Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 277

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 22, 2022 (GE-22-1627)

Tribunal member:	Pierre Lafontaine
Decision date:	March 15, 2023
File number:	AD-23-99

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 policy (Policy).[1] The employer did not grant her an exemption for religious reasons. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended because of misconduct. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the employer suspended the Claimant because she did not comply with their Policy. She was not granted an exemption for religious reasons. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division found that the non-compliance with the Policy was the cause of her suspension. It concluded that the Claimant was suspended from her job because of misconduct.

[5] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division did not respect a principle of natural justice and committed errors of fact or law when it concluded that she was suspended because of misconduct.

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

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[1] The employer refers to it as a "health and safety – immunization disclosure procedure".

[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] In support of her application for leave to appeal to the Appeal Division, the Claimant submits the following:

a) It was unreasonable for her to only be granted 24 days to reply to the General Division's letter of intention to summarily dismiss her appeal;

b) The General Division member did not have the experience to rule on her section 29(c) of the *Employment Insurance Act* (EI Act) argument; She was therefore denied the right to be heard on her most important argument;

c) The General Division member showed bias by not investigating the employer, by not ruling on the Commission's conduct during the claim process, and by attempting to summarily dismiss her case;

d) The person who decided to summarily dismiss her case was not the General Division member;

e) The legislative provisions she submitted in her appeal application were not referenced in the General Division decision;

f) The General Division gave the employer's procedure higher precedence than the Constitution, labor and safety laws, the collective agreement, policies, in order to misapply section 29(c);

g) The employer discriminated against her and violated her human and constitutional rights;

h) She did comply with the employer's procedure by applying for an exemption for religious reasons;

i) The employer did not have a policy;

j) She was placed on a non-disciplinary leave and not an unpaid leave which has a different meaning in her collective agreement;

k) The employer is not calling her actions misconduct;

l) She did not lose her job because of misconduct under the EI Act.

[13] The Claimant puts forward that the General Division made an error when it did not apply section 29(c) of the EI Act to her situation. She argues that the General Division member should have investigated her employer further and did not have the required experience to rule on her section 29(c) argument.

[14] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. It is not the General Division's role to investigate the employer or to rule on the Commission's conduct during the claim process.

[15] I note that the General Division specifically addressed in its decision the Claimant's argument regarding section 29(c) of the EI Act.

[16] The General Division considered that the Claimant was adamant that she was put on an involuntary unpaid leave of absence. It considered that the Claimant stressed that she did not ask for the leave of absence, and that her employer's unilateral decision to put her on an unpaid leave of absence was a violation of her collective agreement and subject to a grievance.

[17] The General Division correctly determined that section 29(c) of the EI Act applies to claimants who have voluntarily left their job or voluntarily taken a leave of absence from their employment. The term "voluntarily" applies to both the quitting and the taking of a leave of absence.

[18] The evidence shows that the employer prevented the Claimant from working starting November 1, 2021. The Claimant recognized that she did not request a leave and would have continued working if not for the Policy. The employer stopped the Claimant from working even though there was work.

[19] The evidence shows that the Claimant did not request leave and that she did not voluntary leave her employment. Furthermore, the Claimant could have continued work if not for the Policy. Section 29(c) of the EI Act clearly does not apply in her case.

[20] Therefore, the General Division member did not have to address in its decision all arguments related to section 29(c) presented by the Claimant in her appeal application and during the hearing.

[21] Since the evidence shows that the Claimant was not allowed to report to work following the employer's decision, the General Division had to decide whether the Claimant was suspended from her job because of misconduct.[2]

[22] 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.

[23] It is well established that 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 whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.[3]

[24] The General Division found that the Claimant was suspended because she refused to follow the employer's Policy (or procedure) that had been implemented to protect employees and students during the pandemic. She had been informed of the employer's Policy that was in effect and was given time to comply. She was not granted an exemption for religious reasons. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her suspension.

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[2] Within the meaning of section 31 of the *Employment Insurance Act*.
[3] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

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

[26] It is well-established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[4] 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.[5]

[27] The Claimant submits that being forced on unpaid leave without consent is a violation of the collective agreement her union negotiated with the employer.

[28] It was not necessary for the General Division to determine whether the employer could put the Claimant an "unpaid leave" under her collective agreement for refusing to follow their Policy. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[6]

[29] The Claimant further submits that the General Division did not consider that the employer failed to accommodate her, discriminated against her, and that the employer's Policy violated her employment, human, and constitutional rights.

[30] 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 Ontario Chief Medical Officer of Health's recommendations to implement its own Policy to protect the health of all employees and students during the pandemic.[7] The Policy was in effect when the Claimant was suspended.

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[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[5] CUB 71744, CUB 74884.
[6] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[7] The Procedure considered advice from Peel Public Health, provincial government guidance and protocols, recommendations of the Chief Medical Officer of Ontario, obligations under the *Education Act* and the *Occupational Health and Safety Act*, and relevant human rights legislation including *Ontario's Human Rights Code*.

[31] The question of whether the employer failed to accommodate the Claimant, or whether the employer's Policy violated her employment rights, 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]

[32] 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.

[33] 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.

[34] 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.[9] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[35] In the recent *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.

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[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] The Court refers to Bellavance, see note 2.

[36] The Federal Court also 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.[10]

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

[38] 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.

[39] 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]

[40] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[12] This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was suspended because of misconduct.

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[10] I note that the Claimant has filed a grievance alleging that the employer violated her collective agreement and requesting that all leaves of absence under the policies to be rescinded and all employees be reinstated.

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

[12] 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);

Allegation of bias

[41] The Claimant puts forward that the General Division member showed bias by not further investigating the employer, not ruling on the Commission's conduct during the claim process, and by summarily dismissing her case.

[42] An allegation of bias against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[43] I cannot find that the General Division member showed bias by not further investigating the employer and not ruling on the Commission's conduct during the claim process. It was not her role. As stated previously, the role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[44] The fact that the General Division member considered the summarily dismissal process does not show bias. It is a procedure that is allowed by law when a member is of the view that the appeal might not have a reasonable chance of success.[13]

[45] On July 12, 2022, the Claimant was advised of the member's intention to summarily dismiss her appeal and given an opportunity to respond. Following her review of the Claimant's response, the member decided not to summarily dismiss her appeal and elected to hold a hearing instead to clarify the Claimant's evidence and submissions. That hearing was held on October 24, 2022.

[13] Section 53(1) of the *Department of Employment and Social Development Act*.

[46] The General Division member who conducted the hearing rendered a very detailed decision supported by the evidence and authored the decision. There is no material evidence presented by the Claimant that would demonstrate that the member was influenced by someone or any other source in rendering her decision.

[47] I cannot see any material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such a serious allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

[48] In view of the above, I find that this ground of appeal has no reasonable chance of success.

Principle of natural justice

[49] The Claimant submits that the General Division did not respect a principle of natural justice. She puts forward that the person who chose to summarily dismiss her case was not the General Division member. She expected to have more than 24 days to reply to the General Division's letter of intention to summarily dismiss her appeal. The Claimant submits that she was denied the right to be heard.

[50] I must reiterate that the Claimant's appeal was not summarily dismissed by the General Division member. The Claimant was informed by letter of the member's decision not to summarily dismiss her appeal.[14] There is no evidence that this decision was made by another person than the member. The General Division hearing was held on October 24, 2022.

[51] I listened to the General Division hearing recording. I noted that the General Division hearing lasted one hour and a half. The member explained the legal test for misconduct. She listened to the Claimant's testimony and exercised her role of trier of fact. She referred to the Claimant's arguments and exhibits when she questioned the Claimant on her position.

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[14] See GD8-1, GD8-2.

[52] I find that the General Division addressed in its decision all issues raised by the Claimant in her written and oral presentation at the hearing.

[53] As far as the delay to reply to the summarily dismissal letter is concerned, I do not find in the file any request by the Claimant for an extension of delay to file her response, or any objections by the Claimant regarding the delay awarded by the General Division member for her to respond to the letter of intention to summarily dismiss her appeal.

[54] I note that the Claimant filed extensive submissions consisting of 11 pages in response to the letter of intention. Following these submissions, the General Division member decided not to summarily dismiss. I see no prejudice for the Claimant. She also had the opportunity to fully present her case before the General Division in writing prior to the hearing and during the hearing.

[55] I therefore see no breach of natural justice. This ground of appeal has no reasonable chance of success.

Final disposition

[56] 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 on the issue of misconduct.

[57] 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

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

Pierre Lafontaine
Member, Appeal Division