Citation: *VT v Canada Employment Insurance Commission*, 2023 SST 491

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	V. T.
Representative:	M. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 30, 2023 (GE-22-2372)

Tribunal member:	Pierre Lafontaine
Decision date:	April 21, 2023
File number:	AD-23-215

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 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. She was not granted an exemption. It found that the Claimant knew or ought to have known that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant was dismissed from 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 did not request a translator but a representative. She puts forward that she was prevented from presenting her case because the General Division questioned her on her English skills and education, thus creating an intimidating environment. The Claimant submits that the General Division did not consider that she filed a grievance because the COVID-19 vaccination Policy was unilaterally imposed by her employer. She submits that the General Division did not consider her religious exemption letter and beliefs. The Claimant submits that she was available to work because she started to look for employment immediately after being terminated and continued to search for suitable work until she found one.

[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 did not request a translator but a representative. She puts forward that she was prevented from presenting her case because the General Division questioned her on her English skills and education, thus creating an intimidating environment. The Claimant submits that the General Division did not consider that she filed a grievance because the COVID-19 vaccination Policy was unilaterally imposed by her employer. She submits that the General Division did not consider her religious exemption letter and beliefs. The Claimant submits that she was available to work because she started to look for employment immediately after being terminated and continued to search for suitable work until she found one.

Misconduct

[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 his 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 an exemption for

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

religious beliefs. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant knew or ought to have known that her refusal to comply with the Policy could lead to her dismissal.

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

[18] 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]

[19] 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 Provincial Health Officer Order to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was dismissed.

[20] The Claimant submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer should have accommodated her religious beliefs and whether the employer violated her employment contract and collective agreement.

[21] The question of whether the employer should have accommodated the Claimant by allowing her religious exemption, or whether the employer's Policy violated her employment rights, 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.[4]

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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] 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.

[22] 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.

[23] 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.[5]

[24] 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.

[25] In the previous *Paradis* case, the claimant was refused EI benefits because of misconduct. He argued that there was no misconduct because his employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[26] 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.

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

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

[28] 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.

[29] 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.

[30] 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]

[31] 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.

Availability

[32] The Claimant submits that she was available to work under the law because she started to look for employment immediately after being terminated and continued to search for suitable work until she found one.

[33] The General Division found that the Claimant didn't start looking for another job as soon as she was dismissed. Based on the Claimant's initial statements to the Commission on March 1, 2022, and May 4, 2022, the General Division found that she began looking for another job on May 4, 2022, after her final conversation with the Commission.

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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.

[34] I note that on March 1, 2022, the Claimant stated that she had not applied for any jobs since being dismissed.[8] On May 4, 2022, the Claimant stated that she had not been looking lately (for a job) because she was not vaccinated, and no one would hire her.[9]

[35] I see no reviewable error made by the General Division when it concluded, based on the evidence, that the Claimant was not available from November 15, 2021, to May 3, 2022.

Natural Justice

[36] The Claimant submits that, in her appeal documents, she did not ask the General Division for an interpreter but for a representative.

[37] The General Division did not have a duty to provide the Claimant with a representative.[10] Although access to legal services is fundamentally important in any free and democratic society, the text of the Constitution, the jurisprudence, and the historical understanding of the rule of law, does not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.[11]

[38] The Claimant submits that the General Division member questioned her on her English skills and education, thus creating an intimidating environment, and preventing her from fully presenting her case.

[39] I proceeded to listen to the recording of the General Division hearing. The hearing lasted over 2 hours. The Claimant has every opportunity to present her case. The General Division member exercised her role as a trier of fact by questioning the Claimant on her English skills and education to determine, among other things, whether she understood the consequences of not complying with the Policy.

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[8] See GD3-23.
[9] See GD3-36.
[10] *Papouchine v Canada (Attorney General)*, 2018 FC 1138
[11] Supreme Court of Canada, in *B.C. v Christie* 2007 SCC 21 (CanLII), [2007] 1 SCR 873.

[40] I find no breach of natural justice by the General Division.

Disposition

[41] 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

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

Pierre Lafontaine
Member, Appeal Division