



Citation: *LJ v Canada Employment Insurance Commission*, 2022 SST 149

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

<b>Applicant:</b>	L. J.
<b>Respondent:</b>	Canada Employment Insurance Commission
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<b>Decision under appeal:</b>	General Division decision dated January 20, 2022 (GE-21-2505)
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<b>Tribunal member:</b>	Pierre Lafontaine
<b>Decision date:</b>	March 8, 2022
<b>File number:</b>	AD-22-103

## Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

## Overview

[2] The Applicant (Claimant) left his job on June 7, 2021 and applied for EI benefits. The employer placed the Claimant on an indefinite leave of absence from his job because he refused to be vaccinated or tested weekly for COVID-19 in accordance with the employer's vaccination policy. The Claimant refused to follow the policy because he is in good health and did not see the need for vaccination or testing.

[3] The Respondent (Commission) determined that the Claimant was placed on a leave of absence from his job because of his misconduct so it was not able to pay him benefits. After reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended because of his misconduct. It found that the Claimant should have known that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was placed on a leave of absence from his job because of his own misconduct.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division made an error in concluding that he was suspended because of his misconduct. He puts forward that after 23 years of service, the employer suddenly introduced a policy that requires a vaccination to maintain employment. He submits that this policy is unreasonable and against the *Canadian Charter of Rights (Charter)*. The Claimant submits that if it were any other vaccine prior to 2019, he would have qualified for benefits.

[6] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[7] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

## **Issue**

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

## **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 that:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that 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 leave 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 leave to appeal stage, the Claimant does not have to prove his case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

**Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?**

[12] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division made an error in concluding that he was suspended because of his misconduct. He puts forward that after 23 years of service, the employer suddenly introduced a policy that requires vaccination to maintain employment. He submits that this policy is unreasonable and against the Charter. The Claimant submits that if it were any other vaccine prior to 2019, he would have qualified for benefits.

[13] The General Division had to decide whether the Claimant was placed on a leave of absence from his job because of his 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, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[15] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that this dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to the loss of his employment.

[16] Based on the evidence, the General Division determined that the Claimant was placed on leave because he refused to be vaccinated or tested weekly for COVID-19 in accordance with the employer's vaccination policy in response to

the global pandemic. He had been informed of the employer's vaccination policy and was given time to comply. It found that the Claimant had refused intentionally because he felt he did not need to receive the vaccine. 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 a suspension and an eventual dismissal.

[17] The General Division concluded from the preponderant evidence that the Claimant's refusal constituted misconduct. As stated by the General Division, if the Claimant did not want to receive the vaccine, the employer provided the reasonable option of COVID-19 testing.

[18] It is well established case law that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.<sup>1</sup>

[19] The Claimant further raises the argument that the employer's policy violated his rights under the Charter. In view of this ground of appeal, I listened to the General Division recording of the hearing. I noticed that the Claimant did not raise any Charter argument before the General Division. He rather mentioned that he was not claiming any personal rights.<sup>2</sup> I also noticed that no evidence was presented to the General Division in support of his Charter argument.

[20] Unfortunately, for the Claimant, an appeal to the Appeal Division of the Tribunal is not a new hearing where a party can re-present evidence and hope for a favorable outcome.

[21] In his application for leave to appeal, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have

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<sup>1</sup> Canada (Attorney General) v Bellavance, 2005 FCA 87; Canada (Attorney General) v Gagnon, 2002 FCA 460.

<sup>2</sup> At 22:22 of the General Division hearing recording.

made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[22] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

## **Conclusion**

[23] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division