[TRANSLATION]

Citation: *ER v Canada Employment Insurance Commission*, 2023 SST 112

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. R.
Representative:	A. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 30, 2022 (GE-22-2188)

Tribunal member:	Pierre Lafontaine
Decision date:	February 3, 2023
File number:	AD-23-9

Decision

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

Overview

[2] The Applicant (Claimant) was suspended because she refused to follow the employer's COVID-19 vaccination policy (policy). She did not get an exemption. She then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended because of misconduct. Because of this, it decided that she is disqualified from receiving EI benefits. The Claimant asked the Commission to reconsider. It 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. It found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her non-compliance was intentional, conscious, and deliberate. The General Division decided that the Claimant was suspended because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. She says that the employer's policy was unreasonable and abusive. She says that the employer breached the collective agreement, since it changed conditions of employment without consulting the union. She says that it has been proven that the vaccine is ineffective and does not stop transmission of the virus. She argues that she did nothing wrong and that her employer called her back to work.

[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 permission 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 permission 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 at the hearing of the appeal on the merits. At the permission to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[11] I will grant permission 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 says that the employer's policy was unreasonable and abusive. She says that the employer breached the collective agreement, since it changed conditions of employment without consulting the union. She says that it has been

proven that the vaccine is ineffective and does not stop transmission of the virus. She argues that she did nothing wrong and that her employer called her back to work.

[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 suspending the Claimant in such a way that her suspension was unjustified. Its role is to decide whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[16] The General Division found that the Claimant was suspended because she did not comply with the employer's policy in response to the pandemic.

[17] The Claimant was told about 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 found that the Claimant deliberately refused to follow the policy and that she did not get an exemption. This was the direct cause of her suspension.

[18] The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

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

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

[21] 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. In this case, the employer followed recommendations from public health authorities in implementing its policy to protect the health of all employees during the pandemic. The policy was in effect when the Claimant was suspended.

[22] It was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy. In other words, the Tribunal does not have jurisdiction to decide whether the employer's COVID-19 measures were effective or reasonable.

[23] The question of whether the employer breached the collective agreement or should have accommodated the Claimant, or whether its policy was unreasonable and abusive, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy that she is seeking.[2]

[24] The Federal Court recently made a decision in *Cecchetto* about misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy. The claimant argued that the safety and efficacy of the vaccine had not been proven. He felt discriminated against because of his personal medical choice. He said that he had the right to control his own bodily integrity and that his rights had been violated under Canadian and international law.

[25] The Federal Court confirmed the Appeal Division's decision that, by law, the Tribunal is not permitted to address these questions. The Court agreed that by making a

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[1] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *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 found that it was a matter 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*.

personal and deliberate choice not to follow the employer's vaccination policy, the claimant had lost his job because of misconduct under the EI Act. The Federal Court said there were other legal avenues through which the claimant's claims could be heard.

[26] In *Paradis*, the claimant applied for judicial review of a decision by the Tribunal's Appeal Division refusing permission to appeal. He argued that there was no misconduct because the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

[27] The Federal Court confirmed that it was a matter for another forum. It noted that there are remedies to penalize an employer's behaviour other than through the EI program.[3]

[28] The evidence before the General Division shows, on a balance of probabilities, that the employer's policy applied to the Claimant. She refused to comply with the policy. She knew that the employer was likely to suspend her in these circumstances, and her non-compliance was intentional, conscious, and deliberate.

[29] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the unique circumstances created by the pandemic, and her employer suspended her because of this.

[30] 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]

[31] The Claimant referred to a General Division decision in support of her position.[5] I note that the decision is currently under appeal before the Appeal Division, that it is not binding on the Appeal Division, and that the facts are different. In this case, the

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[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] *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

evidence does not show that the collective agreement had a provision allowing the Claimant to refuse vaccination. The General Division decision does not help her.

[32] Even though the Claimant argues that her employer called her back to work, this fact does not change the nature of the misconduct that initially led to her suspension.[6]

[33] I am fully aware that the Claimant may seek relief in another forum if a violation is established.[7] 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.

[34] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission 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

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

Pierre Lafontaine
Member, Appeal Division

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[6] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

[7] I 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.