



Citation: *KK v Canada Employment Insurance Commission*, 2023 SST 1139

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: K. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 16, 2023
(GE-22-3324)

Tribunal member: Solange Losier

Decision date: August 21, 2023

File number: AD-23-217

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] K. K. is the Claimant in this case. She worked in administrative role for a university. When she stopped working, she applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits because she was dismissed due to misconduct.¹

[4] The General Division came to the same conclusion.² It said that the Claimant was aware of her employer's Covid-19 vaccination policy, had enough time to comply and should have known the consequences of non-compliance.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.³ She needs permission for the appeal to move forward.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.⁴

Preliminary Matter

[7] The Claimant applied to the Appeal Division explaining why she disagreed with the General Division decision.⁵

[8] The Claimant didn't fill out the correct forms, so the Tribunal sent her a letter on April 17, 2023, asking her for more information about her appeal. The letter asked the

¹ See pages GD3-25 and GD3-34.

² See General Division decision at pages AD1A-1 to AD1A-11.

³ See pages AD1-1 to AD1-11.

⁴ See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

⁵ See pages AD1-1 to AD1-11.

Claimant to identify the type of error made and to provide reasons based on what the Appeal Division could consider. The deadline to reply letter was April 28, 2023.

[9] The Claimant asked the Tribunal for an extension to reply.⁶ She then asked for a second extension to reply. The new deadline was May 19, 2023.

[10] As of the date of this decision, the Tribunal has not received a reply to the letter or any communication from the Claimant.

Issue

[11] Is there an arguable case that the General Division made a reviewable error?

Analysis

The test for getting permission to appeal

[12] An appeal can proceed only if the Appeal Division gives permission to appeal.⁷

[13] I must be satisfied that the appeal has a reasonable chance of success.⁸ This means that there must be some arguable ground upon which the appeal might succeed.⁹

[14] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (this is called the “grounds of appeal”).¹⁰

[15] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:¹¹

- proceeded in a way that was unfair

⁶ See letters dated April 21, 2023 and May 5, 2023 granting an extension for the Claimant to reply.

⁷ See section 56(1) of the DESD Act.

⁸ See section 58(2) of the DESD Act.

⁹ See *Osaj v Canada (Attorney General)*, 2016 FC 115.

¹⁰ See section 58(1) of the DESD Act.

¹¹ See section 58(1) of the DESD Act.

- acted beyond its powers or refused to exercise those powers
- made an error in law
- based its decision on an important error of fact

[16] For the appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.¹²

I am not giving the Claimant permission to appeal

[17] The Claimant disagrees with the decision and argues the following in this appeal:¹³

- First, she says that the General Division relied on cases that were not similar to her own case. She says those cases involved illicit drugs and an existing drug policy, unlike the new vaccination policy implemented at her workplace.
- Second, the employer changed the terms of her contract without her consent.
- Third, her conduct was not misconduct and it was not wilful.

[18] The Claimant did not identify which specific type error that she thinks the General Division made. Even so, I have considered whether there were any reviewable errors based on the information that she provided.¹⁴

– The General Division decided that the Claimant was dismissed due to misconduct

[19] The General Division had to decide whether the Commission had proven that the Claimant was dismissed due to misconduct according to the *Employment Insurance Act* (EI Act).

¹² See section 58(2) of the DESD Act.

¹³ See page AD1-7.

¹⁴ See section 58(1) of the DESD Act.

[20] The law says that a Claimant who is suspended or dismissed because of misconduct is not entitled to receive EI benefits.¹⁵

[21] Misconduct is not defined in the EI Act, but the Federal Court of Appeal (Court) has provided a definition. In the *Mishibinijima* decision, the Court defined “misconduct” as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.¹⁶

[22] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.¹⁷

[23] This is a summary of the General Division’s key findings in this case:

- The Claimant was dismissed on February 23, 2022 because of misconduct resulting in a disqualification to EI benefits.¹⁸
- The Claimant was aware of the vaccination policy and knew that she needed to be fully vaccinated for COVID-19. As well, she had enough time to comply.¹⁹
- The Claimant made a conscious, deliberate and intentional choice to not comply with the vaccination policy.²⁰
- The Claimant went against the vaccination policy and that got in the way of carrying out her duties.²¹

¹⁵ See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See paragraphs 2 and 38 of the General Division decision.

¹⁹ See paragraphs 31, 39 of the General Division decision.

²⁰ See paragraphs 51 and 53 of the General Division decision.

²¹ See paragraph 47 of the General Division decision.

- The Claimant knew or should have known the consequences of non-compliance would lead to her dismissal.²²

– **The General Division relied on relevant case law**

[24] The Claimant argues that the General Division relied on Court cases that are not similar because they involved illicit drugs and an existing drug policy.²³ She says that the vaccination policy at her workplace did not exist when she was hired, unlike the drug policies in those cases.

[25] The Claimant doesn't identify the specific cases, but I think the Claimant was referring to the *McNamara* or the *Paradis* decisions from the Federal Court and Federal Court of Appeal. I note that the General Division relied on both of these cases in its decision.²⁴ Also, both cases involved employees who were dismissed for misconduct because they breached their employer's drug policy.²⁵

[26] It looks like the Claimant might be arguing that these cases are not relevant because the facts are different from her own case. So, I will review what the General Division said about the cases.

[27] First, the General Division relied on *McNamara* decision to say that the focus is on the employee's behaviour, not the employer's conduct.²⁶ Referring to *McNamara*, the General Division said that the employees who have been wrongfully dismissed have other solutions available to them to penalize the employer's behaviour rather than have taxpayers pay for the employer's actions through EI benefits.²⁷

²² See paragraphs 28, 35, 38, 51 and 53 of the General Division decision.

²³ See page AD1-7

²⁴ See paragraphs 17, 20, 21, 22, 23 and 46 of the General Division decision.

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²⁶ See paragraphs 20 to 22 of the General Division decision; *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraphs 22 and 23.

²⁷ See paragraphs 22 of the General Division decision.

[28] Second, the General Division relied on the *Paradis* decision to further support that the focus is on what the Claimant did or failed to do and whether amounts to misconduct.²⁸

[29] The General Division acknowledged that the *McNamara* and *Paradis* had different facts from the Claimant's case. In paragraph 25 of its decision, it said:

These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to dismiss the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[30] The General Division correctly focused its analysis on the Claimant's conduct and not the employer's conduct. This is what the case law says to do.

[31] Even though the facts are different in this case, and they do not involve drugs or an existing drug policy, the legal principles from *McNamara* and *Paradis* are still relevant and applicable in EI misconduct cases.

[32] The Claimant's other arguments to the Appeal Division include that there was no vaccination policy when she was hired and that the employer changed the terms of her employment without her consent. However, the Court has already established that the focus is on the employee's conduct, not the employer's conduct.

– **There was a similar case heard by the Federal Court**

[33] The Federal Court has confirmed the Tribunal's limited jurisdiction in the recent *Cecchetto* decision. The General Division did not specifically refer to the *Cecchetto* decision, but it is factually similar to this case.²⁹

²⁸ See paragraphs 17, 23 and 25 of the General Division decision; *Paradis v Canada (Attorney General)*, 2016 FC 1282, at paragraph 31.

²⁹ The *Cecchetto* decision was issued by the Federal Court on January 23, 2023, shortly before this hearing took place.

[34] That *Cecchetto* case involved a person who was suspended and dismissed for misconduct because he did not comply with his employer's COVID-19 vaccination policy.³⁰ Because of that he was not entitled to receive EI benefits.³¹

[35] In paragraph 32 of the *Cecchetto* decision, the Court said:

While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[36] The Claimant was asking the General Division to decide issues that it cannot decide. The *Cecchetto* decision supports the Tribunal's narrow role, namely that those issues are not within the Tribunal's mandate or jurisdiction to decide.

[37] The General Division acknowledged the Claimant's other arguments around the employer's conduct: breach of contract, discrimination, accommodation, and wrongful dismissal, but it decided that it did not have the authority to address them.³²

[38] The General Division did say that if the employer breached the employment contract, she could seek recourse at another Court or Tribunal.³³ The Court in *Cecchetto* noted there are other ways in which these claims can be properly advanced under the legal system.³⁴

[39] It is clear that the Claimant disagrees with the General Division's decision. However, an appeal to the Appeal Division is not a new hearing. I cannot reweigh the

³⁰ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 47.

³¹ See sections 30 and 31 of the EI Act.

³² See paragraphs 48, 49 and 50 of the General Division decision and *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 48.

³³ See paragraph 48 of the General Division decision.

³⁴ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 49.

evidence in order to come to a different conclusion that is more favourable for the Claimant.³⁵

[40] So, it is not arguable that the General Division made any reviewable errors for the following reasons.³⁶

[41] The General Division relied on the relevant section of the EI Act.³⁷ It also stated and applied the above legal test for misconduct based on what the Court has said.³⁸

[42] The General Division relied on binding case law from the Court when it characterized misconduct the way it did.³⁹ It had to focus on the Claimant's conduct and not the employer's conduct. It is undisputed that the Claimant did not comply with the policy.⁴⁰

[43] Lastly, the General Division's key findings were supported by the evidence, and it only decided the issues it had the power to decide.

– **There are no other reasons for giving the Claimant permission to appeal**

[44] I reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.⁴¹ I did not find any relevant evidence that the General Division might have ignored or misinterpreted. There is no reasonable chance of success.

Conclusion

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

Solange Losier
Member, Appeal Division

³⁵ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

³⁶ See section 58(1) of the DESD Act.

³⁷ See paragraphs 2 and 7 of the General Division decision.

³⁸ See paragraphs 15 to 18 of the General Division decision.

³⁹ See section 58(1) of the DESD Act.

⁴⁰ See paragraph 28 of the General Division decision.

⁴¹ The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General)*, 2016 FC 874 and *Karadeolian v Canada (Attorney General)*, 2016 FC 615.