[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2022 SST 1409

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 3, 2022 (GE-22-1468)

Tribunal member:	Pierre Lafontaine
Decision date:	December 5, 2022
File number:	AD-22-850

Decision

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

Overview

[2] The Applicant (Claimant) works as a screening officer for an airport security company. The employer implemented a vaccination policy (policy) during the COVID-19 pandemic. On November 14, 2021, he was suspended because he refused to comply with the employer's policy.

[3] The Respondent (Commission) found that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving Employment Insurance (EI) benefits. The Claimant asked it to reconsider. The Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer's policy. He did not get an exemption from his employer. The General Division found that the Claimant knew or should have known that the employer was likely to suspend him in these circumstances and that his non-compliance was intentional, conscious, and deliberate. The General Division decided 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 did not commit misconduct under the law. He says that the General Division did not decide issues that it should have decided.

[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 of the appeal 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.

[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] In support of his application for leave to appeal, the Claimant argues as follows:

- Refusing an experimental vaccine does not amount to misconduct under the law.

- The efficacy of COVID-19 vaccines has never been proven. Furthermore, vaccines do not prevent the transmission of the virus.

- The employer's vaccination policy constitutes extortion of consent to a medical procedure forcing the Claimant to get vaccinated. This pressure on the Claimant did not allow for valid consent.

- The employer acted contrary to the law and collective agreement and offered him no accommodations.

- When an employer abuses its right to manage with an illegal policy, the Claimant cannot be accused of misconduct for refusing to follow it.

- The employer's mandatory vaccination policy violates the *Quebec Charter of Human Rights and Freedoms*.

- Imposing a medical treatment violates the Claimant's constitutional rights.

- The General Division ignored the fact that the employer acted illegally and unilaterally modified his employment contract and the collective agreement.

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

[14] 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.

[15] 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 dismissing 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.

[16] The General Division found that the Claimant was suspended because he did not comply with the employer's policy in response to the pandemic. The Claimant was told about the employer's policy to protect the health and safety of its staff and had time to comply. The General Division found that the Claimant deliberately refused to follow the policy and that he did not get a medical or religious exemption. The General Division found that the Claimant knew or should have known that his refusal to comply with the policy could lead to his suspension.

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

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

[19] It is not disputed that an employer has a legal obligation to take all reasonable precautions to protect the health and safety of its employees in the workplace.

[20] It is not for the General Division to decide whether vaccines are effective or whether the employer's policy is reasonable. In other words, the Tribunal does not have the expertise or jurisdiction to decide whether the COVID-19 measures imposed by the employer were effective or reasonable.

[21] The Claimant argues that the employer refused to follow the collective agreement, refused to accommodate him, and violated his fundamental and constitutional rights. These issues are for another forum. This Tribunal is not the

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

appropriate forum through which the Claimant can obtain the remedy that he is seeking.[2]

[22] In *Paradis*, the claimant asked for judicial review of a decision of the Tribunal's Appeal Division. He argued that the Appeal Division had not considered that the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

[23] The Federal Court decided that that issue was for another forum. The Court noted that there are other available remedies to sanction the behaviour of an employer other than by way of EI benefits.[3]

[24] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant. He refused to comply with the policy. He knew or should have known that the employer was likely to suspend him in these circumstances, and his refusal was wilful, conscious, and deliberate.

[25] 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, which resulted in his suspension.

[26] I see no reviewable error by the General Division when it decided the issue of misconduct within the parameters established by the Federal Court of Appeal, which has defined misconduct under the EI Act.[4]

[27] 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

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[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 at para 34.
[4] *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[5] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675: In a constructive dismissal case, the Supreme Court of British Columbia found that the employer's mandatory vaccination policy was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information that was

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

[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

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then available to it. 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.