Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 1239

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 3, 2023 (GE-22-2760)

Tribunal member:	Solange Losier
Decision date:	September 11, 2023
File number:	AD-23-128

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] A. M. is the Claimant in this case. He worked an inspector for a municipality. When he stopped working, he applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disqualified from receiving EI regular benefits from January 1, 2022 because he lost his job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It decided that he knew he could lose his job for not complying with the COVID-19 vaccination policy.[3] It also said that it did not have jurisdiction to decide whether the COVID-19 vaccine was effective or whether the vaccination policy was fair or reasonable.[4]

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[5] He argues that the General Division made an error of jurisdiction when it decided the issue of misconduct. He says that it was not wilful misconduct because his employer violated the *Occupational Health and Safety Act* (OHSA).[6]

Issue

[6] Is there an arguable case that the General Division made an error of jurisdiction when it decided the issue of misconduct?

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[1] See initial decision at pages GD3-39 to GD3-40 and reconsideration decision at page GD3-47.
[2] See General Division decision at pages AD1A-1 to AD1A-6.
[3] See paragraphs 2 and 21 of the General Division decision.
[4] See paragraphs 23 and 24 of the General Division decision.
[5] See application to the Appeal Division at pages AD1-1 to AD1-8.
[6] See Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1.

Analysis

[7] An appeal can proceed only if the Appeal Division gives permission to appeal.[7]

[8] I must be satisfied that the appeal has a reasonable chance of success.[8] This means that there must be some arguable ground upon which the appeal might succeed.[9]

[9] The possible grounds of appeal to the Appeal Division are that the General Division:[10]

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact.

[10] For the Claimant's appeal to proceed to next steps, I have to find that there is a reasonable chance of success on one of the above grounds of appeal.

I am not giving the Claimant permission to appeal

– The Claimant says that the General Division made an error of jurisdiction

[11] The Claimant argued that the General Division made an error of jurisdiction for the following reasons:[11]

- It was not misconduct because he had a concern for his personal safety and health risks, which were wilfully ignored by his employer;

- His employer required him to be vaccinated for COVID-19, but he argues that it would endanger him. He argues that the *OHSA* allows a worker to refuse

[7] See section 56(1) of the *Department of Employment and Social Development Act* (DESD Act).
[8] See section 58(2) of the DESD Act.
[9] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[10] See section 58(1) of the DESD Act.
[11] See pages AD1-1 to AD1-8.

work if he has a reason to believe it would endanger himself or another worker;

- The employer breached the OHSA when it failed to respond to his work refusal complaint;
- The employer breached the OHSA because reprisals imposed by the employer are prohibited;
- The employer's conduct was unlawful when they suspended and dismissed him for not getting the COVID-19 vaccine.

– The legal test for proving misconduct

[12] The General Division had to decide whether the Commission had proven that the Claimant was dismissed due to misconduct according to the *Employment Insurance Act* (EI Act).

[13] The law says that a Claimant who loses their job due to misconduct is disqualified from receiving EI benefits.[12]

[14] Misconduct is not defined in the EI Act. The Federal Court of Appeal (Court) has provided a definition for misconduct for the purposes of EI benefits. The Court defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[13]

[15] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[14]

[16] This means that misconduct is any action that is intentional and likely to result in the loss of employment.

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[12] See section 30(1) of the EI Act.
[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraphs 13 and 14.
[14] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.

– The General Division decided that the Claimant was dismissed from his job due to misconduct

[17] The General Division found that the Claimant was first put on an unpaid leave of absence on November 11, 2021 and then lost his job due to misconduct on January 1, 2022.[15] Because of that, it said that the Claimant was disqualified from receiving EI regular benefits from January 2, 2022.[16]

[18] The employer's policy required the Claimant to provide proof of vaccination for COVID-19 by January 1, 2022.[17] It is undisputed that the Claimant did not comply with the policy because he did not provide proof of vaccination for COVID-19 by the deadline.[18] The Claimant testified that he was aware of the vaccination policy and knew the deadline to comply.[19]

[19] The General Division decided that the Claimant was aware of the vaccination policy, the deadline to comply and knew that non-compliance would lead to his dismissal.[20]

– There is no arguable case that the General Division made an error of jurisdiction

[20] The General Division decided that it wasn't within its jurisdiction to decide if the employer's policy was fair or reasonable. It said that other avenues existed for the Claimant to make these arguments and referred to a Court case called *Paradis*.[21]

[21] The General Division's conclusion was consistent with the case law from the Court. The Court in *Paradis* said that the question of whether an employer has failed to

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[15] See paragraphs 3, 11 and 14 of the General Division decision.
[16] See paragraph 2 of the General Division decision.
[17] See page GD3-19
[18] See hearing recording at 48:34.
[19] See hearing recording at 35:32.
[20] See paragraph 21 of the General Division decision.
[21] See paragraph 23 of the General Division decision and *Paradis v Canada (Attorney General)*, 2016 FC 1281.

provide an accommodation under human rights legislation is not relevant to the question of misconduct under the EI Act. It is a matter for another forum.[22]

[22] The Court said in *McNamara* that the focus is not on the behaviour of the employer, but rather on the behaviour of the employee. In paragraph 23 of *McNamara,* it said:

> …there are, available to an employee wrongfully dismissed, remedies available to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.[23]

[23] In *Dubeau*, the Court said that even if an employee has a legitimate complaint against their employer that "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits".[24]

[24] In fact, the Claimant testified at the General Division hearing that he had filed a grievance against his employer because his rights were being infringed under the *Human Rights Code* and *Canadian Charter of Rights and Freedoms.*[25] This resulted in a settlement ("without prejudice") with his employer after his dismissal and included financial compensation. Part of the settlement required the employer to amend the ROE to show there was a "non-disciplinary suspension" and write a letter of employment. As well, the Claimant relinquished his right to be reinstated to his job under the collective agreement.[26]

[25] Even though the Claimant settled the grievances against his employer, that in itself is not determinative of the issue of whether he was dismissed for misconduct for the purposes of EI. The Court says that it is up to the Tribunal to assess the evidence

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[22] See *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraph 34.
[23] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.
[24] See *Dubeau v Canada (Attorney General)*, 2019 FC 725 at paragraph 36; *Canada (Attorney General)* v *McNamara*, 2007 FCA 107 at paragraph 23.
[25] See hearing recording at 26:22 to 30:40.
[26] See GD7-1 to GD7-5; GD8-1 to GD8-3 and GD9-1 to GD9-6.

and come to a conclusion.[27] That is exactly what the General Division did, it assessed the evidence and determined that the Claimant was dismissed for misconduct because he did not comply with the employer's vaccination policy. Because of that, he was not entitled to EI benefits.

[26] This means that the General Division was not bound by how the employer and Claimant might have characterized the grounds on which an employment has been terminated. As noted above, the Court has already decided that there are other avenues to pursue the wrongful conduct of employers, and it is not the responsibility of taxpayers to assume that cost.

[27] The General Division correctly decided that it wasn't within its jurisdiction to decide the effectiveness of the COVID-19 vaccine, but rather the only issue was whether the Claimant lost his job on January 1, 2022 because of misconduct.[28] This was in response to the Claimant's arguments that he had personal health and safety concerns.

[28] The Claimant argues in his Appeal Division application that the employer breached several provisions of the OHSA and that he shouldn't have been penalized. [29] By doing so, the Claimant is focusing on the employer's conduct. But misconduct is not about what an employer does or does not do. The General Division properly focused its analysis on the Claimant's conduct. Put simply, the General Division does not have the authority to decide if the employer's policy was unlawful or if they breached the OHSA when it implemented the COVID-19 vaccination policy.

[29] Further, the Court says that the Tribunal doesn't have to determine whether the penalty was dismissed or justified. It has to focus on the Claimant's conduct and whether it amounted to misconduct within the meaning of the EI Act.[30]

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[27] See *Canada (Attorney General) v Boulton*, A-45-96; *Canada (Attorney General) v Perusse*, A-309-81.
[28] See paragraph 24 of the General Division decision.
[29] See page AD1-3 and AD1-4 for the specific provisions he says the employer breached.
[30] See *Canada (Attorney General) v Marion*, 2002 FCA 185, at paragraph 3.

[30] I want to highlight that the General Division's conclusion is consistent with recent case law from the Court. The *Cecchetto* decision involved similar facts and a COVID-19 vaccination policy imposed by the employer. That person was suspended and dismissed from his job for non-compliance and was not entitled to EI benefits. The Court confirmed the Tribunal's narrow role in paragraph 32 of its decision when it said:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[31] It is not arguable that the General Division made a jurisdictional error when it decided the issue of misconduct. There is no reasonable chance of success on this ground because the Claimant's arguments to the Appeal Division are about the employer's conduct and vaccination policy in relation the collective agreement and OHSA. These are not issues that the General Division could decide.

Conclusion

[32] I reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.[31] It only decided the issues that it had the power to decide. The General Division applied the relevant section in law and legal test for misconduct based on binding case law from the Court for EI misconduct cases.[32]

[33] Permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

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[31] The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.
[32] See section 30 of the EI Act and paragraphs 2, 16, 17,18 and 21 of the General Division decision.