Citation: *NB v Canada Employment Insurance Commission*, 2023 SST 1262

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. B.
Representative:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 20, 2023 (GE-23-257)

Tribunal member:	Pierre Lafontaine
Decision date:	September 14, 2023
File number:	AD-23-713

Decision

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

Overview

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

[3] The Respondent (Commission) determined that the Claimant had voluntarily taken a leave of absence from her job without just cause. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant did not take a leave of absence from her job. It found that she was suspended for refusing to follow the employer's Policy. She was not granted an exemption. It found that the Claimant should have known 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 exceeded its jurisdiction, based its decision on an important error of fact, and made an error of law when it concluded that she was suspended from her 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.

Issue

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

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

a) The employer did not follow the required steps to raise a misconduct issue;

b) The General Division was out of its jurisdiction to override the employer and declare that she was suspended because of her misconduct;

c) She was not eligible to take the vaccine shot because she could not give an informed consent; It was unlawful for her to take the injection as she could not accept the conditions of the experimental vaccine;

d) The General Division made an error when it considered the email of the Union Director as an official direction from the employer.

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

[14] The General Division is not bound by the reasons given by an employer or a claimant to justify the separation from 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 before it. Whether the employer followed its discipline procedure is irrelevant to determine misconduct under the *Employment Insurance Act* (EI Act).[1]

[15] 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.

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[1] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.

[16] 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 whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[17] 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 an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension.

[18] The General Division found that the Claimant was aware of the possibility of being suspended considering that her Union Director had warned her that she was putting her employment at risk, or at least, her salary for the semester.[2] It found that that risk was confirmed to the Claimant by the events of September 3rd to 10th. The employer formalized the unpaid leave without pay effective September 12, 2021.

[19] The General Division found that the Claimant should have known that her refusal to comply with the Policy could lead to her suspension.

[20] The Claimant submits that the General Division made an error when it relied on the email of the Union Director because it does not represent an official direction from the employer.

[21] The General Division had to determine whether the Claimant knew or should have known of the real possibility of suspension if she did not follow the employer's Policy. To do this, the General Division had to consider all the evidence before it.

[22] I see no reviewable error made by the General Division when it considered the email of the Union Director and the employer's phone call advising her that she was not to come onto campus for her classes of September 8, 2021, to determine that she

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[2] GD7-4.

should have known that her refusal to comply with the Policy would 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.[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. In the present case, the employer followed the Ontario's Chief Medical Officer of Health recommendations to implement its Policy to protect the health of all employees during the pandemic.[5] The Policy was in effect when the Claimant was suspended.

[26] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated her employee rights or Collective Agreement, 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.[6]

[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 *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

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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] See GD3-120.
[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.

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]

[29] The Federal Court confirmed 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.

[30] The *Cecchetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[9] These decisions all say that it is not for this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's vaccination Policy.

[31] The Federal Court found it reasonable for this Tribunal to conclude that the claimants had lost their employment because of their misconduct because they were aware of their employer's vaccination policies and the consequences that would result from refusing to comply.

[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 her 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

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[7] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[8] The Court refers to *Bellavance*, see note 3.
[9] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134.

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.[10]

[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 her 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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

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