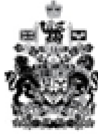

[TRANSLATION]

Citation: *DR v Canada Employment Insurance Commission*, 2023 SST 808

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. R.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 5, 2023 (GE-22-2863)

Tribunal member:	Pierre Lafontaine
Decision date:	June 20, 2023
File number:	AD-23-407

Decision

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

Overview

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

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was suspended and lost his job 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 was suspended and lost his job because he refused to comply with the employer's policy. He did not get an exemption. It found that the Claimant knew that the employer was likely to suspend and dismiss him in these circumstances. The General Division decided that the Claimant was suspended and lost his job because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. He argues that the employer caused his unemployment and that he did not commit misconduct under the law. He says that in declining to make a finding about the fundamental rights of citizens, the General Division is allowing the employer to implement illegal policies. He argues that the General Division made a decision before another body could decide the legality of the policy in question. As a result, it is preventing him from exercising certain rights in a peremptory manner.

[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 argues that the employer caused his unemployment and that he did not commit misconduct under the law. He says that in declining to make a finding about the fundamental rights of citizens, the General Division is allowing the employer to implement illegal policies. He argues that the General Division made a decision before another body could decide the legality of the policy in question. As a result, it is preventing him from exercising certain rights in a peremptory manner.

[13] It is well established that I have to rely on the evidence that was before the General Division in deciding the Claimant's application for permission to appeal. A hearing before the Appeal Division is not a new opportunity to present evidence. The powers of the Appeal Division are limited by law.

[14] The General Division had to decide whether the Claimant was suspended and lost his job because of misconduct.

[15] 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.

[16] 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 and dismissing the Claimant in such a way that his suspension and dismissal were unjustified. Its role is to decide whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension and dismissal.

[17] The General Division found that the Claimant was suspended and lost his job because he did not comply with the employer's policy. He was told about the policy the employer put in place, 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 an exemption. He was suspended and lost his job as a direct result of this.

[18] The General Division found that the Claimant knew that his refusal to comply with the policy could result in his being suspended and losing his job.

[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 implemented its policy to protect the health of all employees during the pandemic. The policy was in effect when the Claimant was suspended and lost his job.

[22] It was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy, which applied to employees working from home. 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 violated the collective agreement, whether it could have accommodated the Claimant, or whether its policy violated his human and 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.[2]

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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*.

[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 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.

[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 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 even though he was working from home. He refused to comply with the policy. He did not ask for an exemption. He knew that the employer was likely to suspend him and terminate his employment in these circumstances, and his 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 this resulted in suspension and the end of his employment.

[3] See *Paradis*, above, at para 34.

[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] 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 and lost his job because of misconduct.

[32] The Claimant argues that the General Division made a decision before another body could decide the legality of the policy in question. As a result, it prevented him from exercising certain rights in a peremptory manner.

[33] I listened to the recording of the General Division hearing. The Claimant never asked for his hearing to be adjourned or postponed pending the decision of another body. However, he had previously asked for his hearing to be postponed because he had to be out of the country from December 5, 2022, to February 15, 2023.

[34] It is well established that the General Division does not have an obligation to act as counsel for a claimant.[6] It was up to the Claimant to take the appropriate steps before the General Division to protect his rights.

[35] 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.

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[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 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.

[6] *AP v Canada Employment Insurance Commission*, 2017 CanLII 91677 (SST), affirmed by the Federal Court of Canada, T-2111-17.

Conclusion

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

Pierre Lafontaine

Member, Appeal Division