Citation: *ET v Canada Employment Insurance Commission*, 2023 SST 1193

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. T.
Representative:	Umar Sheikh
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 16, 2023 (GE-22-3180)

Tribunal member:	Pierre Lafontaine
Decision date:	September 1, 2023
File number:	AD-23-765

Decision

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

Overview

[2] The Applicant (Claimant) lost her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). She was not granted a religious 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 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 based its decision on important errors of fact and that it made an error of law when it concluded that she had lost her employment because of 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

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

a) The General Division made an error when it did not follow a decision rendered by another member of the General Division;

b) The Claimant was aware of previous decisions and governed her actions according to those published outcomes as markers of the rules of conduct;

c) The General Division made an error when it found that based on an announcement of the federal government of an impending mandatory vaccine policy, she was aware of the consequence of non-compliance;

d) She had a legitimate expectancy that her religious exemption would be granted; She was terminated a mere 3 days following her denial of religious exemption;

e) The delay to comply was the employer's Policy was clearly insufficient and unreasonable;

f) In these circumstances, the General Division made an error when it concluded that she had been dismissed because of misconduct.

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

[14] The General Division is not bound by the reasons given by an employer to justify the employee's termination. It is 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. Furthermore, an employer's 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,

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

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.

[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 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.

[17] The General Division found that the Claimant was dismissed by her employer on December 1, 2021, because she failed to comply with the employer's Policy.

[18] The General Division found that the Claimant was aware of the possibility of being dismissed for not following the Policy. It considered that the employer had already suspended her without pay as of November 1, 2021, for failure to follow the Policy.

[19] The General Division also considered that the Claimant had written an email to her employer as early as September 5, 2021, expressing her discontent with the vaccination mandates issued by the federal government, mandates that were "*Threatening to remove a person from the activity that gains them their livelihood unless they accept a medical intervention*…"[2]

[20] The Claimant submits that the employer refused her accommodation request on Saturday, November 27, 2021, and dismissed her on December 1, 2021, not leaving her enough time to comply with the Policy.

[21] However, the General Division found that the next steps listed in the employer's November 27, 2021, refusal letter, states that should she wish to become fully vaccinated against COVID-19 in compliance with the employer's vaccination policy, she

[2] See GD3-39, GD3-40.

was to email the employer no later than 1700MST on Sunday November 28, 2021, "*…to discuss reasonable timelines for your compliance.*"[3]

[22] The General Division found that the November 27, 2021, refusal letter, further states that if she fails to inform the employer of her intentions by November 28, 2021, the employer will consider her to be non-compliant with the Policy, and her employment will be terminated as early as December 1, 2021.[4]

[23] The Claimant confirmed that the did not respond to the employer by November 28, 2021. The employer contacted her by phone on December 1, 2021. Following that call, she was dismissed later that day.

[24] A claimant cannot successfully argue that they did not have enough time to comply with a policy when their action or inaction is the reason why they did not have a reasonable timeline for compliance. Therefore, the General Division did not err when it did not apply the *TC* case because the facts are totally different.[5] In the present case, the Claimant was aware of the Policy, was initially suspended for failure to follow the Policy, and was offered time to comply with the Policy after the refusal of her religious exemption.

[25] The Claimant submits that she was aware of previous decisions and governed her actions according to those published outcomes as markers of the rules of conduct. I note that the *TC* decision was rendered September 20, 2022. The Claimant was dismissed December 1, 2021. I am not aware of any decision rendered by this Tribunal that was rendered in favor of a claimant following their refusal or unwillingness to discuss with their employer reasonable timelines to follow the employer's policy.

[26] 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 a religious

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[3] See GD3-55.
[4] See GD3-56.
[5] *TC v Canada Employment Insurance Commission* - 2022 SST 891.

exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal.

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

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

[29] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[6] 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.[7]

[30] 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.[8]

[31] 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.

[32] 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

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

control his own bodily integrity and that his rights were violated under Canadian and international law.[9]

[33] 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.[10] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[34] The *Cecchetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[11] These decisions all say that not following an employer's vaccination policy is misconduct under the EI Act. They also say that it is not for this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's vaccination Policy.

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

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[9] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[10] The Court refers to *Bellavance*, see note 6.
[11] *Milovac v Canada (Attorney General)*, 2023 FC 1120; Kuk v Canada (Attorney General), 2023 FC 1134.

[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]

[39] 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 dismissed because of misconduct.

[40] 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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

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