Citation: *SB v Canada Employment Insurance Commission*, 2024 SST 197

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 17, 2023 (GE-23-2546)

Tribunal member:	Pierre Lafontaine
Decision date:	February 29, 2024
File number:	AD-23-1128

Decision

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

Overview

[2] The Applicant (Claimant) initially stated that she was dismissed from her job for not following the employer's vaccination policy (Policy). The employer issued an initial *Record of Employment* (ROE) that indicates the Claimant's employment ended on November 2, 2021, due to her dismissal. She then applied for Employment Insurance EI benefits.

[3] The employer later amended the ROE to "dismissal or suspension" and further amended again to "leave of absence". For both amendments, the employer included "suspension without pay".

[4] The Respondent (Commission) determined that the Claimant lost her job for the period of November 2, 2021, to January 2, 2023, because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[5] The General Division found that the Claimant was suspended from 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 suspend her in these circumstances. The General Division concluded that the Claimant was suspended from her job because of misconduct.

[6] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division did not consider the evidence before it and made an error of law when it concluded that she was suspended from her job because of misconduct.

[7] I must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

[8] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[9] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[10] 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.

[11] 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.

[12] 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?

[13] The Claimant submits that the employer rescinded their original decision of "misconduct" since they knew it was incorrect and than re-issued another ROE to replace the first one with the new decision of "suspended without pay". She submits that the General Division made an error of law when it concluded that she was suspended from her job because of misconduct because her employer's new ROE does not indicate that there was misconduct. The Claimant believes she should have the right to the equal protection and equal benefit of the law without discrimination.

[14] The General Division had to decide whether the Claimant was suspended from her job because of misconduct under the *Employment Insurance Act* (EI Act).

[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, 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.

[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 suspending the Claimant in such a way that her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[17] It is well established that the General Division is not bound by how an employer 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.

[18] The evidence shows that the employer prevented the Claimant from working even though there was work. The Claimant acknowledged that she would have

continued to work but for the Policy. The Claimant temporarily lost her job. She was therefore suspended from work under the EI Act.

[19] Based on the evidence, the General Division determined that the Claimant was suspended 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 suspension.

[20] The General Division relied on the employer's most recent ROE to show that the Claimant was "suspended without pay", but not dismissed from her job. It relied on the Claimant's application for benefits, along with the conversation between the Commission and the employer, to show that the reason she stopped working is because she went against her employer's Policy.

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

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

[23] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[1]

[24] 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 Public Health recommendations to implement its Policy to protect the health and safety of all its employees during the pandemic. The Policy was in effect when the Claimant was suspended.

---

[1] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[25] 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.

[26] 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."[2]

[27] The question of whether the employer should have accommodated the Claimant by allowing her to work from home, or whether the employer violated her employment rights, or whether the employer's 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.[3]

[28] 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 policy.[4]

[29] 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.

[30] 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

---

[2] *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[3] 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.
[4] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

misconduct under the EI Act.[5] 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 seven other Federal Court decisions regarding vaccination cases, *Kuk*, *Milovac*, *Francis*, *Matti*, *Davidson, Sullivan* and *Abdo*.[6] 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 Federal Court reiterated several times that this Tribunal does not have the authority to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

[32] 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 her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct under EI law and whether this misconduct led to her suspension.

[33] 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 suspended from work.

[34] 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.

---

[5] The Court refers to *Bellavance,* see note 1.
[6] *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; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; *Abdo v Canada (Attorney General)*, 2023 FC 1764.

[35] The Claimant submits that the employer called her back to work. This fact does not change the nature of the misconduct, which initially led to her suspension.[7]

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

Conclusion

[37] 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.

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

Pierre Lafontaine
Member, Appeal Division

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