Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 768

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 3, 2023 (GE-22-2456)

Tribunal member:	Solange Losier
Decision date:	June 14, 2023
File number:	AD-23-124

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] M. S. is the Claimant in this case. She worked as a letter carrier. She applied for Employment Insurance (EI) regular benefits after she stopped working.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits because she voluntarily took a leave of absence from her job.[1] The Claimant appealed the Commission's decision to the General Division.

[4] The General Division decided that the Claimant did not voluntarily take a leave of absence from her job, but instead that she was suspended from her job due to misconduct. It said the Claimant was aware of her employer's Covid-19 vaccination policy and should have known the consequences of non-compliance.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[2] For misconduct to be established, she says that case law requires there to be a breach of an express or implied duty arising out of the employment contract. She also says that the General Division ignored the fact that the employer breached the collective agreement. She wants her case to be reconsidered.

[6] The Claimant argues that the General Division made an error of law by not following case law.[3] But I have also considered whether there was an error of fact because she says that the General Division ignored the collective agreement.

[7] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.[4]

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[1] See initial decision at page GD3-24; reconsideration decision at page GD3-66 and section 32 of the *Employment Insurance Act (EI Act).*
[2] See application to the Appeal Division at page AD1-1 to AD1-6.
[3] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[4] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

Issue

[8] Is there an arguable case that the General Division made an error of law or based its decision on an important mistake about the facts of the case when it concluded that the Claimant couldn't get EI benefits because of misconduct?

Analysis

[9] An appeal can proceed only if the Appeal Division gives permission to appeal.[5]

[10] I must be satisfied that the appeal has a reasonable chance of success.[6] This means that there must be some arguable ground upon which the appeal might succeed.[7]

[11] The possible grounds of appeal to the Appeal Division are that the General Division:

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact.[8]

[12] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

I am not giving the Claimant permission to appeal

– **There is no arguable case that the General Division made an error of law**

[13] An error of law can happen when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[9]

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[5] See section 56(1) of the DESD Act.
[6] See section 58(2) of the DESD Act.
[7] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[8] See section 58(1) of the DESD Act.
[9] See section 58(1) of the DESD Act.

[14] The law says that a claimant who is suspended because of misconduct is not entitled to receive EI benefits.[10] As well, a claimant who voluntarily takes a period of leave from their job without just cause is not entitled to receive EI benefits.[11] Both of these result in a "disentitlement" to EI benefits.

[15] Misconduct is not defined in the *Employment Insurance Act* (EI Act). The Federal Court of Appeal defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[12]

[16] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal (or suspension in this case) was a real possibility.[13]

[17] The Claimant relies on a Court case to support her position that the General Division made an error of law.[14] The Claimant argues that in order to find misconduct, the *Lemire* case says there must be a breach of an express or implied duty arising out of the employment contract.[15]

[18] The *Lemire* case involved an employee who worked as a delivery person for a restaurant. In his work uniform, he sold contraband cigarettes to another colleague in the employer's parking lot. This was a breach of the employer's policy which prohibited the sale of contraband cigarettes on work premises. He was dismissed from his job for misconduct.

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[10] Section 31 of the *Employment Insurance Act* (EI Act) says that a person who is suspended for misconduct is disentitled to EI benefits until the period of suspension expires, or if they lose or voluntarily leave their job, or if they accumulate enough hours of insurable employment with another employer to qualify for EI benefits.
[11] Section 32 of the EI Act says that a claimant who voluntarily takes a period of leave from their employment without just cause is not entitled to receive benefits if, before or after the beginning of the period of leave, (a) the period of leave was authorized by the employer; and (b) the claimant and employer agreed as to the day on which the claimant would resume employment.
[12] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[14] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[15] See Claimant's arguments at page AD1-3.

[19] The Claimant relies on paragraph 14 in the *Lemire* case, which says this:

> To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment ...

[20] First, the Court in *Lemire* was talking misconduct in the context of a dismissal, not a suspension. That employee was dismissed from his job due to misconduct and disqualified from EI benefits.[16] In this case, the General Division determined that the Claimant stopped working because she was suspended by her employer for not following its Covid-19 vaccination policy.[17] This resulted in a disentitlement to EI benefits.[18] The General Division was therefore considering whether the Claimant's suspension amounted to misconduct in the context of the EI Act.[19]

[21] Second, the Court in *Lemire* also said that, deciding whether a dismissal was justified under labour law principles is not the question. Instead, the Tribunal has to determine whether the misconduct was such that the person could normally foresee that it would be likely to result in their dismissal.[20]

[22] Third, the employer had a policy which stated that employees cannot sell contraband cigarettes on work premises. The Court noted that the claimant chose to disregard the policy.[21] The Court confirms that it isn't necessary that the breach of conduct be the result of a wrongful intent. It stated that wilful misconduct is conduct that is conscious, deliberate, or intentional.[22]

[23] Although the General Division did not specifically refer to the *Lemire* decision, the General Division outlined and applied the legal test for misconduct as set out by the

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[16] Section 30 of the EI Act imposes a *disqualification* to EI benefits. It says that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause.
[17] See paragraphs 15,16, 21 and 27 of the General Division decision.
[18] See section 31 of the EI Act.
[19] See paragraphs 2, 15, 20 and 21 of the General Division decision.
[20] See *Canada (Attorney General) v Lemire*, 2010 FCA 314, paragraph 15.
[21] See *Canada (Attorney General) v Lemire*, 2010 FCA 314, paragraphs 17,19 and 20.
[22] See *Canada (Attorney General) v Lemire*, 2010 FCA 314, paragraph 13.

Court. It considered that the Claimant knew about the Covid-19 vaccination policy; knew the deadline to comply with it; knew the consequences of not complying and that her own conduct directly resulted in her suspension.[23]

[24] So, the Claimant's argument that the General Division made an error of law in relation to the *Lemire* case has no reasonable chance of success. The General Division did not have to consider whether the employer breached labour laws when they imposed the Covid-19 vaccination policy because that would have shifted the focus to the employer's behaviour. The Courts have been clear that it is the conduct of the employee that matters.

– **There is no arguable case that the General Division made an error of fact**

[25] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[24]

[26] If the General Division based its decision on an important mistake about the facts of the case, then I can intervene.

[27] The Claimant says that the General Division ignored the collective agreement.[25] She argues that the General Division should have considered that the employer breached the collective agreement.

[28] The General Division considered the Claimant's argument that the employer acted unlawfully when it introduced a Covid-19 vaccination policy violating the terms of the collective agreement.[26] It decided that it could not make any decisions about whether the employer violated the terms of the collective agreement when it introduced

[23] See paragraphs 22, 23 and 34 of the General Division decision.
[24] See section 58(1)(c) of the DESD Act.
[25] See Claimant's arguments at page AD1-3.
[26] See paragraph 26 of the General Division decision.

the Covid-19 vaccination policy.[27] It relied on the following Court cases to support that decision.[28]

[29] In *McNamara*, the Court confirmed that the focus is not on the behaviour of the employer, but rather on the behaviour of the employee.[29] The Court also said that it's not the role of the Tribunal to determine whether the dismissal of an employee is wrongful or not, but rather it has to decide whether the act or omission of the employee amounted to misconduct within the meaning of the EI Act.

[30] In *Paradis*, the Court confirmed again that the conduct of the employer is not a relevant consideration in misconduct cases.[30]

[31] There is also a recent case from the Court called *Cecchetto* that considered misconduct in the context of Covid-19 vaccination mandates and EI benefits.[31] In that case, another claimant was suspended and later dismissed from his job for not complying with the employer's Covid-19 vaccination policy. He argued that the employer's policy violated his rights. The Court confirmed that the Appeal Division has a narrow and specific role which involves determining why a person is suspended or dismissed from his job and whether that reason is misconduct based on the EI Act.[32] The Court acknowledged that there may be other ways in which claims between an employer and employee can be properly advanced under the legal system.[33]

[32] The Court has previously stated there are remedies available to an employee that is wrongfully dismissed (or suspended in this case) to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.[34]

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[27] See paragraph 33 of the General Division decision.
[28] See paragraph 22 of the General Division decision and *Paradis v Canada (Attorney General)*, 2016 FC 1282, paragraphs 31 and 34.
[29] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, paragraphs 22 and 23.
[30] See *Paradis v Canada (Attorney General)*, 2016 FC 1282, paragraph 31.
[31] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.
[32] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 47.
[33] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 49.
[34] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.

[33] So, the General Division did not make an error of fact by ignoring the collective agreement because it was following directions from the Courts. It knew there was a collective agreement but decided that it could not consider the employer's actions and focused on whether the Claimant's actions were misconduct under the terms of the EI Act. [35]

[34] The General Division does not need to refer to every piece of evidence and is only required to refer to relevant evidence.[36] The collective agreement was not relevant to the determination of misconduct because the General Division had to focus on the Covid-19 vaccination policy and whether the Claimant could foresee that her actions would result in her suspension from her job.

[35] That is exactly what the General Division did in this case. It outlined the legal test for misconduct.[37] It found that the Claimant was aware of the Covid-19 vaccination policy, she deliberately chose to not comply with the policy by the deadline and that she should have known there was a real possibility she could be suspended or lose her job.[38] The Claimant agreed that she didn`t comply with the policy because she did not provide proof of Covid-19 vaccination by the deadline.[39] And this conduct is what led to her suspension.

[36] There is no reasonable chance of success for this argument because the General Division did not ignore the collective agreement.

– **There are no other grounds**

[37] I acknowledge that the Claimant wants her case reconsidered.[40] However, an appeal to the Appeal Division is not a new hearing. I cannot reweigh the evidence in order to come to a different conclusion that is more favourable for the Claimant.[41]

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[35] See paragraph 33 of the General Division decision.
[36] See *Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319, at paragraph 39; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), at paragraph 16.
[37] See General Division decision at paragraphs 22-24.
[38] See General Division decision at paragraphs 27, 31, 32, 34 and 35.
[39] See General Division decision at paragraph 19.
[40] See Claimant`s arguments at page AD1-3.
[41] See *Garvey v Canada (Attorney General),* 2018 FCA 118.

[38] I also reviewed the file, listened to the recording of the General Division hearing, and reviewed the General Division decision.[42] I did not find any relevant evidence that the General Division might have ignored or misinterpreted. As well, the General Division applied the relevant parts of the law.

Conclusion

[39] There is no arguable case that the General Division made an error of law or made an error of fact.

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

Solange Losier
Member, Appeal Division

[42] The Federal Court recommends doing such a review in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874, and *Karadeolian v Canada (Attorney General),* 2016 FC 615.