Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 569

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 29, 2022 (GE-22-533)

Tribunal member:	Pierre Lafontaine
Decision date:	June 29, 2022
File number:	AD-22-328

Decision

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

Overview

[2] The Applicant (Claimant) worked in an information technology role for the Government of Canada. The employer suspended him because he did not comply with their COVID-19 vaccination policy (policy). The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was not entitled to receive benefits because he was placed on a mandatory leave of absence due to his own misconduct for failure to comply with the employer's policy. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended following his refusal to follow the employer's policy. It found that the Claimant knew 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 misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division did not consider the evidence before it and made an error in law when it concluded that he had been suspended because of his misconduct.

[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 submits that the employer's policy is illegal and that the court's will overturn it eventually. He submits that forcing a choice between a forced medical intervention and livelihood is coercion under the law and constitutes no choice.

[13] The Claimant puts forward that the laws of Canada protect his rights not to disclose his private medical information, not to accept any medical intervention, and not to participate in a clinical trial. He submits that these laws exist because of what happened in WWII and are a direct result of the Nuremberg trials and resulting code. The Claimant puts forward that his employer controls EI and therefore, there is a conflict of interest.

[14] The Claimant worked in an information technology role for the Government of Canada. The employer suspended him because he did not comply with their COVID-19 vaccination policy. It became effective on October 6, 2021. The Claimant did not comply with the policy and did not file a grievance with his union.

[15] The General Division had to decide whether the Claimant was placed on a leave of absence from his job because of misconduct.

[16] 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.

[17] 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 suspending the Claimant in such a way that his suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.

[18] Based on the evidence, the General Division found that the Claimant was placed on leave because he refused to be vaccinated in accordance with the employer's policy in response to the pandemic. He had been informed of the employer's policy put in place to protect the health and safety of all its workers in the workplace and was given time to comply.

[19] The General Division found that the Claimant refused intentionally and that his refusal was wilful. He knew or should have known that his refusal to comply with the policy could lead to a suspension. The General Division found that this was the direct cause of his suspension. It concluded that the Claimant was suspended because of his misconduct.

[20] As stated by the General Division, the employer had the right to establish a policy to protect the health and safety of all of its employees in the workplace during the pandemic. The Claimant always had the right to refuse the employer's vaccination policy. However, by choosing not to receive the vaccine in response to the pandemic, he made a personal decision that led to foreseeable consequences on his job.

[21] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

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

[23] The Claimant further raises the argument that the employer's policy violated his rights not to disclose his private medical information, not to accept any medical intervention, and not to participate in a clinical trial.

[24] I note that the Ontario Human Rights Commission has said that mandating and requiring proof of vaccination to protect people at work is generally

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

permissible under the *Ontario Human Rights Code* as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated.[2] The Claimant did not make a request for accommodation.

[25] Furthermore, I see no reviewable error made by the General Division when it decided that it had to make a ruling in relation to misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[26] I am fully aware that the Claimant may seek relief under another law, if a violation is established. However, this does not change the fact the Commission has proven on a balance of probabilities (more likely than not) that the employer suspended him because of misconduct under the EI Act.

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

[28] 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

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

Pierre Lafontaine
Member, Appeal Division

[2] See GD9-6.