Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 855

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 5, 2023 (GE-23-429)

Tribunal member:	Pierre Lafontaine
Decision date:	June 27, 2023
File number:	AD-23-519

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 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 that he is entitled to a measure of privacy with respect to his health, and there is no obligation on an employee to disclose a health condition that does not affect the employee's ability to do the job. He submits that a foundational

principle is that employees have a strong right to privacy with respect to their bodily integrity and medical practitioner. The Claimant submits that he refused to file the employer's accommodation request form provided with the employer's Policy because it required a diagnosis (medical reason) be stated as well as authority for the employer to contact the employee's doctor to validate the diagnosis. He did, however, provide a medical note without the employer's accommodation request form.

[13] The Claimant submits the employer's Policy stated it would follow updated Federal Government direction. This direction was issued via orders of Transport Canada specifically directing the employer on medical exemptions. The employer stated it would modify its Policy to conform to this direction. They did not. His actions followed these facts and were legitimate and are supported by directly applicable case law and specific Federal Government direction. He submits that the assessment of misconduct is incorrect.

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

[15] 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.

[16] 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.

[17] 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.

[18] The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his suspension.

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

[20] 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]

[21] 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 implemented its Policy to protect the health of all employees during the pandemic. The Policy was in effect when the Claimant was suspended.

[22] The Claimant has submitted two Federal Court cases that he says should be followed by the Tribunal.[2] These cases involve the Canadian Human Rights Tribunal and the Public Service Labour Relations Board. One delt with a discrimination issue and the other dealt with a labour and employment law issue. The issues in dispute in these cases relate to the application of different laws that are well beyond the Tribunal's jurisdiction.

[23] The question of whether the employer failed to accommodate the Claimant (by refusing his medical exemption), or whether the Policy violated his labour rights, or whether the Policy violated his human and constitutional rights, is a matter for another

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[1] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[2] The Claimant submits two cases in support of his position: *Canada (Attorney General) v Grover*, 2007 FC 28; *A.J. v Canada (Attorney General)*, 2008 FC 591.

forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[3]

[24] The Federal Court of Canada has rendered a recent decision in *Cecchetto* regarding misconduct under the EI Act and a claimant's refusal to follow the employer's COVID-19 vaccination policy.

[25] 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.[4]

[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.[5] 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.

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[3] 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.
[4] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[5] The Court refers to *Bellavance*, see above note 1.

[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 **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] 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.[6]

[33] I am fully aware that the Claimant may seek relief before another forum if a violation is established.[7] 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.

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

[7] 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).

[34] 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 Tribunal follow that decision.[8]

[35] It is important to reiterate that the referred to General Division decision is not binding on the Appeal Division.[9] 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, and most importantly, the General Division decision referred to was rendered prior to the Federal Court decision in *Cecchetto*.

Two appeals with the General Division

[36] As stated by the General Division, the Claimant filed two reconsideration requests with the Commission. Each of these were decided separately. One decision was in June 2022. This was a decision to maintain their original decision of misconduct. The second decision was a decision not to reconsider their June 2022 decision as the Claimant had already requested a reconsideration. The Commission denied this second request for reconsideration in January 2023.

[37] The Claimant provided both decisions to the General Division when requesting his appeal. In response to this, the General Division created two appeal files.

[38] In its June 2022 reconsideration decision, the Commission decided to maintain its initial decision on misconduct. In its January 2023 decision, the Commission decided not to rescind or amend its reconsideration decision because the Claimant did not present new facts and it was satisfied that the decision was not given without knowledge of, or was based on a mistake as to, some material fact. Those are two different issues before the General Division.

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

[39] Although the General Division decided both appeals solely on the issue of misconduct, I see no reviewable error in the Commission's application of section 111 of the EI Act that would justify the intervention of the Appeal Division. The Claimant did not present new facts and the Commission's reconsideration decision of June 2022 was not given without knowledge of, or was not based on a mistake as to, some material fact.

Conclusion

[40] 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.

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

Pierre Lafontaine
Member, Appeal Division