



Citation: *LH v Canada Employment Insurance Commission*, 2023 SST 371

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: L. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 10, 2023
(GE-22-2167)

Tribunal member: Pierre Lafontaine

Decision date: March 21, 2023

File number: AD-23-151

Decision

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

Overview

[2] The Applicant (Claimant) lost her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). She was not granted a medical exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant lost 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 dismissed from her job following her refusal to follow the employer's Policy. It found that the Claimant knew that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant lost 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 she had health reasons for refusing to be vaccinated. She submits that vaccination against COVID-19 remained voluntary in the absence of federal and provincial legislation requiring vaccination. The Claimant submits that it is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies. The individual has the final say in whether they accept any medical treatment. The Claimant submits that exercising that right should not be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of punishment under the law.

[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 she had health reasons for refusing to be vaccinated. She submits that vaccination against COVID-19 remained voluntary in the absence of federal and provincial legislation requiring vaccination. The Claimant submits that it is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies. The individual has the final say in whether they accept any medical treatment. The Claimant submits that exercising that right should not be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of punishment under the law.

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

[16] Based on the evidence, the General Division determined that the Claimant was dismissed 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 a medical

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

exemption. Her doctor determined that she was physically capable of receiving the COVID-19 vaccine. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal.

[17] The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her 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 Directive 6 issued by the Ontario Chief Medical Officer 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] This Tribunal does not have the jurisdiction to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

[22] The question of whether the employer should have accommodated the Claimant by accepting her request for a medical exemption, or whether the Policy violated her human and constitutional rights, is a matter for another forum. This Tribunal is not the

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

³ CUB 71744, CUB 74884.

⁴ The Ontario's Chief Medical Officer of Health issued a directive (Directive 6) under section 77.7(1) of the *Health Protection and Promotion Act*. The employer was required by law to comply with Directive 6.

appropriate forum through which the Claimant can obtain the remedy that she is seeking.⁵

[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.

[24] 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.⁶

[25] 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.⁷ The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[26] 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.

⁵ 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.

⁶ *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

⁷ The Court refers to *Bellavance*, see above note 2.

[27] 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.

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

[29] 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 her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[30] 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 dismissed from her job.

[31] 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.⁸

[32] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.⁹ 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.

[33] The Claimant referred to a General Division decision that she considers like her case where the applicant was successful in receiving EI benefits.¹⁰ She is asking that

⁸ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

⁹ 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 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).

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

she also be allowed to qualify for EI benefits. 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 and have been followed by the Appeal Division.

[34] Furthermore, the facts are different in that the claimant's collective agreement had a specific 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

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