Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 485

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	D. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 30, 2022 (GE-22-2302)

Tribunal member:	Pierre Lafontaine
Decision date:	April 21, 2023
File number:	AD-23-143

Decision

[1] I am extending the time to file the application. However, leave to appeal is refused. This means the appeal will not proceed.

Overview

[2] The Applicant (Claimant) was suspended from 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] After reconsideration, the Respondent (Commission) determined that the Claimant was suspended from his job because of misconduct, so it was not able to pay him benefits. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant was suspended from his job following his refusal to follow the employer's Policy. He was not granted an exemption. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was suspended 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 Commission did not meet its burden of proof. He submits that the General Division made an error when it determined that proof of vaccination became an expressed duty when the Policy came into effect. The Claimant submits that there was no provision in his collective agreement or employment contract regarding proof of vaccination which he or his union agreed to be bound by. He submits that there cannot be an expressed or implied duty arising from the contract unless both parties agree to the change.

[6] I must decide whether the Claimant's application to the Appeal Division is late. If it is, I need to decide whether I extend the time for filing the application. If I do extend the time, I need to decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[7] The application is late. I am extending the time to file the application. However, I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[8] The issues in this appeal are:

- Was the application to the Appeal Division late?
- Should I extend the time for filing the application?
- Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

The application was late

[9] The delay to file an application for leave to appeal is 30 days after the day on which the decision and reasons are communicated in writing to the Claimant.

[10] The General Division rendered a decision on December 30, 2022. It was communicated to the Claimant on January 4, 2023. The Claimant filed an application for leave to appeal on February 5, 2023. The Application is late.

I am extending the time for filing the application

[11] When deciding whether to grant an extension of time, I must consider whether the Claimant has a reasonable explanation for why the application is late.

[12] The delay herein is three days. The Claimant explains that during the month of January, he was preparing with his counsel for an arbitration hearing regarding the same issue he is appealing before the Tribunal. This required extensive preparation and research. All these duties made him miss the deadline by a couple of days.

[13] I am satisfied that an extension of time to file an application for leave to appeal is warranted in the case at bar. The Claimant has a reasonable explanation for why the application is late.

I am not giving the Claimant permission to appeal

[14] 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.

[15] 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.

[16] 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?

[17] The Claimant submits that the Commission did not meet its burden of proof. He submits that the General Division made an error when it determined that proof of vaccination became an expressed duty when the Policy came into effect. The Claimant submits that there was no provision in his collective agreement or employment contract regarding proof of vaccination which he or his union agreed to be bound by. He submits that there cannot be an expressed or implied duty arising from the contract unless both parties agree to the change.

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

[19] 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.

[20] 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.[1]

[21] Based on the evidence, the General Division determined that the Claimant was suspended 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.

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

The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

[22] The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his suspension.

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

[24] 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]

[25] The Claimant submits that the General Division made an error in determining that the Policy was part of his contract of employment. He never gave his consent to the new Policy. Therefore, no breach occurred. There can be no misconduct when a unilaterally introduced Policy is not recognized.

[26] 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 requirements of the Transport Canada to implement its own Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was suspended.[4]

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

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 71744, CUB 74884.
[4] On October 6, 2021, the Government of Canada announced mandatory COVID-19 vaccination requirements for all Federally regulated industries – this included the Aviation sector.

[28] The question of whether the employer's Policy violated the Claimant's employment contract and collective agreement 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.[5]

[29] 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.[6]

[30] 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.

[31] 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.

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[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.

[32] 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.

[33] 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.

[34] 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.

[35] 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]

[36] 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 suspended because of misconduct.

[37] 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.

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

Conclusion

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

Pierre Lafontaine

Member, Appeal Division