Citation: *LJ v Canada Employment Insurance Commission*, 2023 SST 214

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 12, 2022 (GE-22-2433)

Tribunal member:	Pierre Lafontaine
Decision date:	February 28, 2023
File number:	AD-23-20

Decision

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

Overview

[2] The Applicant (Claimant) 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 lost 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 lost his job following his refusal to follow the employer's Policy. He did not get an exemption. It found that the Claimant knew or should have known that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant was dismissed because of misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that he was told by his supervisor and manager that he would not be fired. He submits that the employer is lying and covering up the fact that he was never put on a leave of absence. The Claimant submits that he did not lose 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] The Claimant submits that he was told by his supervisor and manager that he would not be fired. He submits that the employer is lying and covering up the fact that he was never put on a leave of absence. The Claimant submits that he did not lose his job because of misconduct.

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

[16] Based on the evidence, the General Division determined that the Claimant lost his job 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 an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his dismissal. The General Division found that the Claimant knew or should have known that his refusal to comply with the Policy could lead to his dismissal.

[17] The General Division found that the employer told the Claimant that all staff were required to be fully vaccinated. It found that the employer's written correspondence did not indicate that the Claimant would be allowed to work at another location.

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

[18] The General Division preferred the written correspondence of the employer over the testimony of the Claimant, as it is consistent, clear, and reflects the written policy.

[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).[2]

[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 the Public Health guidelines to implement its Policy to protect the health of all employees and clients during the pandemic. The Policy was in effect when the Claimant was dismissed.[3]

[22] The question of whether the employer failed to accommodate the Claimant, or whether the employer's 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]

[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

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] The employer indicated that its Policy is guided by the requirements of the *Occupational Health and Safety Act of Ontario*; See GD3-25.
and the Ontario Human Rights Code and will be interpreted in accordance with both statutes.
[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.

own bodily integrity and that his rights were violated under Canadian and international law.[5]

[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 the employer 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.

[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.

[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 his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his 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 him being dismissed from work.

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

[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.[7]

[32] I am fully aware that the Claimant may seek relief before another forum, if a violation is established. 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] I must reiterate that an appeal to the Appeal Division is not an opportunity to re-present evidence and hope for a different outcome. This is not the role of the Appeal Division.

[34] In his 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. He 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.

[35] 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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

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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.