Citation: *PT v Canada Employment Insurance Commission*, 2023 SST 843

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 3, 2023 (GE-23-154 and GE-23-155)

Tribunal member:	Pierre Lafontaine
Decision date:	June 26, 2023
File number:	AD-23-533 and AD-23-534

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. He applied for EI benefits on July 13, 2022. He wanted his application to be treated as though it was made earlier, on December 12, 2021.

[3] The Respondent (Commission) determined that the Claimant lost his job because of misconduct, so it was not able to pay him benefits. It also determined that the Claimant had not proven that he had good cause for the delay in applying for benefits throughout the entire period of the delay. 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. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. However, he did not know or ought to have known that he would be dismissed. The General Division concluded that the Claimant was suspended from his job because of misconduct.

[5] The General Division also concluded that the Claimant did not prove good cause because he did not act as a reasonable and prudent person would have done in similar circumstances. Therefore, his antedate request was refused.

[6] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that Service Canada gave a warning not to apply for EI benefits. He submits that the media made it clear that people who did not get vaccinated may not be entitled to EI benefits. The Claimant puts forward that this made

his decision even harder to make. He only found out that he could apply because he met a co-worker in a public area. The Claimant puts forward that we should be able to trust our government and media.

[7] I must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

[8] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[9] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[10] 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.

[11] 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.

[12] Therefore, before I can grant leave, 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

[13] The General Division had to decide whether the Claimant lost 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 or dismissing the Claimant in such a way that his suspension or dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension or dismissal.

[16] Based on the evidence, the General Division determined that the Claimant was suspended 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.

[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).[1] 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.[2]

[20] 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 Health Canada recommendations to implement its Policy to protect the health of all employees during the pandemic.[3] The Policy was in effect when the Claimant was suspended.

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

[22] The question of whether the employer failed to accommodate the Claimant, 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.[4]

[23] 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

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

[2] CUB 71744, CUB 74884.

[3] The policy was issued pursuant to sections 7 and 11 of the *Financial Administration Act*.

[4] 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.

own bodily integrity and that his rights were violated under Canadian and international law.[5]

[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.[6] 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] 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.

[29] 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]

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[5] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[6] The Court refers to *Bellavance*, see above note 1.
[7] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[30] 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 because of misconduct.

[31] I see no reviewable error made by the General Division on the issue of misconduct.

Antedate

[32] The Claimant submits that Service Canada gave a warning not to apply for EI benefits. He submits that the media made it clear that people who did not get vaccinated may not be entitled to EI benefits. The Claimant puts forward that this made his decision even harder to make. He only found out that he could apply because he met a co-worker in a public area. The Claimant puts forward that we should be able to trust our government and media.

[33] To establish good cause, a claimant must be able to show that they did what a reasonable person in their situation would have done to satisfy themselves as to their rights and obligations under the law.[8]

[34] The General Division considered some media reports and other documents that the Claimant said supported his decision. It determined that, at the most, they suggested that each case would be determined on its merits and that employees who were suspended or let go for not following their employers' vaccination policies **might not** get EI benefits.

[35] The General Division found that a reasonable and prudent person in the Claimant's circumstances would have promptly contacted or visited Service Canada to ask about his entitlement. It found that his inaction was based on his assumptions and opinions and went on for several months.

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[8] Section 10(4) of the *Employment Insurance Act* (EI Act).

[36] The General Division concluded that the Claimant did not prove good cause for the entire delay because he did not act as a reasonable and prudent person would have done in similar circumstances.

[37] It is well established that a delay in applying for EI benefits based on an incorrect and unverified assumption that a claimant would not be eligible does not constitute good cause for purposes of the EI Act.[9] The fact that there was a lot of information and misinformation being communicated to Canadian citizens made it even more important for the Claimant to verify his eligibility directly with Service Canada.

[38] I see no reviewable error made by the General Division on the issue of antedate.

Conclusion

[39] After reviewing the appeal file and the General Division's decision as well as considering the Claimant's arguments in support of his request for leave to appeal, I have no choice but to find that the appeal has no reasonable chance of success. The Claimant has not set out a reason, which falls into the above-enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

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

Pierre Lafontaine
Member, Appeal Division

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[9] *Howard v Canada (Attorney general)*, 2011 FCA 116, *Canada (Attorney general) v Innes*, 2010 FCA 341, *Shebib v Canada (Attorney general)*, 2003 FCA 88.