Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 1151

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 6, 2023 (GE-22-3671)

Tribunal member:	Pierre Lafontaine
Decision date:	August 23, 2023
File number:	AD-23-679

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] After reconsideration, the Respondent (Commission) determined that the Claimant was suspended from his job because of misconduct, so it was not able to pay him benefits. The Claimant appealed the reconsideration decision 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 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 and that the member was biased. 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 for 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 did not allow him enough time to present his case; He was told to "wrap it up" because the allowed time was expired and the material he submitted was redundant;

b) The Tribunal is a joke just like the government. There is no way for a claimant to win; The member was biased;

c) The General Division did not give any weight to his arguments, or take into consideration his religious objections;

d) The Policy was unilaterally imposed on him by the employer;

e) Refusing to accept forced vaccination is not misconduct;

f) The penalty for not following the Policy is disproportionate; He did not do anything wrong;

Misconduct

[15] The General Division had to decide whether the Claimant was suspended from his 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.

[16] 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 *Employment Insurance Act* (EI Act) but that does not necessarily mean that they have done something "wrong" or "bad."[1]

[1] 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."

[17] As stated by the General Division, the evidence shows that the Claimant was regularly paid for work with his employer. The record of employment that he submitted shows that he was paid for 21 out of 26 pay periods between November 27, 2020, and November 20, 2021.

[18] The Claimant's employment was sufficiently regular and expected to continue. Therefore, it cannot be considered casual employment under the EI Act.[2]

[19] The evidence shows that the employer prevented the Claimant from working in November 2021. The Claimant recognized 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.[3]

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

[22] 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

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[2] Meaning of casual: See *Canada Employment Insurance Commission v J. M*, 2019 SST 770; *Canada Employment Insurance Commission v K. K*, 2019 SST 547. *R. F. v Canada Employment Insurance Commission*, 2019 SST 1046.
[3] See section 2(1) of the Employment Insurance Act: employment means the state of being employed. See also section 29 (b) of the *Employment Insurance Act*: loss of employment includes a suspension from employment.

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.

[23] The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his suspension.

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

[25] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[4] 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.[5]

[26] 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 followed the government's instructions to implement its Policy. The Policy was in effect when the Claimant was suspended.

[27] It is not for this Tribunal to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable. Ruling on a public health issue is well beyond the scope of the Tribunal's expertise in EI matters and lies outside its jurisdiction.

[28] The question of whether the employer failed to accommodate the Claimant by not allowing his religious exemption, or whether the Policy violated his employee 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.[6]

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

[29] 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.

[30] 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.[7]

[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.[8] 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 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.

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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.
[7] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[8] The Court refers to *Bellavance*, see note 4.

[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.[9]

[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.

Natural Justice

[39] The Claimant submits that the General Division did not give him a fair hearing because it did not allow him enough time to present his case; He was told to "wrap it up" because the allowed time was expired and the material he submitted was redundant.

[40] 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. The hearing lasted an hour and a half. The General Division considered the submissions of the Claimant in its decision.

[41] The Claimant did not raise any issues during the General Division hearing. At the end of the hearing, the Claimant acknowledged that the General Division member had

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

enough material to decide his case. He had every opportunity to present his defence to the allegations against him.

[42] The General Division member managed the hearing and decided to end the hearing to avoid unnecessary repetition. This does not constitute a breach of natural justice.

Allegation of Bias

[43] The Claimant puts forward that the General Division member showed bias because he was in a rush to end the hearing and did not want to go against the government.

[44] An allegation of bias against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[45] As stated previously, the role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[46] The member allowed the Claimant enough time to present his case. The fact that the General Division member ended the hearing after an hour and a half because the Claimant's arguments were starting to be repetitive does not constitute bias. The General Division must manage the length of its hearing to use its resources efficiently.

[47] The General Division member who conducted the hearing rendered a very detailed decision supported by the evidence and authored the decision. There is no material evidence presented by the Claimant that would demonstrate that the member was influenced by someone or any other source in rendering his decision.

[48] I cannot see any material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such a serious allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

Conclusion

[49] 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.

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

Pierre Lafontaine
Member, Appeal Division