[TRANSLATION]

Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 1077

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 4, 2023(GE-22-3894)

Tribunal member:	Pierre Lafontaine
Decision date:	August 14, 2023
File number:	AD-23-577

Decision

[1] Permission to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) was suspended because she refused to comply with the employer's COVID-19 vaccination policy (policy). The employer did not grant an exemption.

[3] The Respondent (Commission) decided that the Claimant was suspended because of misconduct. It disqualified her from receiving Employment Insurance (EI) benefits. The Claimant asked the Commission to reconsider its decision. It upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer's policy. It found that she knew that the employer was likely to suspend her in these circumstances and that her refusal was wilful, conscious, and deliberate. The General Division found that the Claimant was suspended because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. She argues that the General Division made errors of fact and law when it found that she was suspended because of misconduct.

[6] I must decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[7] I am refusing permission to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

Issue

[8] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

Preliminary remarks

[9] In deciding the Claimant's application for permission to appeal, I considered only the evidence before the General Division. The Appeal Division's powers are limited. This is because an appeal to the Appeal Division is not a new hearing where a party can present evidence again and hope for a different decision.[1]

Analysis

[10] 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 the following:

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.

[11] An application for permission 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 permission to appeal stage, the Claimant does not have to prove her case but must establish that her appeal has a reasonable chance of success. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[12] I will grant permission to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

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[1] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157: The Court listed three, potentially non-exhaustive, exceptions to the general rule: (1) general background information, (2) bringing procedural flaws to the tribunal's attention, and (3) highlighting the complete absence of evidence. None of these exceptions apply in this case.

Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[13] The Claimant raises the following grounds of appeal:

a) The employer placed her on a leave of absence without her consent and she was not suspended.

b) The General Division failed to consider evidence of her religious belief being sincere and that this belief is objectively related to a religious tenet that flows from a text or other article of faith.

c) The employer's policy caused her issues of religious conscience because there was no way to ensure that the vaccines had been produced, approved, distributed, in an ethically acceptable manner.

d) The employer had to accommodate her by granting her a religious exemption.

e) The employer's policy was unreasonable, abusive, and discriminatory.

f) She followed the employer's policy because she asked for an exemption.

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

[15] It was up to the General Division to verify and interpret the facts of this case and make its own assessment on the issue of misconduct.

[16] It was not necessary for the General Division to decide whether the employer could put the Claimant on an [translation] "unpaid leave" for refusing to follow its policy. It is well established that an employer's disciplinary procedure is irrelevant to determine misconduct under the *Employment Insurance Act* (EI Act).[2]

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

[17] The evidence shows that the employer prevented the Claimant from working even though there was work to do. The Claimant acknowledged that the leave of absence was imposed on her and that she would have continued working if it had not been for the policy. The Claimant temporarily lost her job. This means that she was suspended under the EI Act.[3]

[18] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[19] The General Division's role is not to rule on 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 her suspension was unjustified. Its role is to decide whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[20] The General Division found that the Claimant was suspended because she did not comply with the employer's policy in response to the pandemic. The Claimant was informed of the employer's policy put in place to protect the health and safety of all employees and was given time to comply with it.

[21] The General Division found that the Claimant deliberately refused to follow the policy and that she did not get an exemption. This directly led to her suspension. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

[22] The General Division found, on a balance of probabilities, that the Claimant's behaviour constituted misconduct.

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[3] See section 29(b) of the *Employment Insurance Act* (EI Act): Loss of employment includes suspension of employment.

[23] It is well established that a deliberate violation of an employer's policy is considered misconduct under of the EI Act.[4] It is also considered misconduct under the EI Act not to follow a policy duly approved by a government or industry.[5]

[24] The question of whether the employer's policy was unreasonable, abusive, and discriminatory is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[6]

[25] It is not really in dispute that an employer is required to take all reasonable precautions to protect the health and safety of its employees in the workplace. It is not for this Tribunal to decide whether the employer's COVID-19 health and safety measures were effective or reasonable. The policy was in effect when the Claimant was suspended.

[26] The question of whether the employer failed to accommodate the Claimant, or whether the employer's policy violated her 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 she is seeking.[7]

[27] 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.[8]

[28] In this case, the claimant argued that refusing to abide by a vaccine policy unilaterally imposed by an employer does not constitute misconduct. He said that the

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[4] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[5] CUB 71744, CUB 74884
[6] See *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*. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, The Court indicates that the employer's duty to accommodate is not relevant to determining misconduct under the EI Act.
[7] In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Applicant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found that this 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 not relevant to deciding misconduct cases.
[8] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

vaccine was not proven to be safe and effective. The Claimant felt discriminated against because of his personal medical choice. The Claimant argued that he has a right to control his own bodily integrity and that his rights had been violated under Canadian and international law.

[29] The Federal Court confirmed the Appeal Division decision that, by law, the 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 breached his duties to his employer and lost his job because of misconduct under the EI Act.[9] The Court has said that there are other ways the Claimant's claims can properly advance within the legal system.

[30] In *Paradis*, the Claimant was denied 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 that this was a matter for another forum.

[31] The Federal Court has said that there are remedies available to a claimant to penalize an employer's behaviour other than having taxpayers pay for the employer's actions through the EI program.

[32] In *Mishibinijima*, the Federal Court of Appeal said that the employer's duty to accommodate is not relevant to deciding EI misconduct cases.

[33] As previously mentioned, 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 her suspension was unjustified, but rather to decide whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[34] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant. After her accommodation was denied, she refused to comply

[9] The Court refers to *Bellavance*, see note 4.

with the policy. She knew or should have known that the employer was likely to suspend her in these circumstances, and her refusal was wilful, conscious, and deliberate.

[35] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the unique and exceptional circumstances created by the pandemic and this resulted in her employment being suspended.

[36] 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]

[37] I am fully aware that the Claimant can seek relief in another forum, if a violation is established.[11] 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.

[38] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission to appeal, I am of the view that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

Conclusion

[39] Permission to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

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

[11] I note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights* [*sic*] despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.