Citation: *AD v Canada Employment Insurance Commission*, 2023 SST 1096

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 12, 2023 (GE-22-3011)

Tribunal member:	Pierre Lafontaine
Decision date:	August 15, 2023
File number:	AD-23-607

Decision

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

Overview

[2] The Applicant (Claimant) lost his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant him an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] After reconsideration, the Respondent (Commission) decided that the Claimant lost his job because of misconduct. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the employer suspended and dismissed the Claimant because he did not comply with their Policy. It found that the Claimant knew that the employer was likely to suspend and dismiss him in these circumstances. The General Division found that the non-compliance with the Policy was the cause of his dismissal. It concluded that the Claimant was dismissed from his job because of misconduct.

[5] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division committed errors of fact and law when it concluded that he had lost his job because of misconduct.

[6] I must decide whether the Claimant has 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 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.

[11] Therefore, before I can grant leave to appeal, 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 the General Division committed errors of fact and law when it concluded that he had lost his job because of misconduct.

[13] More precisely, the Claimant submits the following:

- His employer violated and ignored his religious beliefs;

- The rejection of his honest, sincere and passionate request for a religious exemption was done by the employer, and it was not only wrong, it was in contradiction of what the courts have said;

- Religious rights are protected in the *Employment Insurance Act* (EI Act) in Section 29 via the *Canadian Human Rights Act*, so the violation of those rights resulting in the end of employment is relevant;

- He made the choice to not comply with providing medical evidence to his employer, a demand for which is illegal, the medical intervention potentially unsafe, and against his religious beliefs and human rights;

- Section 29 of the EI Act does apply to him. He had a legitimate, legal reason, under section 29 (c) to voluntarily leave with just cause. In fact, the original decision of the Commission found he did leave voluntarily;

- His employment contract and *Collective Bargaining Agreement* (CBA) do not require that he follow medical advice provided by the employer;

- The employer was basically asking him to enter an unsafe work environment, against health and safety rules, and he was put on leave for not complying; That is considered voluntary leaving with cause under the *EI Act*;

- It was his choice not to comply with the Policy and he agreed to a leave of absence without pay;

- There were no performance issues that violated mutually agreed upon hiring policies. There is no record of him refusing to be vaccinated, nor any record of him refusing to comply with the Policy; With no action, there is no misconduct. With no proof of wilful refusal there is no misconduct;

- There is no reason that the employer would not have included pandemic or vaccination requirements and policies in the CBA, had they wanted to. The reasons they didn't include them was likely that many potential employees would not have accepted jobs, and the policies could very well be illegal;

- If a policy requires unsafe, unhealthy, or invasive actions, such as mandatory experimental vaccines, he does not have to follow that policy;

- Failing to comply with a policy is not always wilful, intentional, or reckless. It must be proven to be so;

- He did not know himself, at any point, whether he would or would not get vaccinated and whether he would choose his job over his religious and privacy rights. It was a terribly difficult situation, knowing his livelihood and future were being taken away from him;

- It was unclear whether he would be terminated. In fact, he truly believed he would not be and that the policy would be reversed, as many Covid 19 policies were during this period;

- The General Division made an error in law in applying the case law related to misconduct under the EI Act, including *Cecchetto*;

- The Commission has not met the burden of proof to substantiate that he breached an expressed or implied duty owed to the employer, and the General Division decision that he committed misconduct was incorrect;

- He believes he showed ample evidence that it is very difficult to get a fair hearing when the Minister of Employment, and the Prime Minister himself, have made the outcome of unvaccinated claims for EI a near certainty.

Voluntary leave

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

[15] The Claimant's Record of Employment issued May 20, 2022, indicates that he was suspended /dismissed from his job.[1] The Claimant mentioned on several occasions that he did not quit and was dismissed because he did not follow the employer's vaccination Policy.[2] The evidence also shows that the employer stopped the Claimant from working even though there was work.[3]

[1] See GD3-18.
[2] See GD3-26, GD3-28, GD3-30.
[3] See GD9-10: The employer was ready to plan the Claimant's return to work if vaccinated.

[16] It is clear from the evidence that the Claimant did not voluntarily leave his employment. The employer terminated his contract of employment. Therefore, section 29(c) of the EI Act receives no application in his case.

Misconduct

[17] The General Division had to decide whether the Claimant lost his job because of misconduct.[4]

[18] 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. The General Division is not bound by the reasons for separation given by the employer or the Commission.

[19] 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]

[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] It is well established that 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 dismissing the Claimant in such a way that his dismissal was unjustified, but rather of

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[4] Within the meaning of sections 29 and 30 of the *Employment Insurance Act*.
[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."

deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.[6]

[22] The Claimant was dismissed because he refused to follow the employer's Policy that had been implemented to protect staff during the pandemic. He had been informed of the employer's Policy that was in effect 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 dismissal.

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

[24] The General Division based its finding on the employer's letter dated April 22, 2022, about the unpaid leave of absence. The letter says that employment will terminate as of May 2, 2022, if the Claimant continues to choose to remain unvaccinated beyond April 30, 2022. The Claimant chose not to comply with his employer's Policy. He was terminated.

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

[26] 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]

[27] 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. It is not for the Tribunal to decide questions about the vaccine's effectiveness or the reasonableness of the employer's Policy.

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[6] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[7] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[8] CUB 71744, CUB 74884.

[28] In the present case, the employer followed the Alberta Health Services recommendations in order to implement its own Policy to protect the health of all employees during the pandemic. The Policy applied to the Claimant and was in effect when the Claimant was dismissed.

[29] The question of whether the employer failed to accommodate the Claimant by not allowing his religious exemption, or whether the employer's Policy violated his employment rights, or whether the employer violated the Claimant's 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.[9]

[30] 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 teachings of the Court go well beyond the interpretation made by the Claimant.

[31] *Cecchetto* submitted that he should have been granted leave to appeal by the Appeal Division because 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]

[32] 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

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[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.

[10] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

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.

[33] 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.

[34] 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.

[35] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

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

[37] 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 dismissed from work.

[38] 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]

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[11] The Court refers to *Bellavance*, see note 7.
[12] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

Allegation of bias

[39] The Claimant puts forward that he showed ample evidence that it is very difficult to get a fair hearing when the Minister of Employment, and the Prime Minister himself, have made the outcome of unvaccinated claims for EI a near certainty.

[40] 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.

[41] The member who conducted the lengthy hearing gave the Claimant all the time he needed to present his case.[13] She rendered a very complete and detailed decision. There is no material evidence filed by the Claimant that would demonstrate that the member was influenced by someone or any other source in rendering her decision. The member's decision is based on the facts presented and on the applicable case law.

[42] 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.

[43] In view of the above, I find that this ground of appeal has no reasonable chance of success.

[13] The General Division hearing lasted over 3 hours.

Conclusion

[44] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision on the issue of misconduct.

[45] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

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

Pierre Lafontaine
Member, Appeal Division