Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 780

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. S.
Representative:	L. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 31, 2022 (GE-22-834)

Tribunal member:	Pierre Lafontaine
Decision date:	August 19, 2022
File number:	AD-22-416

Decision

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

Overview

[2] The Applicant (Claimant) worked as a locomotive conductor. The employer put the Claimant on an unpaid leave of absence because he did not comply with their COVID-19 vaccination policy (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 an unsuccessful 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 once his request for exemption based on religious beliefs was denied. 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 was put on an unpaid leave of absence by his employer and not suspended by his employer. The Claimant submits that the General Division refused to exercise its jurisdiction on the issue whether the employer discriminated against him under the *Canadian Human Rights Act* (CHRA). He submits that the General Division made an error in law in its interpretation of misconduct. The Claimant puts forward that he has proven that his request for an exemption was based on religious beliefs.

[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.

Preliminary matters

[12] Prior to rendering my decision on the Claimant's leave to appeal application, I requested to be informed of the expected delay before the Claimant's grievance would go to arbitration regarding the employer's refusal of the Claimant's request to be exempted based on religious grounds. The Claimant's representative indicated that it would probably take 5 to 10 years.

[13] Considering my obligation towards both parties to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit, I have decided not to suspend the application for leave to appeal.

[14] The Claimant's arbitration process is still at a very early stage and no hearing date has been set. It will take several years before the matter reaches a conclusion. I do not find that delaying the present appeal would be in the interest of justice.

[15] I will therefore render a decision on the Claimant's application for leave to appeal based on the evidence presented before the General Division.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[16] The Claimant submits that he was put on an unpaid leave of absence and not suspended by his employer. He submits that the General Division refused to exercise its jurisdiction on the issue whether the employer discriminated against him under the CHRA. The Claimants submits that the General Division made an error in law in its interpretation of misconduct. He puts forward that he has proven that his request for an exemption was based on religious beliefs.

[17] The evidence shows that the Claimant worked as a locomotive conductor. The employer implemented a policy to enhance the safety and security of Canada's transportation system and facilitate the resumption of safe travel.[1] It provided a procedure to grant exceptions based on a person's sincerely held religious beliefs. The policy became effective around November 2021.

[18] The Claimant requested an exemption based on his religious beliefs. The employer denied the request and the Claimant did not comply with the policy. The employer put him on an unpaid leave of absence. The Claimant then filed a grievance against his employer.

[19] The General Division had to decide whether the Claimant was suspended because of his misconduct.

[20] 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.

[21] Case law has established that 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 or dismissing the Claimant in such a way that his suspension or dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension or dismissal.[2]

[22] Based on the evidence, the General Division determined that the Claimant was suspended because he refused to be vaccinated in accordance with the employer's policy. He had been informed of the employer's policy and was given

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[1] See GD3-128.
[2] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

time to comply. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension. The General Division found that he knew, after the refusal of the requested exemption, that his refusal to comply with the policy could lead to his suspension.

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

[24] 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).[3]

[25] The question of whether the employer discriminated against the Claimant and should have accepted the Claimant's request for an exemption from the vaccination policy based on his religious beliefs is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[4]

[26] 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.[5]

[27] The evidence presented to the General Division supports its conclusion that the Commission has proven on a balance of probabilities that the Claimant was suspended (considered unemployed) because of his misconduct.

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[4] In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another forum.
[5] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[28] Furthermore, I see no failure by the General Division to observe a principal of natural justice. It is evident from the General Division's decision that the Claimant was allowed to present his arguments in respect of the entire case and that he had many opportunities to challenge the Commission’s position.

[29] 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.

[30] 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

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

Pierre Lafontaine
Member, Appeal Division