[TRANSLATION]

Citation: *FD v Canada Employment Insurance Commission*, 2023 SST 745

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated March 8, 2023(GE-22-3124)

Tribunal member:	Pierre Lafontaine
Decision date:	June 8, 2023
File number:	AD-23-332

Decision

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

Overview

[2] The Applicant (Claimant) was suspended because she refused to wear a mask in compliance with the employer's directive and refused to follow the employer's vaccination directive. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) found that the Claimant was suspended because of misconduct. It disqualified her from EI benefits. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended from her job between January 3 and January 24, 2022, because she did not wear a mask the way the employer required, and that she was suspended from her job from January 6, 2022, because she refused to comply with the employer's vaccination directive. It found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her refusal was wilful, conscious, and deliberate. The General Division found that the Claimant was suspended because of misconduct.

[5] The Claimant seeks permission from the Appeal Division to appeal the General Division decision. She argues that the General Division focused on only one 30-minute event. The Claimant feels that she is being penalized for having a different opinion. She says that she is entitled to EI benefits because she is hard-working, responsible, and follows the rules. The Claimant argues that getting tested had become difficult because testing centres were gradually closing.

[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 on 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 argues that the General Division focused on only one 30-minute event. The Claimant feels that she is being penalized for having a different opinion. She says that she is entitled to EI benefits because she is hard-working, responsible, and compliant. The Claimant argues that getting tested had become difficult because testing centres were gradually closing.

[13] The General Division had to decide whether the Claimant was suspended because of misconduct.

[14] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient 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 role of the General Division 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 determine whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[16] The General Division determined that the Claimant was suspended between January 3 and January 24, 2022, because she did not wear a mask the way the employer required. Also, it decided that she was suspended from her job from January 6, 2022, because she refused to comply with the employer's vaccination directive, which required three COVID-19 tests per week.

[17] Before the General Division, the Claimant admitted that she no longer wanted to be tested like the employer required. She also admitted that she did not wear a mask over her nose while feeding a resident.

[18] The General Division found that the Claimant was informed of the employer's guidelines to protect the health and safety of staff and had time to comply with them. It found that the Claimant deliberately stopped following public health guidelines and that she did not get a medical exemption. This directly led to her suspension. The General Division found that the Claimant knew that her refusal to continue following the employer's instructions could lead to her suspension. The General Division found, on a balance of probabilities, that the Claimant's behaviour constituted misconduct.

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

[20] There is not really any 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 instructions of public health officials to protect the health of staff during the pandemic. The guidelines were 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 determine 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 the employer's policy was unreasonable, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the remedy

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

she is seeking.[2] The Federal Court noted that there are remedies to penalize an employer's behaviour other than through the EI program.[3]

[23] The evidence before the General Division shows that the employer's directives applied to the Claimant. She refused to comply with them. She knew that the employer was likely to suspend her in these circumstances, and her refusal was wilful, conscious, and deliberate. The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the exceptional circumstances created by the pandemic, and her employer suspended her because of this.

[24] I am fully aware that the Claimant can seek compensation in another forum, if a violation is established. 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 for misconduct.

[25] Even though the employer later recalled the Claimant to work, this fact does not change the nature of the misconduct, which initially led to the Claimant's suspension.[4]

[26] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for permission to appeal, I am of the view 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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[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 decided that that issue was 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*.
[3] See *Paradis*, supra, at para. 34.
[4] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division