



Citation: *NF v Canada Employment Insurance Commission*, 2022 SST 742

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: N. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated June 3, 2022
(GE-22-1227)

Tribunal member: Pierre Lafontaine

Decision date: August 10, 2022

File number: AD-22-409

Decision

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

Overview

[2] The Applicant (Claimant) worked as a receptionist. She would attend the office as needed. In September 2021, the employer put in place a COVID-19 policy (policy) that required employees to receive the vaccine or to submit to regular testing for COVID-19. The employer first suspended the Claimant and later dismissed her because she did not comply with their policy. According to the employer, the Claimant refused to receive the vaccine or to submit to regular COVID-19 testing. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant voluntarily left her employment without just cause 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 rather dismissed from her job following her refusal to follow the employer's policy. The policy required her to receive the vaccine against COVID-19 or to provide negative COVID-19 test results every 72 hours. It found that the Claimant knew that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant was dismissed 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 an employee's refusal to undergo a particular medical treatment is not akin to refusing to perform an aspect of one's duties and responsibilities or refusing to attend work. The Claimant submits that she has a right to bodily autonomy and freedom of choice. The Claimant puts

forward that the vaccination policy was illegal and went against her contract of employment. She submits that forcing her to get the vaccine is a violation of her constitutional rights.

[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 an employee's refusal to undergo a particular medical treatment is not akin to refusing to perform an aspect of one's duties and responsibilities or refusing to attend work. The Claimant submits that she has a right to bodily autonomy and freedom of choice. The Claimant puts forward that the vaccination policy was illegal and went against her contract of employment. She submits that forcing her to get the vaccine is a violation of her constitutional rights.

[13] The Claimant worked as a receptionist. She would attend the office as needed. In September 2021, the employer put in place a policy that required employees to receive the vaccine or to submit to regular testing for COVID-19. The Claimant did not comply with the policy.

[14] The General Division found that the employer initiated the Claimant's separation from employment. It put weight on the Claimant's consistent statements that the employer placed on her leave and then dismissed her from her job. The General Division determined that the letter of termination and the Record of Employment issued by the employer supported her testimony.

[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 and dismiss her in these circumstances. The General Division concluded that the Claimant was suspended and then dismissed 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 and dismissing the Claimant in such a way that her suspension and dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension and dismissal.¹

[18] Based on the preponderant evidence, the General Division determined that the Claimant was suspended and dismissed 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.

[19] 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 and an eventual dismissal because the employer denied her requests for accommodations. This was the direct cause of her suspension and dismissal.

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

¹ *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[21] 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

[22] The Claimant further raises the argument that the employer's policy was illegal and went against her contract of employment. She submits that forcing her to get the vaccine is a violation of her constitutional rights.

[23] 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

[24] 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 losing her employment. The preponderant evidence shows that the Claimant refused to follow the employer's policy in response to the pandemic and this resulted in her losing her job.

[25] I am fully aware that the Claimant may seek relief in 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 and dismissed because of her misconduct under the EI Act.

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 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).

[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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division