Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 755

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 28, 2023 (GE-22-3428)

Tribunal member:	Pierre Lafontaine
Decision date:	June 9, 2023
File number:	AD-23-335

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. After an unsuccessful reconsideration, 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. 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 employer unilaterally imposed a new condition of employment without offering any accommodations. He submits that making personal health decisions, as one has the inalienable right to do in Canada, cannot be misconstrued as misconduct and he objects to any policy or mandate suggesting it can overrule established 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?

[12] The Claimant submits that the employer unilaterally imposed a new condition of employment without offering any accommodations. He submits that making personal health decisions, as one has the inalienable right to do in Canada, cannot be misconstrued as misconduct and he objects to any policy or mandate suggesting it can overrule established law.

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

[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 (prevented from working) 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. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

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

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

[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 EI Act.[2] In the present case, the employer followed the directives of the Federal Government to implement its own Policy during the pandemic. The Policy was in effect when the Claimant was suspended.

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

[21] The question of whether the employer failed to accommodate the Claimant, or whether the employer violated his employment contract, or whether the 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.[3]

[22] The Federal Court of Canada 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.[4]

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] 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.
[4] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[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 his employer and had lost his job because of misconduct under the EI Act.[5] 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 the 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.

[28] 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.

[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 him being suspended from work.

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[5] The Court refers to *Bellavance*, see above note 2.

[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.[6]

[31] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[7] 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.

[32] 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 the issue of misconduct.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

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

[7] 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).