Citation: *DG v Canada Employment Insurance Commission*, 2023 SST 849

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 25, 2023 (GE-22-4124)

Tribunal member:	Pierre Lafontaine
Decision date:	June 27, 2023
File number:	AD-23-556

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 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 or ought to have known 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 now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division based its decision on an important error of fact and that it made an error of law when making its decision.

[6] I must decide whether the Claimant 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, 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 he repeatedly requested the employer to provide him with the necessary training and information so that he could make an informed decision, as it was their obligation to do so. However, the employer was unable to fulfill this obligation. He therefore could have continued to work from home until the requested information was provided. Furthermore, the concept of leave without pay (LWOP) was not presented to him as a punitive measure, but rather as an accommodating or administrative action, the way LWOP is defined in his Collective Agreement. The Claimant submits that the employer unilaterally imposed its Policy on him and violated his employment contract. He submits that the General Division failed to consider that he is guided by his religious beliefs and failed to recognize the protected nature of religious freedoms.

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

[14] Even if the employer did not accuse the Claimant 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.

[15] It was not necessary for the General Division to decide whether the employer placed the Claimant on an administrative leave instead of a disciplinary suspension. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[1]

[16] 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.

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

[17] 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.

[18] 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 a religious exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

[19] 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.

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

[21] 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]

[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. In the present case, the employer followed Health Canada recommendations to implement its Policy to protect the health of all employees during the pandemic.[4] The Policy was in effect when the Claimant was suspended.

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 71744, CUB 74884.
[4] The policy was issued pursuant to sections 7 and 11.1 of the *Financial Administration Act*, and applied to all employees of the core public administration whether they work on-site or telework.

[23] It is not for this Tribunal to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable. In other words, it was not up to this Tribunal to decide whether it was reasonable for the employer to extend this protection to employees working from home during the pandemic.

[24] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated his Collective Agreement, 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.[5]

[25] 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. 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.[6]

[26] 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.[7] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

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[5] 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.
[6] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[7] The Court refers to *Bellavance*, see above note 2.

[27] 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.

[28] 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.

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

[30] 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.

[31] The preponderant evidence before the General Division shows that the Claimant attended the employer's training in October 2021. He did not consider the information provided to be sufficient to answer his questions. Following the refusal of his exemption request, the Claimant continued doing his own research to determine if he could come to a decision and take the 2nd dose. Based on his findings, he ultimately decided he could not get the vaccine.[8]

[32] 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.

[8] See GD3-45.

[33] 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]

[34] 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.

[35] The Claimant submits a General Division decision that he considers like his case where the applicant was successful in receiving EI benefits. He is asking that the Tribunal follow that decision.[11]

[36] It is important to reiterate that the referred to General Division decision is not binding on the Appeal Division.[12] Those of the Federal Court are binding and have been followed by the Appeal Division. Furthermore, the facts are different in that the claimant's collective agreement had a specific provision allowing her to refuse any vaccination. The Claimant did not present any such evidence before the General Division. Furthermore, the General Division decision referred to was rendered prior to the Federal Court decision in *Cecchetto*.

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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] 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).

[11] *AL v Canada Employment Insurance Commission*, 2022 SST 1428, The Claimant also submitted two other cases: *TC v Canada Employment Insurance Commission*, 2022 SST 891, and *CG v Canada Employment Insurance Commission*, 2022 SST 356. As stated by the General Division, in Both TC and CG, the issue was whether the appellants in those cases had been given proper notice of their employer's vaccine policy and notice of the consequences of not complying. That is not the case here, where the Claimant was aware of the policy, was given time to comply, and knew he could be suspended if he did not comply.

[12] I also note that the Commission was granted leave to appeal to the Appeal Division of the General Division decision. (AD-23-13).

[37] 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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division