[TRANSLATION]

Citation: *DB v Canada Employment Insurance Commission*, 2022 SST 1476

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 4, 2022 (GE-22-2158)

Tribunal member:	Pierre Lafontaine
Decision date:	December 14, 2022
File number:	AD-22-913

Decision

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

Overview

[2] For several years, the Applicant (Claimant) has worked for a telecommunications company as a liaison officer. The employer implemented a vaccination policy (policy) because of the COVID-19 pandemic. He was suspended from his job because he refused to comply with the employer's policy.

[3] The Respondent (Commission) decided that the Claimant was suspended from his job because of misconduct. Because of this, it disentitled 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 found that the Claimant refused to comply with the employer's policy. He did not get an exemption. It found that the Claimant knew or should have known that the employer was likely to suspended him in these circumstances and that his refusal was intentional, 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 says that he did not commit misconduct under the law. The Claimant says that refusing an experimental vaccine that violates his bodily integrity is not misconduct. The Claimant argues that he always works outside and that he did not need to be vaccinated. The Claimant refers to the Commission's website and says that the policy was not applied reasonably taking into account his workplace context. The Claimant says that the employer's policy is not part of his collective agreement. He argues that he was ready to undergo testing.

[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 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 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 did not commit misconduct under the law. He argues that refusing an experimental vaccine that violates his bodily integrity is not misconduct. The Claimant argues that he always works outside and that he did not need to be vaccinated. He refers to the Commission's website and says that the policy was not applied reasonably taking into account his workplace context. The Claimant argues that the employer's policy is not part of his collective agreement. He argues that he was ready to undergo testing.

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

[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. He had been told about the employer's policy and had time to comply with it. The General Division found that the Claimant had deliberately refused to follow the policy and that he did not get a medical exemption. This was the direct cause of his suspension. The General Division

found that the Claimant knew or should have known that refusing 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 within the meaning of the *Employment Insurance Act* (Act)[1].

[19] The Claimant argues that it is not for his employer to impose a policy when he is teleworking, and when he is not coming into contact with other employees or the public. He argues that the General Division refused to exercise its jurisdiction by not deciding whether it was reasonable to apply the policy to him, while taking into account his workplace context. He refers to the Commission's website to support his position.

[20] It is important to reiterate that the Commission's website is an interpretative aid that is not legally binding to the Tribunal. The site simply reflects the opinion of the administrator who acts under the law. That opinion does not necessarily correspond to the law.

[21] It is not really in dispute that an employer is required to take all reasonable precautions to protect the health and safety of its employees in the workplace. It is not for the Tribunal to decide whether it was reasonable for the employer to extend that protection to employees working remotely or from home during the pandemic.

[22] So, it was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy, which applied to employees teleworking and working remotely.

[23] The Claimant says that the employer violated the collective agreement, refused to accommodate him, and that the employer's policy violated his fundamental and

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

constitutional rights. These issues are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[2]

[24] In a recent case called *Paradi*s, the Claimant applied for judicial review of a decision by the Appeal Division. He argued that the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

[25] The Federal Court decided that that issue was for another forum. The Court said that there are remedies to penalize an employer's behaviour other than through the EI program.[3]

[26] 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 intentional, conscious, and deliberate.

[27] 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 he was suspended because of that.

[28] 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.[4]

[29] I am fully aware that the Claimant can seek compensation in 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 said 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*, *supra*, 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 CSCB 1675: In a constructive dismissal case, the Supreme Court of British Columbia found that the employer's mandatory vaccination policy was a reasonable and

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

[30] 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 question that could justify setting aside the decision under review.

Conclusion

[31] Permission to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

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lawful response to the uncertainty created by the COVID19 pandemic based on the information that was then available to it. I also note that, in a recent decision, the Superior Court of Quebec found that government 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.