



[TRANSLATION]

Citation: *ER v Canada Employment Insurance Commission*, 2023 SST 320

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** E. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
January 25, 2023 (GE-22-2916)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** March 21, 2023

**File number:** AD-23-134

## Decision

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

## Overview

[2] The Applicant (Claimant) was suspended because he refused to follow the employer's COVID-19 vaccination policy (policy). He did not get a medical exemption. He 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 he 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 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 permission from the Appeal Division to appeal the General Division decision. He says that the General Division ignored the fact that he did not meet all the necessary and essential criteria to get vaccinated. He could not go against the medical community's decision. He says that he was suspended to protect seniors while respecting the worker. So, it was not a punitive measure. He says that he did not lose his job because of misconduct under the law.

[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 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 give 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 General Division ignored the fact that he did not meet all the necessary and essential criteria to get vaccinated. He could not go against the medical community's decision. He says that he was suspended to protect seniors while

respecting the worker. So, it was not a punitive measure. He says that he did not lose his job because of misconduct under the law.

[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 his suspension was unjustified. Its role is to decide 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.

[17] The Claimant was told about the policy the employer put in place to protect the health and safety of staff and clients, and he had time to comply with it. The General Division found that the Claimant deliberately refused to follow the policy and that he did not get a medical exemption. This was the direct cause of his suspension.

[18] 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.

[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).<sup>1</sup> It is also considered misconduct within the meaning of the EI Act not to follow a policy duly approved by a government or industry.<sup>2</sup>

[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 was following Government of Quebec guidelines when it implemented its policy to protect the health of staff and clients during the pandemic. The policy was in effect when the Claimant was suspended.<sup>3</sup>

[22] 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.<sup>4</sup>

[23] 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.

[24] 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 personal and deliberate choice not to follow the employer's vaccination policy, the claimant had breached his duties and 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.

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<sup>1</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>2</sup> CUB 71744, CUB 74884.

<sup>3</sup> The employer was following Ministerial Order 2021-072.

<sup>4</sup> *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[25] 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*.

[26] 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.<sup>5</sup>

[27] The evidence before the General Division 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 non-compliance was intentional, conscious, and deliberate.

[28] 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 his employer suspended him because of this.

[29] 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.<sup>6</sup>

[30] The Claimant says that the General Division ignored the fact that he did not meet all the necessary and essential criteria to get vaccinated. He could not go against the medical community's decision.

[31] The evidence before the General Division shows that, on November 8, 2021, the Claimant left his workplace when his employer asked him to get tested.

[32] On June 13, 2022, while the Commission was interviewing him, the Claimant said that vaccination and testing were invasive for his physical health. So, he made a

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<sup>5</sup> See *Paradis*, above at para 34.

<sup>6</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.

personal choice not to comply with health measures. He decided to wait until the law changed before going back to work.<sup>7</sup>

[33] While the Commission was interviewing it on June 13, 2022, the employer said that it told the Claimant about the requirement to get vaccinated or tested several times in October and November 2021. It said that the Claimant never got tested after the Ministerial Order came into force.<sup>8</sup>

[34] In support of his June 23, 2022, request for reconsideration, the Claimant said that he did not consent to the testing requirement when he was hired. That requirement was not part of his employment contract; rather, the Government of Quebec imposed it. He said that he did not commit misconduct under the law.<sup>9</sup>

[35] On August 22, 2022, while the Commission was interviewing him again, the Claimant said that he did not comply with the employer's policy because, when he was hired, he was never told he needed to be vaccinated to keep his job. He said that he would not have worked for that employer if he had been told he needed to be vaccinated. He repeated that it was invasive to make him get tested three times a week.<sup>10</sup>

[36] In support of his notice of appeal to the General Division, the Claimant said that he would not have been suspended and would have been entitled to EI benefits if his right to inviolability had been respected.<sup>11</sup>

[37] I note that the Claimant never said, whether in his interviews or written communications with the Commission or in his notice of appeal to the General Division, that a nurse refused to vaccinate or test him because of the answers he had given. Instead, he reiterated each time that he made a personal choice not to comply with health measures because he found them invasive. In my view, on a balance of

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<sup>7</sup> See GD3-15.

<sup>8</sup> See GD3-16.

<sup>9</sup> See GD3-22.

<sup>10</sup> See GD3-23.

<sup>11</sup> See GD2-10, GD6, and GD7.

probabilities, the evidence supports the General Division's finding that the Claimant made a personal choice not to follow the employer's policy.

[38] I am fully aware that the Claimant may seek relief in another forum if a violation is established.<sup>12</sup> 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.

[39] 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

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

Pierre Lafontaine  
Member, Appeal Division

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<sup>12</sup> 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.