Citation: *DR v Canada Employment Insurance Commission*, 2025 SST 458

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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

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| **Decision under appeal:** | General Division decision dated March 18, 2025 (GE-25-315) |

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| **Tribunal member:** | Janet Lew |
| **Decision date:** | May 1, 2025 |
| **File number:** | AD-25-263 |

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] Leave (permission) to appeal is refused. The appeal will not be going ahead.

## Overview

[3] The Applicant, D. R. (Claimant), is seeking leave to appeal the General Division decision. The General Division found that the Claimant quit his job on August 7, 2024, and that he did not have just cause for having left his job. It found that he had reasonable alternatives to leaving. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant denies that he quit his employment. He argues that the General Division made legal and factual errors. In particular, he says that it failed to consider or apply *Pham v Qualified Metal Fabricators Ltd.*[1] to his case. He also argues that the General Division misapprehended the evidence. He says that the General Division failed to appreciate that his former employer had reissued the Record of Employment, confirming that it had indeed constructively dismissed him from his employment.

[5] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success.[2] This is the same as having an arguable case. If the appeal does not have a reasonable chance of success, this ends the matter.[3]

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with the appeal.

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[1] See *Pham v Qualified Metal Fabricators Ltd.*, 2023 ONCA 255 and at AD1B-2.
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] Under section 58 2) of the *Department of Employment and Social Development* (DESD) *Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

# Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division made a legal error by failing to apply the legal principles set out in *Pham*?

b) Is there an arguable case that the General Division misapprehended the evidence regarding the amended Record of Employment?

# Analysis

## I am not giving the Claimant permission to appeal

[8] Leave to appeal is refused if the Appeal Division is satisfied that the appeal does not have a reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[4]

[9] For these types of factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[5]

## The Claimant does not have an arguable case that the General Division made a legal error by failing to apply the principles in *Pham*

[10] The Claimant does not have an arguable case that the General Division made a legal error by failing to apply the principles in *Pham*.

[11] The Claimant argues that the General Division should have applied *Pham*. As it did not, he argues that it made a legal error when it determined that he quit his employment after his employer recalled him to work on August 7, 2024. At the time of recall, the Claimant had been laid off from work since April 2024.

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[4] See section 58(1) of the DESD Act.
[5] See section 58(1)(c) of the DESD Act.

[12] The Claimant pursued a legal action against his former employer for wrongful dismissal. They settled the action. One of the terms of settlement required his employer to issue an amended record of employment to confirm that the Claimant's employment "terminated as a result of a lack of work."[6]

[13] The Claimant argues that, according to *Pham*, a temporary layoff from one's employment is effectively a termination. So, he denies that he could have quit his job if his employer dismissed him in the first instance. In other words, he says that he was not employed when his employer recalled him to work. He also argues that once his employer laid him off, it no longer held any legal right to recall him since he was no longer an employee.[7]

[14] The Claimant relies on paragraphs 28 to 30 in *Pham* to establish that a temporary layoff is a (constructive) termination. The paragraphs read:

> [28] Constructive dismissal can be established by either (i) the employer's breach of an essential term of the employment contract, or (ii) a course of conduct by the employer that establishes that it no longer intends to be bound by the employment contract [citation omitted].
>
> [29] Absent an express or implied term in an employment agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employer's employment contract that constitutes constructive dismissal: [citation omitted].
>
> [39] In such cases, an employee has an immediate right to pursue a claim for constructive dismissal: [citation omitted].

[15] *Pham* dealt with whether a motion judge made an error when it granted summary judgment in dismissing a claim for wrongful dismissal. The Ontario Court of Appeal in *Pham* also considered the issues of implied agreement and condonation in the context of a layoff.

[16] The Court of Appeal allowed Mr. Pham's appeal and set aside the summary judgment, having determined that there was an issue that the employer had laid him off

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[6] See Minutes of Settlement dated February 11, 2025, at GD7-4.
[7] See Claimant's email dated April 16, 2025, at AD1B-1.

involuntarily and thus had constructively dismissed him. The Court of Appeal sent the action back to the Superior Court for a trial to decide whether Mr. Pham had been wrongfully dismissed.

[17] *Pham* clearly focused on the issue of constructive dismissal. However, the case did not deal with section 29(b.1) of the *Employment Insurance Act*, which defines when voluntarily leaving an employment arises.

[18] As the General Division noted, it lacked the jurisdiction or any authority to decide whether the Claimant's employer had constructively dismissed him from his job.[8] The General Division also noted that the issue of a constructive dismissal is a different issue from voluntarily leaving one's job.[9] As the Federal Court of Appeal held in another case, a decision-maker oversteps its role once it begins to consider whether there has been a constructive dismissal.[10]

[19] *Pham* was irrelevant to the Claimant's case before the General Division as the decision did not deal with the *Employment Insurance Act* and with section 29(b.1) in particular. *Pham* dealt with a matter over which the General Division does not have any jurisdiction.

[20] For this reason, I am not satisfied that there is an arguable case that the General Division made a legal error when it did not consider nor apply the principles set out in *Pham*. The General Division simply did not have the authority to consider whether the Claimant had been constructively dismissed from his job.

[21] Even so, the Claimant argues that the evidence shows that his employer had dismissed him from his employment. He argues that the General Division misapprehended this evidence. I will now examine this argument.

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[8] See General Division decision at para 11, citing *Canada (Attorney General) v Peace*, 2004 FCA 56 at para 17.
[9] See *Canada (Attorney General) v Peace*, 2004 FCA 56 at para 17.
[10] See *Fleming v Canada (Attorney General)*, 2006 FCA 16. The case involved the Board of Referees, the predecessor to the General Division.

## The Claimant does not have an arguable case that the General Division misapprehended the evidence regarding the amended record of employment

[22] The Claimant does not have an arguable case that the General Division misapprehended (failed to understand) the evidence regarding the amended record of employment.

[23] At paragraph 12 of its decision, the General Division wrote:

> The employer filed an amended Record of Employment (ROE) on August 21, 2024, showing that the Appellant was not returning. The reason for issuing the ROE was the same on both ROEs the employer issued: "Shortage of work/End of contract or season[. Code] A". The employer had issued the amended ROE as part of a settlement of the Appellant's lawsuit against the employer for constructive dismissal.

[24] The Claimant argues that the General Division misapprehended this evidence. He argues that the Record of Employment states that he was terminated from his employment.

[25] Unlike the initial Record of Employment, which stated that it was unknown when the Claimant would be returning to work, the amended Record of Employment stated that the Claimant would not be returning to work. He says that this difference shows that his employer had dismissed him from his job.

[26] So, he says the General Division should have concluded that his employer had constructively dismissed him due to a shortage of work.

[27] But contrary to the Claimant's arguments, and despite settling his legal case against his employer, the amended Record of Employment does not expressly state that the Claimant's employer had dismissed him.

[28] At most, the amended Record stated that the employer issued the Record due to a "Shortage of work/End of contract or season." Hence, it was important for the General Division to examine all of the evidence, and not just the amended Record.

[29] To begin with, the General Division looked at what the amended Record of Employment said. The General Division's description of what appeared in the amended Record of Employment accurately reflects the evidence.[11] Indeed the Claimant's evidence supports the reason that the employer gave, namely, that there was a shortage of work:

- In his application for benefits, the Claimant explained that he was no longer working because there was a shortage of work. The application form defined a shortage of work to include closure due to COVID-19, layoff, and contract or season office closure.[12]

- In the application for benefits, there was an opportunity for the Claimant to state that he had been dismissed, but the Claimant did not check this option.[13]

- When the Claimant spoke with the Respondent, the Canada Employment Insurance Commission (Commission), he reportedly advised that his employer had placed him on a temporary layoff in April, although he did not agree to this. He felt that his employer should have given him appropriate notice or severance payments.[14]

- In his Request for Reconsideration, the Claimant wrote that he had been prepared to return to work. But he expected his employer to pay him from the time that it had laid him off.[15]

- In the employer's text message of April 22, 2024, the employer informed the Claimant that it was going to lay him off for the short term. It also advised that it aimed to give him a week's notice before recalling him to work. The employer described it as a temporary layoff. His employer explained that it was sending him a Record of Employment, so he could apply for Employment Insurance

[11] See Record of Employment dated August 21, 2024, at GD 3-18. The initial Record of Employment dated April 23, 2024, provided the same reason for issuing the ROE. See GD3-16.
[12] See Claimant's application for Employment Insurance benefits, at GD3-6.
[13] See Claimant's application for Employment Insurance benefits, at GD3-7.
[14] See Supplementary Record Claim dated September 9, 2024, at GD3-21.
[15] See Request for Reconsideration filed on October 22, 2024, at GD3-28.

benefits.[16] The Claimant responded that he was not accepting the temporary layoff. He wanted his employer to pay severance and terminate his position.[17]

[30] The Commission also spoke with the employer. The employer told the Commission that it had temporarily laid off the Claimant. It had also laid off other employees. The employer did not have any work available.[18]

[31] The Claimant equates the layoff with a constructive dismissal. As I have noted above, the General Division does not have any authority to decide whether the Claimant had been constructively dismissed. But it could examine whether the Claimant had been dismissed.

[32] The General Division did not rely on the amended Record of Employment alone to determine whether the Claimant quit or had been dismissed from his employment. The General Division looked at all of the evidence, including the communications between the Claimant and his employer.

[33] The General Division found that the Claimant intended to quit if the employer did not meet his demands for severance and termination. The General Division found that the Claimant's demand showed that the Claimant understood that there continued to be an employment relationship, even after he had received a layoff notice.

[34] The General Division also found that, even after the employer refused his demands, the Claimant did not take any steps at that point to quit. At the same time, the employer did not terminate the employment relationship. In other words, the General Division found that the employment relationship continued.

[35] The General Division also found that when the employer recalled the Claimant in August 2024 to return to work, the Claimant demanded payment for the entire period of the layoff. The General Division determined that the Claimant's demand for payment

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[16] See employer's text message of April 22, 2024, at GD3-35.
[17] See text exchanges between the Claimant's employer, at GD 3-39 to 41. The Claimant also communicated this to the Commission, on January 14, 2025. See GD 3-42.
[18] See Supplementary Record of Claim dated January 16, 2025, at GD 3-44.

showed that there continued to be an employment relationship. Without a continuing relationship, the General Division in effect found that the Claimant could not and would not have asked for payment for the entire length of time that he had been laid off.

[36] In reviewing the balance of the evidence, the General Division determined that the Claimant's employment continued to August 7, 2024. It was at that point that he chose not to return to work after his employer recalled him.

[37] The evidence reasonably supported the General Division's findings. For that reason, I am not satisfied that there is an arguable case that the General Division misapprehended or mischaracterized the amended Record of Employment.

## Conclusion

[38] The appeal does not have a reasonable chance of success. Therefore, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division