[TRANSLATION]

Citation: *MD v Canada Employment Insurance Commission*, 2022 SST 889

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. D.
Representative:	J. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 17, 2022 (GE-22-785)

Tribunal member:	Pierre Lafontaine
Decision date:	September 12, 2022
File number:	AD-22-437

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. He applied for Employment Insurance (EI) regular benefits. The Respondent (Commission) accepted the employer's reason for the dismissal. It decided that the Claimant was dismissed because of misconduct, specifically, for not complying with his employer's health guidelines. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits. The Claimant asked the Commission to reconsider his application. The Commission denied his reconsideration request. The Claimant appealed to the General Division.

[3] The General Division determined that the employer applied health guidelines to protect employees during the pandemic. It determined that the Claimant did not want to comply with health measures or the employer's proposed accommodations. It determined that the Claimant knew or should have known that the employer was likely to dismiss him in these circumstances and that his refusal was intentional, conscious, and deliberate. The General Division found that the Claimant was dismissed because of misconduct.

[4] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. He argues that the General Division made several errors of fact and law when it found that he had lost his job because of misconduct.

[5] I have to decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[6] I am refusing leave to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

Issue

[7] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

Analysis

[8] 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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue 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.

[9] 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 at the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove his case; he must instead establish that the appeal has a reasonable chance of success. In other words, he must show that there is arguably a reviewable error based on which the appeal might succeed.

[10] I will grant leave to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

Preliminary remarks

[11] Before deciding this application, I gave the Claimant the option to put his appeal on hold pending the outcome of his many grievances before an arbitrator.[1] He chose to

[1] See AD8-3 and AD8-4.

continue with his application for leave to appeal without waiting for a decision on the grievances.[2]

[12] So, I will decide leave to appeal by considering **only** the evidence that was before the General Division, in accordance with the Appeal Division's limited powers.[3]

Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[13] The Claimant raises the following grounds of appeal:

(a) Beginning in September 2021, masks were no longer required but recommended by the CNESST.[4]

(b) He got a medical exemption from wearing a mask, and he was not required to disclose the reasons for the exemption to his employer.

(c) His employer installed physical barriers in all common areas and showed bad faith toward him by imposing unreasonable accommodations on him.

(d) The employer's proposed accommodations did not meet its occupational health and safety obligations. So, he rightfully refused to work.

(e) The employer discriminated against him and violated his constitutional rights.

(f) He has filed many grievances against his employer.

(g) The employer violated the collective agreement.

(h) He should be given the benefit of the doubt because the evidence on each side is equally balanced.

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[2] See AD9-2.
[3] In support of his application for leave to appeal, the Claimant submitted other documents that were not before the General Division.
[4] Commission des normes, de l'équité, de la santé et de la sécurité du travail [Quebec's labour standards commission].

[14] The Claimant had been working as a heavy truck operator for the employer for more than 11 years. During the pandemic, the employer put in place health guidelines, including wearing a mask. But the Claimant got a medical exemption from wearing a mask.

[15] In spite of that, around November 23, 2021, the employer dismissed the Claimant for refusing to comply with health guidelines and the proposed accommodations.

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

[17] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[18] As the General Division pointed out, its role is not to rule on 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. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.[5]

[19] The General Division determined that the employer applied health measures to protect employees during the pandemic. It determined that the Claimant did not want to comply with health measures or the employer's proposed accommodations. It determined that the Claimant knew or should have known that the employer was likely to dismiss him in these circumstances and that his refusal was intentional, conscious, and deliberate. The General Division found that the Claimant was dismissed because of misconduct.

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[5] *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[20] The General Division found, on a balance of probabilities, that what amounted to misconduct was not the Claimant's refusal to wear a mask because he had a medical exemption; it was refusing to follow the employer's guidelines and the accommodations established by different work teams during the pandemic. It found that, even though he had a mask exemption, the Claimant could not act as though he had a mask and had to follow the employer's guidelines, which were adapted to his particular situation.

[21] The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[22] It is well established that a deliberate violation of an employer's guidelines is considered misconduct under the *Employment Insurance Act* (EI Act).[6]

[23] The question of whether the employer discriminated against the Claimant and violated his constitutional rights is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[7]

[24] I see no reviewable error made by the General Division when deciding the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[8]

[25] I am fully aware that the Claimant may seek relief in 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.

[26] Additionally, the Claimant could not be given the benefit of the doubt, since the General Division clearly preferred the employer's evidence.[9]

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[6] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[7] *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[8] *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.
[9] See section 49(2) of the *Employment Insurance Act*.

[27] It is well established that the Appeal Division does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Appeal Division's jurisdiction is limited by the law.

[28] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I am of the view that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

Conclusion

[29] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division