Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 835

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. D.
Respondent:	Canada Employment Insurance Commission
Representative:	Jared Porter

Decision under appeal:	General Division decision dated November 25, 2022 (GE-22-1664)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	April 17, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	June 23, 2023
File number:	AD-22-974

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) was suspended and lost his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant him a medical or religious exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended and lost 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 and lost his job following his refusal to follow the employer's Policy. It found that the Claimant knew or ought to have known that the employer was likely to suspend and dismiss him in these circumstances. The General Division concluded that the Claimant was suspended and lost his job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored evidence and made an error in law when it concluded that he was suspended and lost his job because of his misconduct.

[6] I must decide whether the General Division ignored evidence and made an error in law when it concluded that the Claimant was suspended and lost his job because of his misconduct.

[7] I am dismissing the Claimant's appeal.

Issue

[8] Did the General Division ignore evidence and make an error in law when it concluded that the Claimant was suspended and lost his job because of his misconduct?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division ignore evidence and make an error in law when it concluded that the Claimant was suspended and lost his job because of his misconduct?

[12] The Claimant submits that the General Division mentioned the acceptance of post-hearing documents - notably, the Collective bargaining agreement (CBA) between union, employer, and employee. He submits that in his notice of unpaid leave meeting

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

report (of Nov 15, 2021), he stressed that there is section 22.02 in his CBA that states that he has the right to refuse any required vaccination. The Claimant argues that this evidence was never considered and brought up in the General Division decision.

[13] The Claimant further submits that the General Division made an error in law in its interpretation of misconduct because he never breached an expressed or implied duty owed to his employer. He had no duty to get the COVID-19 vaccine.

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

[15] 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.

[16] 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 and dismissing the Claimant in such a way that his suspension and dismissal were unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension and dismissal.

[17] Based on the evidence, the General Division determined that the Claimant was suspended and dismissed 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 a medical or religious exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension and dismissal.

[18] The General Division found that the Claimant knew or ought to have known that his refusal to comply with the Policy could lead to his suspension and dismissal.

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

[20] 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).[3] 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.[4]

[21] 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 directive of the Government of Ontario to implement its Policy to protect the health of all employees and patients during the COVID-19 pandemic.[5] The Policy was in effect when the Claimant was suspended and dismissed.

[22] The Claimant submits that article 22.02 p.(c) of his CBA states that he has the right to refuse any required vaccination. The Claimant argues that this evidence was never considered and brought up in the General Division decision.

[23] Although the General Division did not specifically mention the CBA section in its decision, it did indicate that its role is not to look at the employer's conduct and determine whether they were right in suspending and dismissing the Claimant. In other words, it was not up to the General Division to determine whether the employer violated the Claimant's rights under the CBA by changing their initial work agreement.

[24] I note that article 22.02 p.(c) is part of a section concerning the influenza vaccine. The General Division did not have jurisdiction to interpret the Claimant's CBA to determine whether the right of refusal also applied to COVID-19 vaccines.

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[4] CUB 71744, CUB 74884.
[5] Directive 6 was issued on August 17, 2021, demanding that hospitals implement a COVID-19 vaccination policy. See GD3-22.

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

[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.

[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 and had lost his job because of 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.

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[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.
[8] The Court refers to *Bellavance,* see note 3.

[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 and dismissing the Claimant in such a way that his suspension and dismissal were unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension and dismissal.

[33] The preponderant evidence before the General Division shows that the Claimant, after being denied an exemption, **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 and dismissed 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]

[35] 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 suspended and dismissed because of misconduct.

[36] The Claimant submits a General Division decision that he considers like his case where the claimant was successful in receiving EI benefits.[10] He is asking the Appeal

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[9] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[10] *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

Division to follow that decision because the claimant in that case also had a clause allowing her to refuse any vaccination.

[37] It is important to reiterate that the General Division decision in *AL* is not binding on the Appeal Division.[11] Those of the Federal Court are binding and must be followed by the Appeal Division.

[38] I reiterate that the General Division could not focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. It had to focus on the Claimant's conduct.

[39] The Claimant further submits that directive 6 was struck down in February 2022. This fact does not change the nature of the misconduct, which initially led to the Claimant's suspension and dismissal.[12]

[40] For these reasons, I have no choice but to dismiss the Claimant's appeal.

Conclusion

[41] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

[11] I also note that the Commission was granted leave to appeal to the Appeal Division of the General Division decision *AL*. (AD-23-13).
[12] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.