Citation: *LD v Canada Employment Insurance Commission*, 2023 SST 1205

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated June 8, 2023 (GE-22-4105)

Tribunal member:	Pierre Lafontaine
Decision date:	September 5, 2023
File number:	AD-23-687

Decision

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

Overview

[2] The Applicant (Claimant) lost her job. The employer says she lost her job 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 lost her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended and lost her job following her refusal to follow the employer's Policy. She was not granted an exemption. It found that the Claimant knew or should have known that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant lost 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 ignored that the Commission did not assess her claim for benefits fairly.

[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

[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 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] The Claimant submits that the General Division ignored that the Commission did not assess her EI claim fairly. She submits that her EI claim was denied on August 21, 2022. She has submitted recordings to support her claim. She submits that records

show that the Commission's agent spoke to her employer on August 22, 2022. She is asking where in the documentation does it show that her EI claim was denied on August 23, 2022.

The role of the General Division and the Commission's conduct.

[13] Before the General Division, and in her application for leave to appeal, the Claimant expressed dissatisfaction with the way the Commission handled the investigation of her claim for benefits.

[14] The General Division and the Appeal Division do not have jurisdiction to investigate the Commission's conduct in the treatment of the Claimant's application for benefits.

[15] 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. The General Division is not bound by how the employer, or the Commission characterizes the termination.

The issue of misconduct

[16] On August 23, 2022, the Commission sent the Claimant a letter of decision.[1] The letter indicates that the Claimant is not entitled to EI benefits because she lost her employment because of misconduct. On September 16, 2023, the Claimant requested reconsideration of the Commission's August 23, 2022, initial decision.[2]

[17] On November 14, 2022, the Commission maintained its initial decision of misconduct.[3] The Claimant appealed the reconsideration decision to the General Division.

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[1] See GD3-26. The fact that a Service Canada recording mentions that the decision was rendered on August 21, 2023, does not change the reason invoked by the Commission to disqualify the Claimant.
[2] See GD3-27.
[3] See GD3-57.

[18] The General Division had to decide whether the Claimant lost her job because of misconduct based on the evidence before it.

[19] 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.

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

[21] Based on the evidence, the General Division determined that the Claimant lost her employment 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 dismissal.

[22] The General Division found that the Claimant knew or should have known that her refusal to comply with the Policy could lead to her dismissal.

[23] The General Division found that the Claimant was aware of the possibility of being dismissed based on her testimony, on emails sent by the employer, and on a letter dated November 12, 2021.[4]

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

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[4] See General Division decision, para. 47.

[25] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[5] 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.[6]

[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. It is not for this Tribunal to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable. The Policy was in effect when the Claimant was dismissed.

[27] The question of whether the employer failed to accommodate the Claimant, or whether her employer's Policy violated her 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.[7]

[28] 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.

[29] 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.[8]

[30] 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

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[5] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[6] CUB 71744, CUB 74884.
[7] 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.
[8] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

owed to his employer and had lost his job because of misconduct under the EI Act.[9] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[31] The *Cecchetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[10] 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.

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

[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 her being dismissed 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.[11]

[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

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[9] The Court refers to *Bellavance*, see note 5.
[10] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[11] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

Commission has proven on a balance of probabilities that the Claimant was dismissed because of misconduct.

[37] The Claimant submits that the employer called back some unvaccinated employees to work after the federal vaccine mandate was lifted in June 2022. This fact does not change the nature of the misconduct, which led to the Claimant's dismissal.[12]

[38] 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

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

Pierre Lafontaine
Member, Appeal Division

[12] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.