[TRANSLATION]

Citation: *IH v Canada Employment Insurance Commission*, 2023 SST 875

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	I. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 13, 2023(GE-22-3977)

Tribunal member:	Pierre Lafontaine
Decision date:	July 4, 2023
File number:	AD-23-445

Decision

[1] Permission to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) was suspended because she refused to comply with the employer's COVID-19 vaccination policy (policy). She did not get an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) found that the Claimant was suspended because of misconduct. It disqualified her from receiving EI benefits. The Claimant asked the Commission to reconsider the decision. The Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer's policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her refusal was intentional, conscious, and deliberate. The General Division decided that the Claimant was suspended because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. The Claimant argues that she did not commit any misconduct but instead exercised a right of refusal protected by the *Canadian Charter of Rights and Freedoms* (Charter). She says that her employer did not discipline her. The Claimant says that her employer placed her on administrative leave. At no time were her actions incompatible with the carrying out of the duties she was hired for. The Claimant argues that the employer did not follow guidelines to impose an administrative leave of absence.

[6] I have to decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[7] I am refusing permission to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

Issue

[8] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue 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 permission 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 permission to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[11] I will grant permission to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[12] The Claimant says that she did not commit any misconduct but instead exercised a right of refusal protected by the Charter. She says that her employer did not discipline her. The Claimant says that her employer placed her on administrative leave. At no time did her actions prove to be incompatible with the carrying out of the duties she was hired for. The Claimant argues that the employer did not follow guidelines to impose an administrative leave of absence.

[13] The General Division had to decide whether the Claimant was suspended because of misconduct.

[14] Although the employer did not accuse the Claimant of misconduct, it was the role of the General Division to verify and interpret the facts of the case and make its own assessment on the issue before it.

[15] It was not necessary 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 disciplinary procedure is irrelevant to determine misconduct under the *Employment Insurance Act* (EI Act).[1]

[16] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[17] The role of the General Division is not to rule on 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. Its role is to determine

---

[1] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.

whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[18] The General Division found that the Claimant was suspended because she did not comply with the employer's policy in response to the pandemic. The Claimant was informed of the policy the employer put in place to protect the health and safety of staff and had time to comply with it. The General Division found that the Claimant deliberately refused to follow the policy and that she did not get an exemption. This was the direct cause of her suspension.

[19] The General Division determined that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

[20] The General Division found, on a balance of probabilities, that the Claimant's behaviour constituted misconduct.

[21] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act.[2]

[22] There is not really any dispute that an employer is legally required to take all reasonable precautions to protect the health and safety of its employees in the workplace. 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.

[23] In other words, the Tribunal does not have jurisdiction to decide whether the employer's health and safety obligations related to COVID-19 stopped or continued to apply when the Claimant started working from home.

---

[2] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[24] In this case, the employer followed the recommendations of public health officials to implement its policy to protect the health of all employees during the pandemic. The policy was in effect when the Claimant was suspended.[3]

[25] The question of whether the employer did not follow guidelines for administrative leave, or whether the employer should have accommodated the Claimant, or whether the employer's policy violated her constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy she is seeking.[4]

[26] The Federal Court has rendered a recent decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's policy. The claimant argued that the safety and efficacy of the vaccine had not been proven. He felt discriminated against because of his personal medical choice. He said that he had the right to control his own bodily integrity and that his rights had been violated under Canadian and international law.

[27] The Federal Court confirmed the Appeal Division decision that, by law, the 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 to his employer and had lost his job because of misconduct under the EI Act.[5] The Federal Court said there were other legal avenues through which the claimant's claims could be heard.

[28] In *Paradis*, the claimant applied for judicial review of a decision of the Tribunal's Appeal Division refusing permission to appeal. He argued that there was no misconduct because the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

---

[3] The Policy was issued pursuant to sections 7 and 11.1 of the *Financial Administration Act*, and applied to all employees of the public administration, whether they work on-site or remotely.
[4] See *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 decided that that issue was for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court indicated that the employer's duty to accommodate is not relevant to determining misconduct under the EI Act.
[5] The Court refers to *Bellavance*, see note 2.

[29] The Federal Court confirmed that it was a matter for another forum. It noted that there are remedies to penalize an employer's behaviour other than through the EI program.[6]

[30] The evidence before the General Division shows, on a balance of probabilities, that the employer's policy applied to the Claimant. She refused to comply with the policy. She knew that the employer was likely to suspend her in these circumstances, and her refusal was wilful, conscious, and deliberate.

[31] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the pandemic's unique circumstances and her employer suspended her because of this.

[32] 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]

[33] I am fully aware that the Claimant can seek compensation in another forum, if a violation is established.[8] 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.

[34] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission to appeal, I am of the view that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

---

[6] See *Paradis*, supra, at para. 34.
[7] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[8] I note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights* [*sic*] (Charter), despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.

Conclusion

[35] Permission to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division