Citation: *MC v Canada Employment Insurance Commission*, 2023 SST 1070

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated March 30, 2023 (GE-22-1993)

Tribunal member:	Pierre Lafontaine
Decision date:	August 11, 2023
File number:	AD-23-425

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 an unsuccessful reconsideration, 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 or should have known 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. The Claimant submits that the hearing was not fair. He submits that the General Division based its decision on important errors of fact and that it made an error of law when it concluded that he was suspended because of misconduct.

[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

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

Preliminary matters

[11] In support of his application for leave to appeal, the Claimant has filed an arbitrator decision rendered after the General Division decision.[1] I will not consider the arbitrator decision to decide the present application. It was not before the General Division and does not meet any exception regarding acceptance of new evidence at the Appeal Division.[2]

[12] Even if I was to admit said new evidence, I don't see how it could be helpful to the Claimant. The arbitrator found that the employer's COVID-19 Policy to be reasonable in the circumstances considering the employer's duty to protect its employees and that the employer had fulfilled its consultation obligations in respect to its creation and implementation. The arbitrator found that issues related to individual exemptions from the Policy were to be dealt later with in the adjudication of individual grievances.

Analysis

[13] 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.

---

[1] See AD1B-2 to AD1B-32.
[2] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157: The Court enumerated three, potentially non-exhaustive, exceptions to the general rule: (1) general background information, (2) to bring procedural defects to the attention of the court, and (3) to highlight the complete absence of evidence. None of these exceptions apply to the present case.

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.

[14] 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.

[15] 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?

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

a) The exclusion of Canadian Law and Acts such as the *Canada Labour Code*, insofar as these Laws and Acts can explain the Claimant's act or omission, is an error;

b) The Claimant's conduct as informed by, for example, his legal "right to know" about the safety risks associated with the Covid Vaccines and his employer's legal obligations to him under these laws are within the General Division's jurisdiction;

c) The Commission did not provide legal proof of how a "leave of absence without pay" counts as a suspension under the *Employment Insurance Act* (EI Act);

d) The Collective Agreement (CA) does not contain a provision for a "forced unpaid leave of absence", meaning that the employer had no agreed upon legal Avenue under the CA to impose this leave on the Claimant;

e) The employer was not allowed under the established rules to put an employee off work if the employee was appealing their suspension;

f) The General Division erred in law by not applying the Astolfi decision; The relevance to the Astolfi case is merely that the employer, by exhibiting potentially coercive behaviour and the use of silence to control behaviour (non-communicative), placed the Claimant in a dangerous, unsafe situation which impacted his conduct towards an intention of self-preservation;

g) Astolfi should have been followed by the General Division as the metaphysical and physical safety of the Claimant was put in jeopardy by the actions of the employer. The employer's actions caused the Claimant's conduct;

h) Astolfi is similar to the Claimant's case in that both individuals were put into an unsafe position by their employer. Astolfi is the best case to follow in his case;

i) In no way did he suggest that he was abused by his employer. Rather, his evidence reinforces the suggestion that the employer's behaviour showed some of the signs of abusive behaviour;

j) The General Division member rendered a decision in a different case that has many similarities with his case, but the member rendered a different decision (GE-22-1864);

k) The General Division did not apply the EI *Digest of Benefit Entitlement Principles* (EI Digest) that states that employees can refuse to perform certain duties if their refusal is based on fear for their health, physical integrity or life;

l) *Cecchetto* does not say that the General Division or Appeal Division cannot look at the conduct of a claimant and their acts or omissions insofar as they considered their rights and the laws that give them rights to behave in ways such as protecting their health and safety;

m) *Cecchetto* does not appear to have requested that the Appeal Division look at his conduct in relation to "the other legislation cited by the Applicant";

n) The General Division did not give him a fair hearing because it interrupted him on two occasions during his presentation. This put him off guard and prevented him from fully and adequately presenting his case.

Misconduct

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

[18] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that does not necessarily correspond to its everyday usage. An employee may be disqualified from receiving EI benefits because of misconduct under the EI Act, but that does not necessarily mean that they have done something "wrong" or "bad."[3]

[19] It is also important that I reiterate that the Digest is an interpretive guide that is not legally binding on the Tribunal. A policy simply reflects the opinion of the administrator who acts under the law. That opinion does not necessarily correspond to the law.[4] 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 of misconduct.

[20] The evidence shows that the employer prevented the Claimant from working at the end of October 2021. The Claimant recognized that the leave was force upon him and that he would have continued working if not for the Policy. The employer stopped the Claimant from working even though there was work. The Claimant temporarily loss his employment. He was therefore suspended under the EI Act.[5]

[21] 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.

[22] 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

---

[3] In *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140, the Federal Court of Appeal said that it was beside the point whether the root cause of an employee's dismissal was "blameless." According to the Court, "relevant conduct is conduct related to one's employment."

[4] *Canada (Attorney General) v Greey*, 2009 FCA 296, *Canada (Attorney General) v Savard*, 2006 FCA 327.

[5] See section 29 (b) of the *Employment Insurance Act*: loss of employment includes a suspension from employment.

whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.

[23] It was not necessary for the General Division to decide as to whether the employer could under the CA put the Claimant on an "unpaid leave" for refusing to follow their Policy. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[6]

[24] 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 a religious exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

[25] 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 suspension.

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

[27] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[7] 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.[8]

[28] 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. The employer's Policy was in effect when the Claimant was suspended. It is not for this Tribunal to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

---

[6] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[7] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[8] CUB 71744, CUB 74884.

[29] The question of whether the employer failed to accommodate the Claimant by refusing his exemption, or whether the Policy violated employment laws or his CA, 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.[9]

[30] 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 teachings of the Federal Court go well beyond the interpretation made by the Claimant. Cecchetto submitted to the Court that he should have been granted leave to appeal by the Appeal Division because 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.**[10]

[31] 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.[11] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[32] 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

---

[9] 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.
[10] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[11] The Court refers to *Bellavance*, see above note 7.

violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[33] 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.

[34] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[35] 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.

[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 suspended 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.[12]

[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 suspended because of misconduct.

---

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

Different decision, same General Division member

[39] The Claimant submits that the General Division member rendered a decision in a different case that has many similarities with his case, but the member rendered a different decision.[13]

[40] In that case, the General Division member found that the claimant was not aware of the employer's policy regarding privacy when she was dismissed. In the present case, the General Division found that the Claimant was fully aware of the Policy and its requirements when he was suspended. It considered that the Claimant had challenged the employer's Policy from the beginning.

[41] I see no reviewable error made by the General Division member when he did not follow the decision he rendered in the other case.

The Astolfi case

[42] The Claimant submits that the General Division made an error by not following Astolfi.[14] He submits that Astolfi is similar to his case in that both individuals were put into an unsafe position by their employer. He is not submitting that his employer abused him but that the employer's behaviour showed some of the signs of abusive behaviour.

[43] The fact that the employer instituted a health and safety policy during the pandemic with which the Claimant clearly disagreed with and actively challenged from its implementation does not constitute signs of an abusive behavior that would justify the application of Astolfi. Here, the employer implemented a policy to protect all its employees. The employees could refuse to follow the employer's Policy. There is no suggestion, as in *Astolfi*, that the employer actively targeted the Claimant. The Claimant acknowledges that he was not abused by his employer.

---

[13] *RP v Canada Employment Insurance Commission*, 2022 SST 1034 (GE-22-1864).
[14] *Astolfi v Canada (Attorney General)*, 2020 FC 30.

[44] I see no reviewable error made by the General Division when it did not apply the principles of Astolfi to the present case.

Natural Justice

[45] The Claimant submits that the General Division did not give him a fair hearing because the member interrupted him on two occasions during his presentation. This put him off guard and prevented him from fully and adequately presenting his case.

[46] I see no breach of natural justice. The Claimant had a fair hearing. He had ample opportunity to present his case, orally and in writing, before, during, and after the hearing that lasted almost two hours. The General Division accepted the Claimant's documents filed after the hearing, reviewed, and considered them in its decision. The Claimant did not raise any issues during the General Division hearing. He had every opportunity to present his defence to the allegations against him.

Final disposition

[47] 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

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

Pierre Lafontaine
Member, Appeal Division