 30, 2023
(GE-22-3691)

Tribunal member: Pierre Lafontaine

Decision date: March 22, 2023

File number: AD-23-157

Decision

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

Overview

[2] The Applicant (Claimant) was suspended from her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). She 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 her job because of misconduct, so it was not able to pay her benefits. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant was suspended from her job following her refusal to follow the employer's Policy. She was not granted an exemption. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended from her 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 Commission has failed to prove that her actions constitute a breach of a duty owed to the employer. She submits that she did not breach any existing term in her employment agreement nor, as indicated in the evidence, was her employer under any other legal obligation to impose on her the mandatory policy on which the Commission relied to deprive her of benefits under the law. The Claimant submits that the General Division unreasonably held that it was known to the Claimant her conduct gave rise to a real possibility of termination. At no time prior to her termination did the employer communicate this to the Claimant.

[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 her 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 Commission has failed to prove that her actions constitute a breach of a duty owed to the employer. She submits that she did not breach any existing term in her employment agreement nor, as indicated in the evidence, was her employer under any other legal obligation to impose on her the mandatory policy on which the Commission relied to deprive her of benefits under the law. The Claimant submits that the General Division unreasonably held that it was known to the Claimant her conduct gave rise to a real possibility of termination. At no time prior to her termination did the employer communicate this to the Claimant.

[13] The General Division had to decide whether the Claimant was suspended from her job because of misconduct.

[14] In her application for benefits, the Claimant indicated that she was on a leave of absence.¹ The *Record of Employment* issued by the employer confirmed that she was on a leave of absence. It says that the date of expected recall is unknown.² The employer's communication to the Claimant stated that she was being placed on an unpaid leave of absence in accordance with its vaccination Policy. The letter also stated the conditions under which the Claimant could return to work.³

[15] 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.

[16] 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 her suspension was unjustified, but rather of deciding

¹ See GD3-8.

² See GD3-19.

³ See GD2-16.

whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.⁴

[17] Based on the evidence, the General Division determined that the Claimant was suspended because she refused to follow the Policy. She had been informed of the employer's Policy and was given time to comply. She was not granted an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension.

[18] The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her suspension.

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

[20] 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).⁵ 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.⁶

[21] 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 Health Canada and Nova Scotia 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.⁷

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

⁴ *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

⁵ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

⁶ CUB 71744, CUB 74884.

⁷ The employer says that the policy was applied in accordance with the *Nova Scotia Occupational Health and Safety Act*, *Human Rights Act*, and any other applicable legislation.

[23] The question of whether the employer should have accommodated the Claimant, or whether the employer violated her 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 she is seeking.⁸

[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.

[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.⁹

[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 owed to his employer and had lost his job because of misconduct under the EI Act.¹⁰ 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.

⁸ 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.

⁹ *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

¹⁰ The Court refers to *Bellavance*, see note 2.

[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 suspending the Claimant in such a way that her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[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 her being suspended 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.¹¹

[33] The Claimant submitted a General Division decision that she considers like her case where the applicant was successful in receiving EI benefits.¹² She is asking that the Appeal Division resolve the ambiguity and inconsistency in the General Division case law.

[34] I note that the General Division decision referred to is inconsistent with the General Division and Appeal Division case law.¹³ Federal Court decisions are binding and have been followed by the Tribunal. As stated by the General Division, the facts in that case are different in that the claimant's collective agreement had a specific

¹¹ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

¹² *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

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

provision allowing her to refuse 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*.

[35] In her application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. She has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

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

Conclusion

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

Pierre Lafontaine
Member, Appeal Division