Citation: *KL v Canada Employment Insurance Commission*, 2023 SST 1108

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | K. L. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated May 23, 2023 (GE-22-4149) |

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| **Tribunal member:** | Pierre Lafontaine |
| **Decision date:** | August 16, 2023 |
| **File number:** | AD-23-608 |

## Decision

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

## Overview

[2] The Applicant (Claimant) was suspended from her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). She was not granted an exemption for religious beliefs. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended from her job following her refusal to follow the employer's Policy. She was not granted an exemption for religious beliefs. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended from her 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 made errors of fact and misapplied the law when it concluded that she 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

[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 her 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 her employer did not apply a fair process in determining her sincerely held religious beliefs and wrongfully refused her request for religious accommodation. She submits that the General Division made an error in law when it did not apply section 29 of the EI Act. The Claimant submits that jurisprudence recognizes the right to leave employment with cause when an employer is not willing to accommodate a person who wishes to do so. There was no other reasonable alternative to quitting to maintain her religious convictions. The Claimant submits that the General Division should have followed the legal reasoning of another General Division decision.

**Voluntary leave**

[13] The Claimant puts forward that the General Division made an error when it neglected to apply section 29(c) of the EI Act to her case.

[14] The Claimant's Record of Employment indicates that she was put on leave of absence.[1] In her application for EI benefits, the Claimant did not indicate that she had quit her job.[2] The Claimant stated that she was put on leave of absence because she did not follow the employer's vaccination Policy.[3] The evidence also shows that the employer stopped the Claimant from working even though there was work.[4]

[15] It is clear from the evidence that the Claimant did not voluntarily leave her employment. The employer put her on leave of absence. Therefore, section 29(c) of the EI Act receives no application.

[16] I see no reviewable error made by the General Division when it did not apply section 29(c) of the EI Act to the Claimant's case.

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[1] See GD3-18.
[2] See GD3-7.
[3] See GD3-23.
[4] See GD3-21: The employer stated the Claimant will be able to return to work now that the vaccine mandate has been lifted.

**Misconduct**

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

[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."[5]

[19] The evidence shows that the employer prevented the Claimant from working. The leave of absence was force upon her and she would have no doubt continued working if not for the Policy. The employer stopped the Claimant from working even though there was work. The Claimant temporarily loss her employment. She was therefore suspended under the EI Act.[6]

[20] 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.

[21] 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 her suspension was unjustified, but rather of deciding

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[5] 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."

[6] 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 her suspension.

[22] Based on the evidence, the General Division determined that the Claimant was suspended because she refused to follow the Policy. She had been informed of the employer's Policy and was given time to comply. She was not granted a religious exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her suspension.

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

[24] 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]

[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. The Policy was in place when she 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.

[26] The question of whether the employer failed to accommodate the Claimant by not allowing her religious exemption, or whether the 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 that she is seeking.[9]

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[7] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[8] CUB 71744, CUB 74884.
[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.

[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.

[28] The claimant *Cecchetto* 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.[10]

[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.[11] 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 suspending the Claimant in such a way that her

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

suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[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 her being suspended from work.

[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] The Claimant submits a General Division decision that she considers like her case where the applicant was successful in receiving EI benefits. She is asking that the Tribunal follow that decision.[14]

[38] It is important to mention that said General Division's decision was recently overturned by the Appeal Division.[15] Furthermore, the General Division decision referred to was rendered prior to the Federal Court decision in *Cecchetto*. The Appeal Division is bound and must follow Federal Court decisions.

[39] After reviewing the appeal file and the General Division's decision as well as considering the Claimant's arguments in support of her request for leave to appeal, I have no choice but to find that the appeal has no reasonable chance of success. The

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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 the Claimant has filed a Human Rights complaint against the employer.
[14] *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[15] *Canada Employment Insurance Commission v AL*, 2023 SST 1032. (AD-23-13).

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

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

Pierre Lafontaine
Member, Appeal Division