



Citation: *ME v Canada Employment Insurance Commission*, 2023 SST 125

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 9, 2022
(GE-22-1859)

Tribunal member: Pierre Lafontaine

Decision date: February 6, 2023

File number: AD-23-37

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). The employer did not grant her an 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. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost her job following her refusal to follow the employer's Policy. The employer did not grant her an exemption. 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. She submits that the General Division ignored evidence and erred in law when it concluded that she had lost her job because of misconduct. The Claimant submits that the General Division Member was biased and did not consider the Commission's conduct during the investigation process.

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

[7] I am refusing 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 did not lose her job because of misconduct. She submits that the employer's Policy was not reasonable within her workplace context because she was working 100% from home on the ground of disability. Her employer could have accommodated her. She was performing her duties and complied with public health directions in the context of the COVID-19 pandemic.

[13] The Claimant submits that she did not breach and expressed or implied duty resulting from her contract of employment. She submits the employer unilaterally imposed a new condition of employment without any consultation or her agreement. The Claimant submits that the employer had no legal grounds to impose the vaccination and violated her human and constitutional rights to informed consent, freedom of choice, and bodily integrity.

[14] It is important to reiterate that the Service Canada website is an interpretive guide that is not legally binding on the Tribunal. A policy simply reflects the opinion of the administrator who acts under the law. That opinion does not necessarily correspond to the law.¹

[15] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular 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 Commission's conduct during the investigation process.

[16] The General Division had to decide whether the Claimant lost her job because of misconduct.

[17] 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,

¹ Canada (Attorney General) v Greey, 2009 FCA 296, Canada (Attorney General) v Savard, 2006 FCA 327.

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.

[18] 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.²

[19] The General Division determined that the Claimant lost her job because she refused to follow the employer's Policy that applied to all employees. She had been informed of the 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 dismissal. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her dismissal.

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

[21] 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).³ 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.⁴

[22] The Claimant raises the question of whether the General Division refused to exercise its jurisdiction by not deciding whether applying the employer's Policy to her was reasonable given the fact that she worked from home.

² *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

³ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

⁴ CUB 71744, CUB 74884.

[23] 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 Public Health officials in order to implement its Policy to protect the health of all employees and clients during the pandemic.⁵ The Policy was in effect when the Claimant was dismissed.

[24] It is not for the Tribunal to decide whether it was reasonable for the employer to extend this protection to employees working from home during the pandemic.

[25] In other words, the Tribunal does not have the jurisdiction to decide whether the employer's health and safety obligations regarding COVID-19 ceased because the Claimant worked from home or whether they continued to apply.

[26] I therefore find no reviewable error in the General Division's determination that it has no jurisdiction to decide questions about the reasonableness of the employer's Policy that applies to workers working from home.

[27] The question of whether the employer should have accommodated her, or whether the Policy 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.⁶

[28] 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 put forward that it was not proven that the vaccine was safe and efficient. He 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.⁷

⁵ Directive #6, issued by the Ontario's Chief Medical Officer of Health under section 77.7 of the *Health Protection and Promotion Act*.

⁶ 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.

⁷ *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[29] 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 lost his job because of misconduct under the EI Act.⁸ The Court stated that there exist other ways in which the Claimant's claims can properly advance under the legal system.

[30] In the previous *Paradis* case, the Claimant was refused EI benefits because of misconduct. He argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[31] 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.

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

[33] 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 work.

[34] 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.⁹

[35] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.¹⁰ This does not change the fact that under the EI Act, the

⁸ Citing *Bellavance*, see note 3.

⁹ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

¹⁰ 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*

Commission has proven on a balance of probabilities that the Claimant was dismissed because of misconduct.

[36] The Claimant further submits that the General Division Member was biased against her. She submits that the Member was influenced by the evidence collected by the Commission during its investigation. The Claimant submits that the Member preferred that information to the evidence and facts she presented to her.

[37] An allegation of bias, especially actual and not simply apprehended 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 their 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.¹¹

[38] I find that the Claimant's allegations are not supported by the evidence. 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 particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[39] I note that the General Division considered all the Claimant's arguments.¹² In her decision, the Member explained in detail why she did not accept the Claimant's arguments and why the preponderant evidence supported a conclusion of misconduct under the EI Act.

[40] I find no material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such an allegation

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¹¹ *Arthur v Canada (Attorney General)*, 2001 FCA 223.

¹² See General Division decision, para. 23.

cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

[41] 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.

[42] 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

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

Pierre Lafontaine
Member, Appeal Division