Citation: *SA v Canada Employment Insurance Commission*, 2022 SST 692

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 20, 2022 (GE-22-579)

Tribunal member:	Pierre Lafontaine
Decision date:	August 2, 2022
File number:	AD-22-390

Decision

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

Overview

[2] The employer suspended the Applicant (Claimant) because she did not comply with their COVID-19 vaccination (policy). According to the employer, the Claimant violated its policy by refusing to be vaccinated against COVID-19. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from her job because of her 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 Claimant was suspended following her refusal to follow the employer's policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended 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 the General Division erred in law in its interpretation of misconduct. She submits that her conditions of employment have never been dependent on an experimental vaccine. The Claimant submits that in Canada vaccines are not mandated. She submits that her employer called her back to work which demonstrates there was no 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 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 submits that the General Division erred in law in its interpretation of misconduct. She submits that her conditions of employment have never been dependent on an experimental vaccine. The Claimant submits that in Canada vaccines are not mandated. She submits that her employer called her back to work which demonstrates there was no misconduct.

[13] The Claimant worked for the employer for 27 years. In August 2021, the employer implemented a policy that required employees to be fully vaccinated by October 30, 2021. The Claimant did not comply with the policy. The employer suspended the Claimant.

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

[15] The General Division found that the Claimant was suspended and dismissed following her refusal to follow the employer's policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division concluded that the Claimant was suspended from her 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 her suspension was unjustified, but

rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.[1]

[18] Based on the preponderant evidence, the General Division determined that the Claimant was suspended because she refused to follow the employer's policy in response to the pandemic. She had been informed several times of the employer's policy put in place to protect the health and safety of all its workers and was given many opportunities to comply. The Claimant refused intentionally; this refusal was wilful. The General Division found that she knew that her refusal to comply with the policy could lead to a suspension because the employer denied her request for accommodations. This was the direct cause of her suspension.

[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).[2]

[21] The Claimant further raises the argument that the employer's policy went against her contract of employment. She submits that in Canada vaccines are not mandated. She submits that her employer called her back to work which demonstrates there was no misconduct.

[22] 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]

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[1] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] CUB 73739A, CUB 58491; CUB 49373.

[23] As stated previously, the question submitted to the General Division was not whether the employer was guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant was guilty of misconduct under the EI Act and whether this misconduct resulted in the Claimant's suspension from her job. The preponderant evidence shows clearly that the Claimant refused to follow the employer's policy in response to the pandemic and this resulted in her suspension from her job.

[24] I am fully aware that the Claimant may seek relief before another forum, 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.

[25] Even tough the Claimant says that the employer called her back to work, this fact does not change the nature of the misconduct that initially led to the Claimant's suspension.[5]

[26] 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.

[27] 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.

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[4] I note that in a recent decision, the Superior Court of Quebec has ruled that 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] *Canada (Attorney general) v Boulton, 1996 FCA 1682; Canada* (Attorney General) v Morrow, 1999 FCA 193.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division