



[TRANSLATION]

Citation: *MC v Canada Employment Insurance Commission*, 2022 SST 1060

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated
September 23, 2022 (GE-22-1978)

Tribunal member: Pierre Lafontaine

Decision date: October 20, 2022

File number: AD-22-703

Decision

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

Overview

[2] The Applicant (Claimant) works as a client service case manager. On January 31, 2022, he was suspended because he refused to provide a vaccination attestation in accordance with the employer's COVID-19 vaccination policy (policy). The Claimant has been back to work since July 18, 2022, because the employer changed its policy.

[3] The Respondent (Commission) accepted the employer's reason for the suspension. The Commission decided that the Claimant temporarily stopped working because of misconduct. It therefore disqualified him from receiving Employment Insurance (EI) benefits. The Claimant requested a reconsideration of the decision. The Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division determined that the Claimant refused to comply with the employer's policy. It found that the Claimant knew that the employer was likely to suspend him in these circumstances and that his refusal was voluntary, conscious, and deliberate. The General Division found that the Claimant was suspended because of misconduct.

[5] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. He argues that he asked his employer several times to accommodate him but never got a response. The Claimant argues that the General Division ignored the fact that the employer acted illegally, discriminated against him, and did not respect human rights.

[6] 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.

[7] 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

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

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 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.

[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 has to 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. Instead, he has to establish that the appeal has a reasonable chance of success. In other words, he has to show that there is arguably a reviewable error based on which the appeal might succeed.

[11] 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.

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

[12] The Claimant argues that he asked his employer several times to accommodate him but never got a response. The Claimant argues that the General Division ignored the fact that the employer acted illegally, discriminated against him, and did not respect human rights.

[13] The Claimant was working as a client service case manager. The employer established a policy to protect workers' health and safety from the danger of COVID-19. The Claimant went against the employer's policy. The employer suspended him.

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

[15] 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.

[16] The General Division's role is not to rule on 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. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.

[17] The General Division found that the Claimant was suspended on January 31, 2022, because he did not comply with the employer's policy in response to the pandemic. Because of the expected return to the office, the employer required all employees to be fully vaccinated before January 31, 2022. The Claimant was told about the employer's policy to protect the health and safety of its employees at work and had time to comply with it.

[18] The General Division determined that the Claimant had deliberately refused to follow the employer's policy and that he had not asked for a medical or religious exemption. This directly led to his suspension. The General Division found that the Claimant should have known that refusing to comply with the policy could lead to his suspension. It found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[19] It is well established that a deliberate violation of an employer's policy is considered misconduct under the *Employment Insurance Act* (EI Act).¹

[20] The question of whether the employer discriminated against the Claimant, failed to accommodate him, and failed to respect his rights and freedoms is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.²

[21] 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.³

[22] I am fully aware that the Claimant may seek relief in another forum if a violation is established.⁴ This does not change the fact that, under the EI Act, the Commission has

¹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

² See *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 decided that that issue was for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court indicated that the employer's duty to accommodate is not relevant to determining misconduct under the *Employment Insurance Act*.

³ See *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

⁴ See *Canadian National Railway Company v Seeley*, 2014 FCA 111, where the Court indicated that human rights legislation does not apply to an individual's choices or preferences. I also note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights [sic]* despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.

proven, on a balance of probabilities, that the Claimant was suspended because of misconduct.

[23] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I find 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

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

Pierre Lafontaine
Member, Appeal Division