Citation: *BA v Canada Employment Insurance Commission*, 2023 SST 860

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated April 6, 2023 (GE-22-3694)

Tribunal member:	Pierre Lafontaine
Decision date:	June 28, 2023
File number:	AD-23-433

Decision

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

Overview

[2] The Applicant (Claimant) lost 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 lost 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 lost 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 let him go in these circumstances. The General Division concluded that the Claimant lost 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 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.

Preliminary matters

[12] It is well established that to decide the present application for leave to appeal, I must consider the evidence that was presented to the General Division.

[13] An appeal to the Appeal Division is not a new hearing where a party can re-present evidence. The role of the Appeal Division is limited by law.[1]

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

[14] In support of his application for leave to appeal, the Claimant submits the following:

a) He always demonstrated willingness to fulfill his work duties;
b) He was willing to take covid tests to continue work but it was never offered;
c) He only found out of a possible dismissal on October 21, 2021, one week before his dismissal;
d) He was not fully aware of the consequences of not getting the second dose of the vaccine and he did not have enough time to comply because the employer did not respond to his email of October 27, 2021;
e) He submits that the employer only wanted to avoid paying him severance and termination pay. They offered to rehire him if he got the second dose;
f) The employer did not inform him of the medical ingredients of the vaccine;
g) The available vaccines had side effects and did not stop the spreading of the virus;
h) The General Division did not consider the employer’s conduct;
i) He asked to be place on an unpaid leave of absence, but the employer refused his request;
j) The General Division made an error in its interpretation of the facts leading to its conclusion of misconduct.

[15] The General Division had to decide whether the Claimant lost his job because of misconduct.

[1] *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[16] 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.

[17] The notion of misconduct under the *Employment Insurance Act* (EI Act) 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.

[18] 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 dismissing the Claimant in such a way that his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal. In other words, the General Division must focus on the Claimant's conduct and not that of his employer.

[19] Based on the evidence, the General Division determined that the Claimant lost his job 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 dismissal. 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 dismissal.

[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 EI Act.[2] It is also considered

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

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, federal, provincial, and local public health recommendations, to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was dismissed.

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

[24] The question of whether the employer failed to accommodate the Claimant, or whether the employer violated his employment rights, 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]

[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.[5]

---

[3] CUB 71744, CUB 74884.

[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.

[5] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

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

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

[31] The Claimant submits that he only found out of a possible dismissal on October 21, 2021, one week before his dismissal. He submits that he was not fully aware of the consequences of not getting the second dose of the vaccine and he did not have enough time to comply because the employer did not respond to his email of October 27, 2021.

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

[32] On October 21, 2021, the Claimant advised his employer by email that he has decided not to receive the second dose and that he would be waiting for the viral vector vaccine to be approved.[7]

[33] The Claimant received a letter from his employer dated October 22, 2021. It says that he is placed on unpaid leave immediately and will be let go on October 29, 2021, if he isn't fully vaccinated by then with all required doses of the applicable vaccination series approved by Health Canada.[8]

[34] On October 27, 2021, the Claimant reiterated by email that he has decided to wait for a vaccine that is right for him. He writes that he hopes that the employer will treat him fairly if they decide to end his employment.[9]

[35] I see no reviewable error in the General Division's finding that the Claimant had clearly made his decision not to comply with the Policy knowing the consequences and that he did in fact have enough time to decide whether to follow his employer's Policy. The fact that the employer did not reply to the Claimant's email of October 27, 2021, does not affect this finding, the Claimant having already clearly expressed to his employer, on two separate occasions, his choice not to receive the second dose.

[36] 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 dismissed from work.

[37] 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.[10]

---

[7] See GD3-31.
[8] See GD3-39, GD3-40.
[9] See GD3-32, GD3-33.
[10] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[38] 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 dismissed because of misconduct.

[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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division