



Citation: *TA v Canada Employment Insurance Commission*, 2022 SST 628

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: T. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 13, 2022
(GE-22-872)

Tribunal member: Pierre Lafontaine

Decision date: July 12, 2022

File number: AD-22-350

Decision

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

Overview

[2] The Applicant (Claimant) worked at a hospital. The employer notified the Claimant about its policy about COVID-19 vaccination (policy) in October 2021. The policy required that the employees get their COVID-19 vaccination by December 17, 2021. The Claimant chose not to get his COVID-19 vaccination as required by the policy. The employer suspended the Claimant because he did not comply with their policy. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from his job because of 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 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 suspended 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 he got his job back as of June 1, 2022. He feels that now that his suspension is over, he should receive retroactively his EI benefits according to the law.

[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 he got his job back as of June 1, 2022. He feels that now that his suspension is over, he should receive retroactively his EI benefits according to the law.

[13] The Claimant worked at a hospital. The employer notified the Claimant about its policy about COVID-19 vaccination (policy) in October 2021. The policy required that the employees get their COVID-19 vaccination by December 17, 2021. The Claimant chose not to get his COVID-19 vaccination as required by the policy. The employer suspended the Claimant because he did not comply with their policy.

[14] The General Division had to decide whether the Claimant was suspended from his job because of his 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.¹

[17] Based on the evidence, the General Division determined that the Claimant was suspended because he refused to be vaccinated in accordance with the

¹ *Canada (Attorney General) v Marion*, 2002 FCA 185.

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. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension. He knew or should have known that his refusal to comply with the policy could lead to a suspension.

[18] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct under the *Employment Insurance Act* (EI Act).

[19] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.²

[20] I see no reviewable error made by the General Division when it stated that it had to decide the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.³

[21] I am fully aware that the Claimant may seek relief under another law, if a violation is established.⁴ 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 because of her misconduct.

[22] The Claimant argues that he got his job back as of June 1, 2022. He feels that now that his suspension is over, he should receive retroactively his EI benefits according to the law.⁵

² *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

³ CUB 73739A, CUB 58491; CUB 49373.

⁴ I note that in a recent decision, the Superior Court of Quebec has ruled that government provisions that imposed the vaccination, although they infringed the liberty and security of the person, did not violate section 7 of the *Canadian Charter of Rights*. Even if section 7 of the Charter were to be found to have been violated, this violation would be justified as being a reasonable limit under section 1 of the Charter - *Syndicat des métallos, section locale 2008 c Procureur général du Canada*, 2022 QCCS 2455 (Only in French at the time of publishing).

⁵ The Claimant refers to section 31 of the EI Act.

[23] A claimant is entitled to receive EI benefits **after** his suspension is over. The Claimant is not entitled to receive EI benefits **during** the period of suspension for misconduct. During the period of suspension, a claimant carries essentially the same consequences as a dismissal for misconduct.⁶ The Claimant cannot receive EI benefits retroactively now that his suspension is over.

[24] 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.

[25] 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

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

Pierre Lafontaine
Member, Appeal Division

⁶ CUB 51820.