



[TRANSLATION]

Citation: *LL v Canada Employment Insurance Commission*, 2022 SST 882

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

# **Leave to Appeal Decision**

**Applicant:** L. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
July 26, 2022 (GE-22-1340)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** September 7, 2022

**File number:** AD-22-587

## Decision

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

## Overview

[2] The Applicant (Claimant) lost her job. She applied for Employment Insurance (EI) regular benefits. The Respondent (Commission) accepted the employer's explanation for the Appellant's leaving. It decided that the Claimant left her job because she did not want to comply with her employer's vaccination policy. The Commission therefore disqualified her from receiving EI benefits. The Claimant asked the Commission to reconsider her application. The Commission once again denied her application for benefits. The Claimant appealed to the General Division.

[3] The General Division determined that the Claimant was dismissed (not that she left her job) because she refused to comply with the employer's vaccination policy. It decided that the Claimant knew or should have known that the employer was likely to let her go in these circumstances and that her refusal was voluntary, conscious, and deliberate. The General Division found that the Claimant was dismissed because of misconduct.

[4] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. She argues that her employment contract did not require her to be vaccinated or to undergo experimental treatment. She says that the COVID-19 vaccine is a poison and that she is free to choose what she injects in her body. The Claimant says she is a victim of discrimination and argues that her right to refuse is a constitutional right.

[5] I have to decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[6] I am refusing leave to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

## Issue

[7] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

## Analysis

[8] 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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue 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.

[9] 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 at the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[10] I will grant leave to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

### **Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?**

[11] The Claimant argues that her employment contract did not require her to be vaccinated or to undergo experimental treatment. She says that the COVID-19 vaccine is a poison and that she is free to choose what she injects in her body. The Claimant

says she is a victim of discrimination and argues that her right to refuse is a constitutional right.

[12] The Claimant was working as an operator. The employer established a policy to protect the health and safety of staff against the dangers of COVID-19. The Claimant refused to comply with the employer's policy. The General Division determined that the Claimant's employer dismissed her.

[13] The General Division therefore had to decide whether the Claimant was dismissed because of 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, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you 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 her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to the loss of her job.

[16] The General Division determined that the Claimant was dismissed because she refused to be vaccinated, as required by the employer's policy in response to the pandemic. The Claimant was informed of the policy the employer established to protect the health and safety of all staff in the workplace and had time to comply with it. The Claimant voluntarily refused to follow the policy, which directly led to her dismissal. The General Division decided that the Claimant knew or should have known that not complying with the policy could lead to her dismissal.

[17] The General Division found from the preponderant evidence that the Claimant's behaviour constituted misconduct.

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

[19] The issue of whether the employer discriminated against the Claimant and whether it failed to respect her constitutional rights is for another forum. This Tribunal is not the appropriate forum through which the Claimant can get the compensation she is looking for.

[20] I see no reviewable error made by the General Division when determining the issue of misconduct only within the parameters established by the Federal Court of Appeal, which defined misconduct under the Act.<sup>2</sup>

[21] I am fully aware that the Claimant can seek compensation in another forum, if a violation is established.<sup>3</sup> This does not change the fact that, under the Act, the preponderant evidence shows that the Claimant was dismissed because of misconduct.

[22] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I am of the view that the appeal has no reasonable chance of success. The Claimant has not raised any issue that could justify setting aside the decision under review.

## Conclusion

[23] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division

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

<sup>2</sup> See *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; and CUB 49373.

<sup>3</sup> I note that, in a recent decision, the Quebec Superior Court ruled that the provisions that required vaccination, even though they infringed on the liberty and security of the person, were not in violation of section 7 of the *Canadian Charter of Rights*. Even if it were to be found that section 7 of the Charter was violated, this violation would be justified as a reasonable limit under section 1 of the Charter – *United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.