



Citation: *MP v Canada Employment Insurance Commission*, 2022 SST 799

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

# **Leave to Appeal Decision**

**Applicant:** M. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated May 31, 2022  
(GE-22-693)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** August 23, 2022

**File number:** AD-22-412

## Decision

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

## Overview

[2] The Applicant (Claimant) worked as a Registered Practical Nurse. The employer suspended and dismissed the Claimant because she 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 and dismissed from her job because of 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 and dismissed following her refusal to follow the employer's policy once her request for an exemption based on her religious beliefs was denied. 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 the General Division disregarded the religious exemption letter from her priest. The Claimant puts forward that the employer failed to respect her human rights. The Claimant submits that the General Division made an error in law in its interpretation of misconduct because she has proven that her request for an exemption was based on religious beliefs. The Claimant submits that she has filed a grievance at work disputing the employer's position.

[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 disregarded the religious exemption letter from her priest. The Claimant puts forward that the employer failed to respect her human rights. The Claimant submits that the General Division made an error in law in its interpretation of misconduct because she has proven that her request for an exemption was based on religious beliefs. The Claimant submits that she has filed a grievance at work disputing the employer's position.

[13] The Claimant worked as a worked Registered Practical Nurse. The employer implemented a policy for the protection of the health and safety of workers from the hazard of COVID-19.<sup>1</sup> It provided a procedure to grant exceptions based on a person's sincerely held religious beliefs. The policy became effective around September 2021.

[14] The Claimant requested an exemption based on her religious beliefs. The employer denied the request and the Claimant did not comply with the policy. The employer suspended and dismissed her. The Claimant then filed a grievance against her employer.

[15] The General Division had to decide whether the Claimant was dismissed because of her misconduct.

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<sup>1</sup> See GD3-25.

[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] It is well established case law 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 her suspension and dismissal.<sup>2</sup>

[18] Based on the evidence, the General Division determined that the Claimant was suspended and dismissed because she refused to follow the employer's policy. She had been informed of the employer's policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension and dismissal. The General Division found that she knew, after the refusal of the requested exemption, that her refusal to comply with the policy could lead to her dismissal.

[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).<sup>3</sup>

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<sup>2</sup> *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

<sup>3</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[21] 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 her religious beliefs is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.<sup>4</sup>

[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.<sup>5</sup>

[23] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.<sup>6</sup> This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was dismissed because of her misconduct.

[24] 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.

[25] 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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<sup>4</sup> 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.

<sup>5</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

<sup>6</sup> 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).

## **Conclusion**

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

Pierre Lafontaine  
Member, Appeal Division