



Citation: *AH v Canada Employment Insurance Commission*, 2022 SST 1235

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: A. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 30, 2022
(GE-22-1781)

Tribunal member: Pierre Lafontaine

Decision date: November 9, 2022

File number: AD-22-801

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. The employer put the Claimant on an unpaid leave of absence and then dismissed him 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 and then dismissed 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 and then dismissed from his job following his refusal to follow the employer's Policy once his request for exemption based on religion was denied. It found that the Claimant made a deliberate decision not to follow the employer's Policy. The General Division concluded that the Claimant was suspended and dismissed 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 the employer refused to accommodate him, discriminated against him, and illegally denied his creed exemption. He submits that the employer's action have been deemed illegal by an arbitrator. The Claimant submits that the General Division refused to exercise its jurisdiction by not determining whether the employer unfairly dismissed him.

[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 the employer refused to accommodate him, discriminated against him, and illegally denied his creed exemption. He submits that the employer's action have been deemed illegal by an arbitrator. The Claimant submits that the General Division refused to exercise its jurisdiction by not determining whether the employer unfairly dismissed him.

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

[14] 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.

[15] 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 or dismissing the Claimant in such a way that his suspension or dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension or dismissal.¹

[16] Based on the evidence, the General Division determined that the Claimant was suspended and then dismissed 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. This was the direct cause of his suspension and dismissal. The Claimant knew, after the

¹ *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

refusal of the requested exemption, that his refusal to comply with the Policy could lead to his suspension and dismissal.

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

[18] 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).²

[19] The Claimant submits that the General Division refused to consider that the employer refused to accommodate him, discriminated against him, and acted illegally by denying his creed exemption.

[20] The question of whether the Claimant's employer failed to accommodate him, discriminated against him, and acted illegally by denying his request for an exemption from the Policy based on his religious beliefs is a matter for another forum. There are other available remedies to sanction the behavior of an employer. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.³

[21] 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.⁴

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

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. The Court also stated that there are available remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.; 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 *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[22] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.⁵ 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 and dismissed because of his misconduct.

[23] 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.

[24] 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

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

Pierre Lafontaine
Member, Appeal Division

⁵ The Claimant presented to the General Division an arbitrator decision concluding that a health nurse was discriminated against on the basis of creed under the *Ontario Human Rights Code* when her employer denied her request for an exemption from its mandatory COVID-19 vaccination policy.