Citation: *DA v Canada Employment Insurance Commission*, 2024 SST 26

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Angèle Fricker

Decision under appeal:	General Division decision dated June 8, 2023 (GE-23-740)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	November 28, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	January 9, 2024
File number:	AD-23-694

Decision

[1] The appeal is dismissed. The Appellant (Claimant) was suspended from his job because of misconduct.

Overview

[2] The Claimant was suspended from 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] The Respondent (Commission) determined that the Claimant was suspended from his job because of misconduct, so it was not able to pay him EI benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended from his job following his refusal to follow the employer's Policy. He was not granted an exemption. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was suspended because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division based its decision on an erroneous finding of fact and that it made an error of law when it concluded that he was suspended from his job because of misconduct.

[6] I must decide whether the General Division based its decision on an erroneous finding of fact and whether it made an error of law when it concluded that he was suspended from his job because of misconduct.

Issue

[7] Did the General Division base its decision on an erroneous finding of fact and make an error of law when it concluded that he was suspended from his job because of misconduct?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division base its decision on an erroneous finding of fact and make an error of law when it concluded that he was suspended from his job because of misconduct?

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[11] The Claimant submits that he was not suspended from his job because of misconduct. He submits that the Policy is unlawful in that it violates legislation and explicitly contradicts his *Collective Bargaining Agreement* (CBA).

[12] The Claimant submits that he did not breach and expressed or implied duty resulting from his CBA. It is his employer who violated his CBA by unilaterally imposing an unlawful Policy.

[13] The Claimant submits that the employer fails the KVP test and that the Policy was not applied and enforced consistently by the employer.

[14] The Claimant submits that the General Division member used templates with the same paragraphs appearing in many of her decisions and that this prevented her from addressing all his arguments. He submits that this also raises a question of fairness.[3]

[15] The General Division had to decide whether the Claimant was suspended because of misconduct.

[16] The evidence shows that the employer prevented the Claimant from working even though there was work. The Claimant acknowledged that the leave was imposed on him and that he would have continued to work but for the Policy. The Claimant temporarily lost his job. He was therefore suspended under the *Employment Insurance Act* (EI Act).

[17] It is well established that the General Division is not bound by how an employer, or the Commission, characterizes the reasons for the temporary lost of 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 of misconduct.

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[3] See the Claimant's detailed appeal arguments in AD1.

[18] It was therefore not necessary for the General Division to determine whether the employer had followed its usual discipline procedure. An employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[4]

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

[22] Based on the evidence, the General Division determined that the Claimant was suspended because he refused to follow the Policy. He had been informed of the employer's Policy 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 suspension.

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

[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."

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

[24] The General Division considered that the Policy indicated that any employee found to be in non-compliance would be placed on an unpaid leave of absence until vaccination is complete, or until an accommodation request is approved.[6]

[25] The General Division also considered that the Claimant had received the December 14, 2021, letter. It warned him that as of January 10, 2022, if the Claimant did not attest, he would be placed on unpaid leave. The Claimant was brought into the office and was handed personally this final warning. He refused to sign the warning. He did not want to confirm his vaccination status.[7]

[26] An employee information bulletin dated January 4, 2022, reiterated that an attestation status had to be submitted by employees before 10h am on January 7, 2022, and that those not fully vaccinated would be put on unpaid leave effective January 10, 2022.[8]

[27] When the Claimant showed up at work on January 10, 2022, he had already made the personal decision not to comply **at any point** with the employer's Policy. Furthermore, the employer had given him a final warning in person that he would be placed on unpaid leave on January 10, 2022, until he met the requirement.

[28] In these circumstances, even tough the Claimant argues that his manager and union steward told him to come in to work on January 10, 2022, he could foresee that his refusal to comply with the employer's Policy would lead to him being placed on unpaid leave.

[29] The fact that the Policy was amended several times by the employer as the situation evolved during the pandemic does not mean that it was not applied and

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[6] See GD2-14.
[7] See GD3-26 and GD3-30.
[8] See GD3-5, GD3-6.

enforced consistently by the employer.[9] The Policy was clear from the beginning: You needed to attest your vaccination status or be put on unpaid leave.

[30] Therefore, the General Division assessed the Claimant's actions to determine the following:

1. He was aware of her employer's Policy;
2. He wilfully refused to follow the employer's Policy;
3. He knew the consequences of not following his employer's Policy.

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

[32] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[10]

[33] 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 then-available medical guidance and the Federal government's direction to implement its Policy to protect the health of all employees during the pandemic.[11] The Policy was in effect when the Claimant was suspended.

[34] It was not up to the General Division to decide whether the employer's health and safety measures regarding COVID-19 were efficient or reasonable.

[35] The Claimant argues that his employer violated several laws and the terms and conditions of his CBA.

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[9] The company reserved the right to amend dates or the terms of this policy at any time in accordance with Public health, legislation, or business requirements. See RGD8-38.
[10] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[11] See GD2-10.

[36] I must reiterate that the General Division could not focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. It had to focus on the Claimant's conduct.

[37] It is one thing to ask whether an express or implied duty exists. It is another to ask whether the duty was validly imposed by the employer. The second question falls outside of EI law.[12]

[38] During the term of employment, the employer may try to impose policies that encroach on their employees' rights. If they believe that a new policy violates their employment contract or collective agreement, they can sue their employer for wrongful dismissal or file a grievance. If they believe that a new policy violates their bodily integrity or freedom of speech, they can take their employer to court or to a human rights tribunal. However, the EI claims process is not the way to litigate such disputes.

[39] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."[13]

[40] The question of whether the employer should have accommodated the Claimant by allowing him to use alternative means of protection, or whether the employer violated legislation and his CBA, or whether the employer's Policy violated his 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.[14]

[41] The Federal Court has rendered a recent decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination

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[12] This is why the KVP test does not apply in EI misconduct cases.

[13] *Dubeau v Canada (Attorney General)*, 2019 FC 725.

[14] 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.

policy.[15] Contrary to the Claimant's submissions, this decision from the Federal Court directly addresses most of his arguments before me.

[42] In that case, the claimant 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.

[43] The Federal Court confirmed the Appeal Division's decision 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.[16] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[44] The *Cecchetto* case has since then been followed by five other Federal Court decisions regarding vaccination cases, *Kuk*, *Milovac*, *Francis*, *Matti*, and *Davidson*.[17] These decisions all say that by making a personal and deliberate choice not to follow their employer's vaccination policy, the claimants had breached their duties owed to their employer and had lost their job because of misconduct under the EI Act. The Court reiterated several times that the Tribunal does not have the authority to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

[45] As stated previously, the General Division's role in EI cases is not to determine whether the employer was guilty of misconduct by suspending the Claimant in such a way that his suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.

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[15] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[16] The Court refers to *Bellavance,* see note 4.
[17] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217.

[46] 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 suspended from work.

[47] 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.[18]

[48] The Claimant submits that the employer later called back some employees to work. This fact does not change the nature of the misconduct, which initially led to the Claimant's suspension.[19]

[49] 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.

[50] I find that the General Division did not base its decision on an erroneous finding of fact and make an error of law when it concluded that the Claimant was suspended from his job because of misconduct. This ground of appeal is without merits.

The General Division member's use of templates

[51] The Claimant submits that the use of templates by the General Division member raises a question of fairness. He argues that this appears to have prevented her from dealing with all the issues he raised before the General Division.

[52] The General Division had to deal with a very high volume of appeal applications regarding the issue of misconduct related to the refusal by claimants to follow their

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[18] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[19] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

employer's vaccination policy. It is therefore not unusual to find a repetition in language in their decisions considering that the applications raise similar issues.

[53] I note that the General Division member did not ignore the Claimant's arguments. She held a two-hour hearing, listened to the Claimant's arguments, and rendered a complete and detailed decision of 23 pages addressing the Claimant's substantive arguments and determined that most of his arguments were outside of its jurisdiction. In doing so, she correctly applied the Federal Court case law.

[54] The mere fact that the Claimant disagrees with some paragraphs of the General Division decision also found in other decisions concerning its legal interpretation of misconduct under the EI Act does not raise question of fairness or raise a reasonable apprehension of bias.

[55] This ground of appeal is without merits.

Conclusion

[56] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division