[TRANSLATION]

Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 425

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | M. J. |
| **Representative:** | J. B. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated January 25, 2023 (GE-22-3177) |

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| **Tribunal member:** | Pierre Lafontaine |
| **Decision date:** | April 12, 2023 |
| **File number:** | AD-23-184 |

## 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. He did not get a medical exemption. It found that the Claimant knew or should have known that the employer was likely to suspend him in these circumstances. 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 did not consider his medical situation. He did not want to take risks given the side effects of vaccination. He did not need to get vaccinated, since he had no contact with customers and very little contact with employees. He argues that the employer did not offer him any reasonable accommodation.

[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 did not consider his medical situation. He did not want to take risks given the side effects of vaccination. He did not need to get vaccinated, since he had no contact with customers and very little contact

with employees. He argues that the employer did not offer him any reasonable accommodation.

[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 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. 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.

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

[19] It is well established that a deliberate violation of an employer's policy is considered misconduct under the *Employment Insurance Act* (EI Act).[1] It is also considered misconduct within the meaning of the EI Act not to follow a policy duly approved by a government or industry.[2]

[20] 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 Canada guidelines when it implemented its policy to protect the health of all employees during the pandemic. The policy was in effect when the Claimant was suspended.

[21] 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.

[22] The question of whether the employer should have accommodated the Claimant, or whether its policy violated his constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy that he is seeking.[3]

[23] 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

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[1] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[2] CUB 71744, CUB 74884.
[3] 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*.

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 to his employer and 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.

[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 policy violated the *Alberta Human Rights Act*. 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.[4]

[26] 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 did not ask for a medical exemption. 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.

[27] 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.

[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.[5]

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[4] See *Paradis*, above, at para 34.
[5] *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.

[29] I am fully aware that the Claimant may seek relief in another forum if a violation is established.[6] 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.

[30] 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

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

Pierre Lafontaine
Member, Appeal Division

[6] 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.