Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 489

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 6, 2023 (GE-22-2490)

Tribunal member:	Pierre Lafontaine
Decision date:	April 24, 2023
File number:	AD-23-243

Decision

[1] 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] The Respondent (Commission) determined that the Claimant was suspended from his job because of misconduct, so it was not able to pay him benefits. It also found that he was not available to work following his suspension. After unsuccessful reconsiderations, the Claimant appealed 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. The General Division 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. It also concluded that the Claimant was not available to work during his suspension.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division made errors of fact and errors of law.

[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?

Misconduct

[12] The Claimant submits that the Commission did not meet its burden of proving misconduct. He submits that the employer imposed new conditions to the collective agreement without proper consultation and acceptance. The Claimant submits that there is no expressed duty detailed in his collective agreement that would support an obligation to get vaccinated against COVID-19. In the absence of specific legislation or directives supported in legislation that obligate individuals to be vaccinated, vaccination remains voluntary.

[13] The General Division had to decide whether the Claimant was suspended from 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 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]

[16] Based on the evidence, the General Division determined that the Claimant was suspended because he refused to follow the Policy. He was not granted an exemption. He 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 his suspension.

---

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

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

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

[19] 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]

[20] Before the General Division, the Claimant referred to the *Digest of Benefit Entitlement Principles* (Digest) and raised the question of whether applying the employer's Policy to him was reasonable given his work context. He also argued that it is not insubordination when a worker finds it impossible, in all conscience, to follow a policy set by an employer.

[21] It is important that I reiterate that the Digest 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.[4]

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

---

[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 71744, CUB 74884.
[4] *Canada (Attorney General) v Greey*, 2009 FCA 296, *Canada (Attorney General) v Savard*, 2006 FCA 327.

[23] I therefore find no error in the General Division's determination that it has no jurisdiction to decide questions about the vaccine's effectiveness or the reasonableness of the employer's policy that applies to workers working remotely and teleworking.

[24] In the present case, the employer followed the Public Health Agency of Canada recommendations to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was suspended.[5]

[25] The question of whether the employer violated the Claimant's collective agreement, 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.[6]

[26] 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.

[27] 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]

[28] 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

---

[5] See GD3A-19 to GD3A-39.
[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.

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.

[29] 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.

[30] 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.

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

[32] 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.

[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 him being suspended 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]

---

[8] The Court refers to *Bellavance*, see 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.

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

Availability

[36] The Claimant submits that the General Division did not consider the context of COVID-19 and his obligations towards his employer under the collective agreement.

[37] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.

[38] Availability must be determined by analyzing three factors:

> (1) the desire to return to the labour market as soon as a suitable job is offered,
>
> (2) the expression of that desire through efforts to find a suitable job, and
>
> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[39] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day they were capable of and available for work, and unable to obtain suitable employment.

[40] A claimant must establish their availability for work and this availability must not be unduly limited to receive benefits. The EI Act is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits.

---

[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).

[41] The fact that the Claimant is prohibited by his employment contract from looking for employment does not exempt him from that obligation under the EI Act. It is an essential condition to receiving EI benefits.

[42] The General Division found that the Claimant did not demonstrate that he wanted to go back to work as soon as a suitable job was available. It found that the Claimant was waiting for his employer to recall him to work after removing the vaccine mandate.

[43] The General Division found that by choosing not to be vaccinated, the Claimant was restricting himself to jobs without a vaccination requirement – at a time when, by his own admission, most (if not all) jobs in his own field or in government occupations required candidates to be vaccinated.

[44] The evidence supports the General Division's conclusion that the Claimant did not demonstrate that he was available for work but unable to find a suitable job.

Conclusion

[45] 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 on both issues.

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

Pierre Lafontaine
Member, Appeal Division