Citation: *SL v Canada Employment Insurance Commission*, 2023 SST 1166

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 24, 2023 (GE-22-3836)

Tribunal member:	Pierre Lafontaine
Decision date:	August 28, 2023
File number:	AD-23-660

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. 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 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 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 am allowing the extension of time to file the application for leave to appeal. However, I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[8] Is the application late? Does the Claimant have a reasonable explanation for being late?

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

Is the application late? Does the Claimant have a reasonable explanation for being late?

[10] The Claimant's application for leave to appeal is late because it was not filed within 30 days after reception of the General Division decision.

[11] I am allowing the extension of time to file the application for leave because it is only two days late and the Claimant has a reasonable explanation for being late.[1]

Analysis

[12] 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.

[1] See AD1B-2.

[13] 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.

[14] 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?

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

a) He was never suspended by his employer but placed on a leave of absence;

b) He was not disciplined by his employer; He did not have a union meeting and was not written up and/or suspended;

c) The employer never said he was placed on leave of absence because of his misconduct;

d) There was no law or amendment to the *Employment Insurance Act* (EI Act) that required him to divulge his vaccination status;

e) His vaccine statues had absolutely no impact on his job because he followed preventive measures;

f) He did everything reasonable that was expected of him and supplying his personal medical records or requiring that he accept a medical procedure to continue his employment is not a realistic expectation;

g) The General Division erred in law in its interpretation of misconduct and cited irrelevant and discriminatory cases in support of its decision.

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

[17] The General Division is not bound by how an employer, or the Commission, characterizes the reasons for the temporary lost of employment. 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 was not necessary for the General Division to determine whether the employer had followed its usual discipline procedure. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[2]

[19] The evidence shows that the employer prevented the Claimant from working in February 2022. The Claimant acknowledged that the leave of absence 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. Therefore, 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.

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[2] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[3] See section 29 (b) of the *Employment Insurance Act*: loss of employment includes a suspension from employment.

[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 change in the employer's Policy in early 2022 that required employees to provide proof that they were fully vaccinated 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 suspension.

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

[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 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.

[26] The question of whether the employer failed to accommodate the Claimant by not allowing him to continue to work by applying preventive measures, or whether the Policy violated his employee rights or collective agreement, 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 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. 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]

[28] The Federal Court confirmed the Appeal Division's decision 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.

[29] In another recent case vaccination case, *Milovac*, the Federal Court followed the reasoning in *Cecchetto* and agreed that it was not up to this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's policy.[9]

[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.[10]

[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.

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[7] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[8] The Court refers to *Bellavance*, see note 4.
[9] *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[10] It is true that the facts do not concern a vaccination case. However, the law principle established by the Court applies to the present case.

[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.[11]

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

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[11] It is true that the facts do not concern a vaccination case. However, the law principle established by the Court applies to the present case.

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

Conclusion

[38] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division