



[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2023 SST 760

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: A. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 24, 2023
(GE-22-3771)

Tribunal member: Pierre Lafontaine

Decision date: June 12, 2023

File number: AD-23-375

Decision

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

Overview

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

[3] The Respondent (Commission) found that the Claimant was suspended from his job because of misconduct. So, it disqualified him from receiving EI benefits. The Claimant asked the Commission to reconsider. The Commission 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 an exemption. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. It found that the Claimant was suspended from his job because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. He says that the employer imposed a new condition of employment on him that was not in his original contract. He says that no law has made vaccination mandatory in Canada. He argues that imposing the vaccination goes beyond the scope of the employer's right to manage. He says that refusing to get vaccinated did not stop him from doing his job.

[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 leave 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 a 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 leave to appeal stage, the Claimant does not have to prove his case; he must instead establish that his appeal has a reasonable chance of success. In other words, he must show that there is arguably a reviewable error 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 imposed a new condition of employment on him that was not in his original contract. He says that no law has made vaccination mandatory in Canada. He argues that imposing the vaccination goes beyond the scope

of the employer's right to manage. He says that refusing to get vaccinated did not stop him from doing his job.

[13] The General Division had to decide whether the Claimant was suspended from his job 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 from his job because he did not comply with the employer's policy. The Claimant was told about the employer's policy and had time to comply. He did not get an exemption. The General Division found that the Claimant wilfully refused to follow the policy. This directly led to his suspension. The General Division found that the Claimant knew that his refusal to comply with the policy could lead to his suspension. The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[17] It is well established that deliberate non-compliance with an employer's policy is considered misconduct under the *Employment Insurance Act* (EI Act).¹ Failure to

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

comply with a government or industry approved policy is also considered misconduct under the EI Act.²

[18] 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 the Government of Canada's directive when it implemented its policy to protect the health of all employees during the pandemic.³ The policy was in effect when the Claimant was suspended.

[19] 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.

[20] The question of whether the employer's policy breached the Claimant's constitutional rights is for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy he is seeking.⁴

[21] The Federal Court of Canada 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.

[22] 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

² CUB 71744, CUB 74884

³ See GD3-30.

⁴ 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*.

claimant breached his duties to his employer and lost his job because of misconduct under the EI Act. The Federal Court said there are other legal avenues through which the claimant's claims could be heard.

[23] 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*.

[24] The Federal Court confirmed that it was a matter for another forum. It noted that there are remedies available to penalize an employer's behaviour other than through the EI program.⁵

[25] 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 an exemption. He knew that the employer was likely to suspend him in these circumstances, and his non-compliance was intentional, conscious, and deliberate.

[26] 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 job was suspended because of this.

[27] 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.⁶

[28] I am fully aware that the Claimant can 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

⁵ See *Paradis*, above, at para 34.

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

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.

proven, on a balance of probabilities, that the Claimant was suspended because of misconduct.

[29] 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

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

Pierre Lafontaine
Member, Appeal Division