Citation: *DN v Canada Employment Insurance* Commission, 2023 SST 1133

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. N.
Representative:	Paul Gemmink
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 31, 2023 (GE-23-369)

Tribunal member:	Pierre Lafontaine
Decision date:	August 21, 2023
File number:	AD-23-662

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 an unsuccessful reconsideration, 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 should have known that the employer was likely to dismiss him 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. The Claimant submits that the General Division did not consider all the circumstances of his case and therefore made an error of law when it concluded that he had lost his job 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?

Analysis

[11] 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.

[12] 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.

[13] 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?

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

a) The General Division was required to do a proper assessment of all the relevant circumstances in this case, including whether the COVID-19 Policy was a part of his contract of employment;

b) The employer could not unilaterally impose changes to his employment contract without his consent;

c) The employer was not prepared to accommodate him with remote work or testing as an alternative to vaccination;

d) The General Division did not consider the full context as required by *Astolfi*, and therefore, it did not undertake the necessary analysis.

e) The General Division should have followed the correct reasoning of another General Division member in *AL*;

Misconduct

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

[16] 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. It is not bound by the reasons of separation invoked by a claimant or the employer.

[17] It is important that I reiterate that the *Digest of Entitlement Principles* 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.[1]

[18] It is also 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

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

Employment Insurance Act (EI Act), but that does not necessarily mean that they have done something "wrong" or "bad."[2]

[19] 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.

[20] 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.

[21] 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.

[22] The General Division found that the Claimant knew or should have known that his refusal to comply with the Policy could lead to his dismissal.

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

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[2] 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."

[24] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[3] 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.[4]

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

[26] The question of whether the employer failed to accommodate the Claimant by not allowing him to work from home or by not allowing alternative testing, or whether the Policy 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.[5]

[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. The teachings of the Court go well beyond the interpretation made by the Claimant.

[28] The claimant *Cechetto* 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.[6]

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[4] CUB 71744, CUB 74884.
[5] 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.
[6] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[29] 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.[7] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[30] 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.

[31] 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.

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

[33] 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.

[34] 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.

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[7] The Court refers to *Bellavance*, see above note 3.

[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.[8]

[36] 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.

[37] The Claimant submitted that the employer called him back to work and rescinded its Policy. This fact does not change the nature of the misconduct, which initially led to the Claimant's dismissal.[9]

The Astolfi case

[38] The Claimant submits that the General Division made an error by not following *Astolfi*.[10]

[39] The fact that the employer instituted a health and safety policy during the pandemic with which the Claimant disagreed with does not constitute behavior by the employer that would justify the application of *Astolfi*. Here, the employer implemented a policy during a pandemic that applied to 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.

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

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[8] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[9] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.
[10] *Astolfi v Canada (Attorney General)*, 2020 FC 30.

The AL decision

[41] The General Division in *AL* was recently overturned by a board of three members of the Appeal Division.[11] The Claimant argued that her collective agreement and employment contract did not contain an express or implied duty to be vaccinated against COVID-19.

[42] The members unanimously concluded that the General Division made two errors. First, it misinterpreted the meaning of misconduct under the EI Act. Then, it went beyond its powers by deciding the merits of a dispute between an employer and an employee. It is one thing to ask whether an express or implied duty exists. It is another to ask whether the duty was validly imposed. The second question falls outside of EI law.

[43] I see no reviewable error made by the General Division when it did not apply the General Division's reasoning in *AL* to the present case. While it is true that the Federal Court made remarks in passing regarding *AL*, that does not make the teachings of *Cecchetto* irrelevant to the present case.

Conclusion

[44] 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.

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

Pierre Lafontaine
Member, Appeal Division

[11] *Canada Employment Insurance Commission v AL*, 2023 SST 1032.