Citation: *ZB v Canada Employment Insurance Commission*, 2023 SST 364

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

| | |
|---|---|
| **Applicant:** | Z. B. |
| **Respondent:** | Canada Employment Insurance Commission |

| | |
|---|---|
| **Decision under appeal:** | General Division decision dated January 10, 2023 (GE-22-2841) |

| | |
|---|---|
| **Tribunal member:** | Pierre Lafontaine |
| **Decision date:** | March 28, 2023 |
| **File number:** | AD-23-154 |

## Decision

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

## Overview

[2] The Applicant (Claimant) was suspended and 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 was suspended from 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 was suspended and lost his job following his refusal to follow the employer's Policy. It found that the Claimant knew or ought to have known that the employer was likely to suspend and dismiss him in these circumstances. The General Division concluded that the Claimant was suspended and 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 refused to exercise its jurisdiction, made errors of fact and errors of law, in order to conclude that he was suspended and lost his job 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.

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

a) The whole process with Service Canada staff was a very humiliating experience. Their lack of impartiality was evident in every step of the process;

b) He is not sure the General Division received the supplemental information he submitted after the hearing. The separation of his case in two files made it difficult. The member also did not list and consider the supplemental information in his decision;

c) He had valid reasons to refuse risky medical intervention based on his medical condition (immunity from previous infection and heart condition) and his constitutional and common law rights; The General Division had the authority to consider his Charter arguments but failed to do so;

d) There can not be misconduct because he did not breach an expressed and implied duty resulting from his contract of employment;

e) To determine the existence of misconduct, it must be linked to a discipline process as per the terms and conditions of employment;

f) The employer did not give until 2022 to comply. Only those who applied for exemption by Nov. 22,2021, were able to receive temporary accommodation until such time their exemption request was reviewed;

g) A Leave of absence can only be initiated by an employee subject to the deputy minister's approval. The employer initiated a Leave of absence contrary to the terms and conditions of employment.

h) The General Division ignored the fact that the employer unilaterally changed his employment contract which is crucial evidence when determining misconduct;

i) The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols.

j) The General Division omitted to address in its decision the employer's lack of any accommodation in order for him to maintain his employment;

k) He was not explained why the Commission changed its initial decision after reconsideration from voluntary leave to misconduct. He was simply informed that a leave of absence is "typically processed" as a suspension. No other details how the decision maker arrived at this important decision which profoundly impacts people's lives as it did in his specific case;

l) The employer's *Record of Employment* (ROE) did not use the code for misconduct but rather used "leave of absence". The Service Canada and Commission unilaterally changed the ROE code without input from the employer;

m) As a non-union employee of the BC Public Service, his employment agreement was governed by the Terms and Conditions for Excluded Employees and Appointees. The contract did not contain the term allowing the province to require him to submit to, or conform with, any medical procedure;

n) There is no case law established to guide decision makers in qualifying his actions as misconduct as the past court cases have no similarity with the mandatory medical intervention resulting from his employer's Policy;

o) Acting consistent with his constitutionally protected rights (which are also well grounded in Canadian common law) cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude there is misconduct worthy of the punishment of disqualification under the EI Act;

p) The General Division decision does not demonstrate that the member's decision is the result of an internally coherent and rational chain of analysis (*Vavilov*)[1].

**Natural Justice**

[13] The Claimant submits that the whole process with Service Canada staff was a very humiliating experience. Their lack of impartiality was evident in every step of the process. They did not explain why they changed the initial decision from voluntary leave to misconduct.

[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 claim or to rule on the Commission's conduct during the claim process.

[1] *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653.

[15] The concept of “natural justice” includes the right of a claimant to a fair hearing before the General Division. A fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations.

[16] The Claimant submits that he is not sure the General Division received the supplemental information he filed after the hearing. The separation of his case in two files made it difficult. The member also did not list and consider the supplemental information in his decision.

[17] I note that the General Division acknowledged reception of the supplementary information filed by the Claimant after the hearing.[2] The documents were accepted by the member and shared with the Commission.[3] No reply from the Commission was received as of the date of the General Division decision.

[18] I note that without specifically addressing the content of every document that was filed by the Claimant, the General Division member does respond to the Claimant's arguments in his decision.

[19] I find that the Claimant had a fair hearing. He received adequate notice of the hearing. He had the opportunity to be heard, the right to know what is alleged against him and the opportunity to answer those allegations. The Claimant suffered no prejudice because the General Division proceeded with two separate appeals during the same hearing.

[20] I cannot see a breach of natural justice by the General Division. This ground of appeal has no reasonable chance of success.

---

[2] See GD7.
[3] See letter of acknowledgment dated December 14, 2022.

**Misconduct**

[21] The General Division had to decide whether the Claimant was suspended from his job because of misconduct.[4]

[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] 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.[5]

[24] Based on the evidence, the General Division determined that the Claimant was suspended (prevented from working) 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 a medical exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

[25] The General Division found that the Claimant knew or ought to have known that his refusal to comply with the Policy could lead to his suspension.

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

---

[4] In appeal of the reconsideration decision rendered by the Commission on August 10, 2022. In accordance with its powers pursuant to section 113 of the *Employment Insurance Act*.
[5] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[27] It is well-established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[6] 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.[7]

[28] 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 recommendations of the British Columbia's Provincial Health Office to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was suspended.[8]

[29] It is not for this Tribunal to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

[30] The Claimant submits that a leave of absence can only be initiated by an employee subject to the deputy minister's approval. The Employer initiating a leave of absence is contrary to the terms and conditions of his employment.

[31] It was not necessary for the General Division to decide whether the employer could put the Claimant an "unpaid leave" 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.[9]

[32] The Claimant further submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer failed to accommodate him, and whether the Policy violated his employment, human and constitutional rights.

---

[6] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[7] CUB 71744, CUB 74884.
[8] This policy applied to any government organization with BCPS employees that were hired under the *Public Service Act*,
[9] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.

[33] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated his employment contract, 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.[10]

[34] 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.[11]

[35] 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.[12] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[36] 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.

---

[10] 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.
[11] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[12] The Court refers to *Bellavance*, see above note 6.

[37] 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.

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

[39] 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.

[40] 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.

[41] The Claimant submits that he found a General Division decision that supports his position.[13] It is important to reiterate that the General Division decision referred to is not binding on the Appeal Division. Those of the Federal Court are binding and have been followed by the Appeal Division. Furthermore, the facts are different in that case because 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*.

[42] 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.[14]

---

[13] *AL v Canada Employment Insurance Commission*, 2022 SST 1428. The General Division decision is currently under appeal before the Appeal Division (AD-23-13).
[14] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[43] The General Division member who conducted the hearing rendered a very structured and detailed decision. The member's conclusion is supported by the preponderant evidence and the law.

[44] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[15] 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.

[45] 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.

## Conclusion

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

Pierre Lafontaine
Member, Appeal Division

[15] 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).