



Citation: *AR v Canada Employment Insurance Commission*, 2022 SST 902

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: A. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 10, 2022
(GE-22-1424)

Tribunal member: Pierre Lafontaine

Decision date: September 15, 2022

File number: AD-22-651

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. The employer suspended the Claimant because he did not comply with their COVID-19 vaccination policy (policy). 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 benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended following his refusal to follow the employer's policy. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. The General Division found that the non-compliance with the policy was the cause of his suspension. It concluded that the Claimant was suspended from 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 he disagrees with the General Division decision that he was suspended from his job because of misconduct. The Claimant submits that he has the right to accept or refuse a vaccination. This is a personal choice. He submits that under the Canadian Constitution, he cannot be forced to get a vaccine against his will to keep his employment.

[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* 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 he disagrees with the General Division decision that he was suspended from his job because of misconduct. The Claimant submits that he has the right to accept or refuse a vaccination. This is a personal choice. He submits that under the Canadian Constitution, he cannot be forced to get a vaccine against his will to keep his employment.

[13] The Claimant was suspended from his job on December 31, 2021. The employer implemented a policy for the protection of the health and safety of all its workers from the hazard of COVID-19.¹ The policy became effective around October 18, 2021. The Claimant refused the vaccination. He did not comply with the policy. The employer suspended him.

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

[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, 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.

[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 his suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.²

¹ See preamble of policy at GD3-31.

² *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[17] The General Division determined that the Claimant was suspended because he refused to follow the employer's policy. He had been informed of the employer's policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. It determined that this was the direct cause of his suspension. The General Division found that the Claimant knew that his refusal to comply with the policy could lead to his suspension.

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

[19] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act* (EI Act).³

[20] The Claimant submits that the employer's policy went against his constitutional rights. This question 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.⁴

[21] As stated previously, the question submitted to the General Division was not whether the employer was guilty of misconduct by suspending the Claimant such that this would constitute an unjust suspension, but whether the Claimant was guilty of misconduct under the EI Act and whether this misconduct resulted in the Claimant's suspension from his job.

[22] 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.

³ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

⁴ 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.

[23] I see no reviewable error made by the General Division when it stated that it had to decide 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

[24] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.⁶ 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 his misconduct.

[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 on the issue of misconduct.

[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

⁵ *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

⁶ I note that in a recent decision, the Superior Court of Quebec has ruled that provisions that imposed the vaccination, although they infringed the liberty and security of the person, did not violate section 7 of the *Canadian Charter of Rights*. Even if section 7 of the Charter were to be found to have been violated, this violation would be justified as being a reasonable limit under section 1 of the Charter - *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (Only in French at the time of publishing).