



Citation: *GW v Canada Employment Insurance Commission*, 2022 SST 567

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: G. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 11, 2022
(GE-22-419)

Tribunal member: Pierre Lafontaine

Decision date: June 28, 2022

File number: AD-22-313

Decision

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

Overview

[2] The Applicant (Claimant) worked as an Early Childcare Educator (ECE) for 12 years at a childcare center. The employer first dismissed her on September 30, 2021, because they said she did not comply with their COVID-19 vaccination & disclosure policy (policy). The Claimant then applied for Employment Insurance (EI) regular benefits indicating that she was laid off. The employer later issued an amended record of employment saying that the Claimant had taken a leave of absence on September 30, 2021.

[3] The Respondent (Commission) determined that the employer dismissed the Claimant from her job because of misconduct so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the employer suspended the Claimant following her refusal to follow the employer's policy. It found that the Claimant should have known that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was placed on a leave of absence from her job because of misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that she has a right to bodily autonomy and freedom of choice. The Claimant puts forward that the government did not order the vaccination policy, therefore, her conduct cannot be considered misconduct under the law. She submits that forcing her to get the vaccine is a violation of her rights under the *Ontario Human Rights Code* (OHRC).

[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 her 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. She submits that she has a right to bodily autonomy and freedom of choice. The Claimant puts forward that the government did not order the vaccination policy, therefore, her conduct cannot be considered misconduct under the law. She submits that forcing her to get the vaccine is a violation of her rights under the OHRC.

[13] The Claimant worked as an ECE for 12 years at a childcare center. As directed by the Chief Medical Officer of Health who considered that Childcare organizations posed a high risk for COVID-19 transmission, the employer implemented a policy. It became effective on September 13, 2021. The Claimant did not comply with the employer's policy.

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

[15] 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.

[16] 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 her suspension was unjustified, but

rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[17] Based on the evidence, the General Division determined that the employer placed the Claimant on leave because she refused to be vaccinated in accordance with the employer's policy in response to the pandemic. She 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. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension. She knew or should have known that her refusal to comply with the policy could lead to a suspension and an eventual suspension.

[18] 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. The Claimant always had the right to refuse the employer's vaccination policy. However, by choosing not to receive the vaccine, she made a personal decision that led to foreseeable consequences on her job.

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

[20] 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

[21] The Claimant further raises the argument that the employer's policy violated her rights under the OHRC.

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

[22] I note that the employer's policy indicates that the employer was not required under the OHRC to accommodate the personal preference for those employees who chose not to obtain the vaccine.²

[23] Furthermore, I see no reviewable error made by the General Division when it decided that it could not make a ruling in relation to misconduct based on the OHRC, but had to do so confined solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[24] I am fully aware that the Claimant may seek relief under the provincial legislation, if a violation is established. That relief, however, will not and cannot change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the employer suspended the Claimant because of her misconduct.

[25] In her 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. She 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 on the issue of misconduct.

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

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

² See GD9-6.