Citation: *JK v Canada Employment Insurance Commission*, 2023 SST 810

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 14, 2023 (GE-22-3202)

Tribunal member:	Pierre Lafontaine
Decision date:	June 21, 2023
File number:	AD-23-423

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 a medical 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. The Claimant appealed the reconsideration decision 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. It found that the Claimant knew 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 seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division should not have considered that the employer would risk losing provincial funding if the employee did not comply. The General Division focused on the employer's actions and therefore showed biased. The Claimant submits that the employer did not give him enough time to obtain information about the vaccine. He submits that the General Division did not ask him to provide evidence that the adverse reaction he had in the past was related to the shot. The Claimant submits that the General Division should have followed a General Division decision rendered by a different member.

[6] I must decide whether the Claimant has 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 to appeal, 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 that the General Division should not have considered that the employer would risk losing provincial funding if the employee did not comply. The General Division focused on the employer's actions and therefore showed biased. The Claimant submits that the employer did not give him enough time to obtain information about the vaccine. He submits that the General Division did not ask him to provide evidence that the adverse reaction he had in the past was related to the shot. The Claimant submits that the General Division should have followed a General Division decision rendered by a different member.

Misconduct

[13] The General Division had to decide whether the Claimant was suspended from 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 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.[1]

[16] The Claimant stated that he got a letter a month or more before the deadline of November 19, 2021. The employer confirmed that they sent the letter around October 8, 2021. The Claimant stated that once he got the policy, he immediately told his employer

[1] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

he was not going to work for him, and his boss said, “if you don't follow the policy then you can't come to work”.[2] The Claimant did not request a medical exemption.

[17] The Claimant stated and testified that he consulted with a doctor before his job ended and was told that it would be wise for him to get the vaccine.[3]

[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. 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 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).[4] 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.[5]

[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 the directives of the New Brunswick government to implement its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was suspended.

[23] This Tribunal does not have the jurisdiction to decide whether the employer’s health and safety measures regarding COVID-19 were efficient or reasonable.

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[2] See GD3-28.
[3] See GD-3-37
[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[5] CUB 71744, CUB 74884.

[24] The question of whether the employer should have accommodated 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.[6]

[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.[7]

[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 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.

[27] In the previous *Paradis* case, the claimant was refused EI benefits because of misconduct. He argued that 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.

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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 above note 4.

[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 **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.

[32] The Claimant submitted a General Division decision that he considers like his case where the applicant was successful in receiving EI benefits. He is asking that the Appeal Division to follow that decision.[9]

[33] It is important to reiterate that the General Division decision is not binding on the Appeal Division.[10] 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*.

[34] The Claimant also submitted other General Division decisions that do not apply to his case because he had time to comply with the Policy and had clearly expressed to his employer that it would not work for him. Furthermore, the conclusion of the Claimant's misconduct is based on the evidence and not the employer's opinion.[11]

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[9] *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[10] I also note that the Commission was granted leave to appeal to the Appeal Division of the General Division decision. (AD-23-13).
[11] See AD1-11.

[35] 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.[12]

[36] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[13] 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.

[37] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success on the issue of misconduct.

Hearing process was not fair in some way

[38] Before the General Division, the Claimant put forward that he was afraid to take the COVID-19 vaccine because of a bad experience after receiving a flu shot. The General Division determined that the Claimant did not provide any evidence that the reaction he had was directly related to that shot. The Claimant submits that the General Division should have requested the evidence if it was important.

[39] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it and to articulate, in its written decision, its own independent decision with respect thereto.

[40] It is well established that the General Division has no obligation to act as a claimant's representative and advise on the evidence to be presented. It was up to the Claimant to present the evidence in support of his case.

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[12] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[13] 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).

[41] Therefore, this ground of appeal has no reasonable chance of success.

Bias

[42] The Claimant submits that the General Division should not have considered that the employer would risk losing provincial funding if the employee did not comply. He submits that the General Division focused on the employer's actions and therefore showed biased.

[43] An allegation of bias against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[44] I cannot find that the General Division member showed bias in its decision and more precisely, by mentioning that the employer risked losing provincial funding if the employees did not comply. The General Division's determination is based on the evidence showing that the employer had to follow the directive of the government and implement a vaccination policy.

[45] The General Division member who conducted the hearing rendered a very detailed decision based on evidence and supported by relevant case law. I cannot see any material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such a serious allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

[46] In view of the above, I find that this ground of appeal has no reasonable chance of success.

Conclusion

[47] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

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

Pierre Lafontaine
Member, Appeal Division