Citation: *AJ v Canada Employment Insurance Commission*, 2023 SST 16

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 2, 2022 (GE-22-2264)

Tribunal member:	Pierre Lafontaine
Decision date:	January 3, 2023
File number:	AD-22-925

Decision

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

Overview

[2] The Applicant (Claimant) was put on an unpaid leave of absence and then lost his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). He was refused an exemption based on religious beliefs. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended and 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 dismissed following his refusal to follow the employer's Policy once his request for exemption based on his religious beliefs was denied. It found that the Claimant knew that the employer was likely to suspend and dismiss him in these circumstances. 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 has submitted an updated *Record of Employment* (ROE). He puts forward that it should be the only ROE considered in his case. The Claimant submits that he has paid for 27 years in the EI Program and that he is entitled to EI benefits.

[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 has submitted an updated ROE. He puts forward that it should be the only ROE considered in his case. The Claimant submits that he has paid for 27 years in the EI Program and that he is entitled to EI benefits.

[13] The General Division had to decide whether the Claimant was suspended and dismissed 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, 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 and dismissing the Claimant in such a way that his suspension and dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension and dismissal.[1]

[16] Based on the evidence, the General Division determined that the Claimant was suspended and dismissed because he refused to follow the Policy. He had been informed of the employer's Policy and was given time to comply. He was not granted an exemption for religious beliefs. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension and dismissal.

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

[17] The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his suspension and dismissal.

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

[19] 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]

[20] The Claimant submits that the employer has submitted an updated ROE that indicates he was let go because of a shortage of work/end of contract.[3]

[21] I see no reviewable error because it was up to the General Division to verify and interpret the facts of the present case and make its own assessment on the issue of misconduct under the EI Act.

[22] The evidence shows that the employer issued two previous ROE's that indicate that the Claimant was suspended and dismissed for cause. The employer stated more than once that the Claimant was suspended and dismissed because he refused to comply with their Policy. The Claimant confirmed the employer's version of events in his application for EI benefits and during interviews with the Commission.[4]

[23] Even tough the employer issued a third ROE, which is not binding on the Tribunal, no evidence provided by the parties before the General Division supports a conclusion that the Claimant was let go following a shortage of work/end of contract.

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[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] See GD3-22.
[4] See GD3-10, GD3-25, GD3-44 and GD3-47.

[24] The question of whether the employer's policy violated the Claimant's human rights or whether the employer should have accepted his request for an exemption based on his religious beliefs is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[5]

[25] In the recent *Paradis* case, the Claimant was refused EI benefits because of misconduct. He argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[26] The Federal Court also stated that there are available remedies for a claimant to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Employment Insurance Program.[6]

[27] The preponderant evidence before the General Division shows that 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 this resulted in him being suspended and dismissed from work.

[28] I see no reviewable error made by the General Division when it decided the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[7]

[29] I am fully aware that the Claimant may seek relief before another forum, if a violation is established. 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 misconduct.

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[5] 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; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.
[6] I note that the Claimant instituted a civil complaint against the employer. See GD3-31.
[7] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[30] The Claimant submits that he has paid for 27 years in the EI Program and that he is entitled to EI benefits. Unfortunately, for the Claimant, the payment of premiums does not in itself give rights to receive benefits. A claimant must still meet the eligibility requirements established by law, as is the case with any insurance policy to which one has subscribed to.[8]

[31] 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.

[32] 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

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

Pierre Lafontaine
Member, Appeal Division

[8] *Canada Employment Insurance Commission v M. W.*, 2014 SSTAD 371.