[TRANSLATION]

Citation: *TC v Canada Employment Insurance Commission*, 2023 SST 18

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

| | |
|---|---|
| **Applicant:** | T. C. |
| **Respondent:** | Canada Employment Insurance Commission |

| | |
|---|---|
| **Decision under appeal:** | General Division decision dated November 10, 2022 (GE-22-1837) |

| | |
|---|---|
| **Tribunal member:** | Pierre Lafontaine |
| **Decision date:** | January 3, 2023 |
| **File number:** | AD-22-920 |

## Decision

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

## Overview

[2] The Applicant (Claimant) works for the Government of Canada as an administrative officer. Because of the COVID-19 pandemic, the employer put in place a vaccination policy (policy). On November 15, 2021, he was suspended because he refused to comply with the employer's policy.

[3] The Respondent (Commission) determined 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 determined 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 suspend 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 argues that he did not commit misconduct under the law. He says that the employer's policy violated his fundamental and constitutional rights. The Claimant argues that the General Division made an error by finding that the Tribunal was impartial despite members being nominated by the Minister of Labour, who said she was against granting EI to unvaccinated people.

[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 Ac*t 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] In support of his application for leave to appeal, the Claimant argues that he did not commit misconduct under the law. He says that the employer's policy violated his fundamental and constitutional rights. The Claimant argues that the General Division made an error by finding that the Tribunal was impartial despite members being nominated by the Minister of Labour, who said she was against granting EI to unvaccinated people.

[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. The Claimant was informed of the policy the employer put in place to protect the health and safety of staff and had time to comply with it. The General Division determined that the Claimant had deliberately refused to follow the policy and that he did not get an exemption. That is what directly caused his suspension. The General Division determined 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 within the meaning of the *Employment Insurance Act* (EI Act).[1]

[19] It is not really in dispute that an employer is legally required to take all reasonable precautions to protect the health and safety of its employees in the workplace.

[20] It was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy.

[21] In other words, the Tribunal does not have the jurisdiction to decide whether the COVID-19 measures imposed by the employer were effective or reasonable.

[22] The Claimant argues that the employer's policy violated his fundamental and 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]

[23] In *Paradis*, the claimant asked for judicial review of a decision of the Tribunal's Appeal Division. He argued that the employer's drug and alcohol policy violated the *Alberta Human Rights Act*

---

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

[24] 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 through the EI program.[3]

[25] 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.

[26] 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 this.

[27] 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]

[28] I am fully aware that the Claimant may seek relief in 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 because of misconduct.

[29] The Claimant argues that the General Division made an error by finding that the Tribunal was impartial despite members being nominated by the Minister of Labour, who said she was against granting EI to unvaccinated people.

[30] Allegations of bias, especially actual not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its

---

[3] See *Paradis*, above, 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] I 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.

members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or their counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.[6]

[31] I find that the Claimant has provided no material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such an allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions of a claimant.

[32] The General Division's role was to verify and interpret the facts of the case and make its own assessment on the issue before it. I note that the General Division's decision reflects the facts and the law that is applicable to misconduct cases.

[33] 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

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

Pierre Lafontaine
Member, Appeal Division

[6] *Arthur v Canada (Attorney General)*, 2001 FCA 223.