Citation: *PP v Canada Employment Insurance Commission*, 2023 SST 528

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	P. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 25, 2023 (GE-22-2526)

Tribunal member:	Pierre Lafontaine
Decision date:	April 27, 2023
File number:	AD-23-201

Decision

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

Overview

[2] The Applicant (Claimant) was suspended from 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 was suspended from her job because of misconduct, so it was not able to pay her benefits. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant was suspended from her job following her refusal to follow the employer's Policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended 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 the General Division ignored relevant facts and misapplied the legal test for 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 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 the General Division ignored relevant facts and misapplied the legal test for misconduct. More precisely, she submits that:

a) Her employer never accused her of misconduct;
b) The employer put her on administrative leave and did not impose a disciplinary suspension;

c) She did not request a leave of absence; The only leaves of absence she agreed to are the ones mentioned in her collective agreement;

d) The General Division ignored the law and did not consider that she had just cause to refuse to follow the employer's Policy;

e) The employer's Policy was in full breach of Canada's labour Code and her collective agreement;

f) The employer denied her any accommodations by allowing testing or other possible alternatives;

g) It cannot be found that her "personal choice" not to obey with an order to receive vaccination, regardless if she did not comply with her Employer's Policy, meets the criteria established by courts to conclude a finding of "misconduct" within the meaning of the law;

h) The Commission did not provide any evidence that her employment contract contained an expressed provision requiring her to receive vaccination or any medical intervention of any kind to maintain her employment;

i) Absent any law specifically requiring vaccination, and absent any expressed requirement found in her employment contract, there is no evidence that she owed an express duty to her employer to receive any vaccination or any medical intervention of any kind to maintain her employment;

j) The Commission did not provide any evidence and no evidence exists in case law demonstrating that one can infer she had an implied duty to receive vaccination or any medical intervention of any kind to maintain her employment;

k) The requirement to receive an experimental medical intervention in order to maintain employment goes far beyond a simple expectation to comply with customary workplace safety policies;

l) The General Division relies on the mere existence of a Policy that was instituted unilaterally by her employer imposing significant new obligations without her agreement or consent to incorrectly make a determination of misconduct;

m) Her lack of agreement to undergo an experimental medical intervention is not akin to refusing to perform an aspect of her duties and is not a breach that can be found "serious in nature";

n) She has a fundamental right to informed consent, the right to bodily autonomy and the right to refuse any medical treatment. The exercise of that right cannot be considered misconduct under the law;

[13] The Claimant puts forward that the General Division left out the words “without just cause” in its analysis of misconduct. She submits that an honest and legal analysis should have included the most important part of section 30 of the *Employment Insurance Act* (EI) Act.

[14] Section 30 (1) of the EI Act states that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct **or** voluntarily left any employment without just cause.

[15] The evidence shows that the employer prevented the Claimant from working starting October 31, 2021. The Claimant recognized that she did not request a leave and would have continued working if not for the Policy. The employer stopped the Claimant from working even though there was work.

[16] It is clear from the evidence that the Claimant did not request leave and that she did not voluntary leave her employment. Therefore, it was not for the General Division to determine whether the Claimant left her employment without just cause.

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

[18] Even if the employer did not accuse the Claimant of misconduct, it was up to the General Division to verify and interpret the facts of the present case and make its own assessment on the issue before it.

[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 her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.[1]

[21] Based on the evidence, the General Division determined that the Claimant was suspended (prevented from working) because she refused to follow the Policy. She had been informed of the employer's Policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her suspension.

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

[23] 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]

[24] It was not necessary for the General Division to make a determination as to whether the employer could, under the collective agreement, put the Claimant on an "unpaid leave" for refusing to follow their Policy. It was also not for the General Division to decide whether the employer placed the Claimant on administrative leave instead of a disciplinary suspension. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[4]

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[1] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 71744, CUB 74884.
[4] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.

[25] 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 was required by the Government of Canada to establish a vaccination policy to protect the health of all employees during the pandemic.[5] The Policy was in effect when the Claimant was suspended.

[26] This Tribunal does not have the jurisdiction to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

[27] The question of whether the employer should have accommodated the Claimant, 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.[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 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.[7]

[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 breached his duties and had lost his job because of misconduct under the

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[5] As of October 29, 2021, employers in the federally regulated air and rail, were required by law to establish vaccination policies for their organizations.
[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.

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 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.

[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] 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 her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her 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 her 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.[9]

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[8] The Court refers to *Bellavance*, see above note 2.
[9] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[36] 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 Commission has proven on a balance of probabilities that the Claimant was suspended because of misconduct.

[37] In her submissions, the Claimant relies on a General Division decision that she considers like her case where the applicant was successful in receiving EI benefits.[11]

[38] It is important to reiterate that the General Division decision referred to is not binding on the Appeal Division.[12] Those of the Federal Court are binding and have been followed by the Appeal Division. Furthermore, the facts are different in that the claimant's collective agreement had a specific provision allowing her to refuse 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*.[13]

[39] The Claimant submits that her employer called her back to work the moment the "Government mandates" were lifted. This fact does not change the nature of the misconduct, which initially led to the Claimant's suspension.[14]

[40] 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

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[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 métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (Only in French at the time of publishing).

[11] *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

[12] I also note that the Commission was granted leave to appeal to the Appeal Division of the General Division decision. (AD-23-13).

[13] The Federal Court did not dismiss M. Cechetto's judicial review solely based on his refusal to accept secondary available protocols.

[14] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

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.

[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