



Citation: *AC v Canada Employment Insurance Commission*, 2022 SST 587

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: A. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 5, 2022
(GE-22-335)

Tribunal member: Pierre Lafontaine

Decision date: July 5, 2022

File number: AD-22-283

Decision

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

Overview

[2] The Applicant (Claimant) worked at a hospital in various roles. The employer first suspended and then dismissed him because he did not comply with "Directive 6" for Public Hospitals (Directive 6). The Claimant then applied for Employment Insurance regular benefits.

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

[4] The General Division found that the Claimant lost his job following his refusal to follow Directive 6. It found that the Claimant should have known that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant lost his job because of misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the vaccine had not completed safety and efficacy trials before one could say that it stopped transmission from occurring at the time of his dismissal. He feels that he is being discriminated for his personal medical choice. The Claimant puts forward that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[6] I must decide whether the Claimant has 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* (DESD 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 his 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 to appeal, 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 vaccine had not completed safety and efficacy trials before one could say that it stopped transmission from occurring at the time of his dismissal. He feels that he is being discriminated for his personal medical choice. The Claimant puts forward that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[13] It is well establish that in order to decide the Claimant's leave to appeal application, I must rely on the evidence that was presented to the General Division.¹

[14] The Claimant worked at a hospital in various roles. The employer first suspended and then dismissed him, because he did not comply with Directive 6.

[15] The Chief Medical Officer of Health considered that unvaccinated health care workers posed a risk to patients and the health care system capacity due to the potential introduction of COVID-19 in its settings. He introduced Directive 6. The Claimant's employer, a public hospital, was required by law to comply with Directive 6.

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

[17] 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.

¹ See section 58(1) of the DESD Act.

[18] 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 his dismissal was unjustified. It must rather decide whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal under the *Employment Insurance Act* (EI Act).

[19] The General Division determined that the Claimant was suspended and later dismissed from his job for not following Directive 6. It found that he was informed several times of Directive 6. The General Division determined that the Claimant refused intentionally; his refusal was wilful and it was the direct cause of his dismissal. It found that he knew or should have known that his refusal to comply with Directive 6 could lead to a suspension and an eventual dismissal. The General Division concluded that the Claimant lost his job because of his misconduct.

[20] As stated by the General Division, the employer, a public hospital, was required by law to comply with Directive 6. The employer declared that the Claimant refused to follow Directive 6 and provide antigen testing. The General Division determined that the Claimant refused and always had the right to refuse to follow Directive 6. However, by choosing not to receive the vaccine or to submit to antigen testing, he made a personal decision that led to undesirable outcomes on his employment.

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

[22] It is well-established that a deliberate violation of the employer's policy (or directive 6 in this case) is considered misconduct within the meaning of the EI Act.²

² *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[23] I see no reviewable error made by the General Division when it decided that it could not make a ruling in relation to misconduct based on other legislation, but had to do so confined solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[24] I am fully aware that the Claimant may seek relief under another law, if a violation is established. However, this does not change the fact the Commission has proven on a balance of probabilities that the employer dismissed him because of his misconduct under the EI Act.

[25] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[26] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division