



Citation: *MO v Canada Employment Insurance Commission*, 2022 SST 897

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

# **Leave to Appeal Decision**

**Applicant:** M. O.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated July 29, 2022  
(GE-22-1397)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** September 14, 2022

**File number:** AD-22-633

## Decision

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

## Overview

[2] The Applicant (Claimant) lost her job. 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 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 dismissed following her refusal to follow the employer's policy by not disclosing her vaccination status. It found that the Claimant knew that the employer was likely to dismiss her in these circumstances. The General Division found that the non-compliance with the policy was the cause of her dismissal. It 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 made several mistakes in its decision. The Claimant raises grounds of natural justice, error of jurisdiction, error of law and error of facts. The Claimant also submits that the General Division member was biased.

[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* (DESD 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 made several mistakes in its decision. She raises grounds of natural justice, error of jurisdiction, error of law and error of facts. The Claimant also submits that the General Division member was biased.

[13] More precisely, the Claimant raises the following grounds of appeal:

- The General Division member did not print her file as a hardcopy and relied on his computer that ended up not working during her hearing thus preventing the member from accessing all her documents;
- The General Division member did not read her entire file before the hearing, including information supplied to the General Division after the hearing that explains how the *Canadian Bill of Rights* applies to her case;
- The General Division did not investigate the Commission's conduct to ensure they treated her equally to her employer and obtained the evidence to support their allegation of misconduct;
- She had a right to an impartial decision maker and freedom from bias. She raises the question whether another person or source influenced the member in the decision process. She argues that the General Division member had an obligation to divulge his vaccination status to clear any apprehension of bias. She puts forward that the member might be biased because he was nominated by the Minister of *Employment Workforce Development and Disability Inclusion* who stated her opinion multiple times regarding EI Entitlements with regards to the mandates in the vaccination policies;
- The General Division should have given her the benefit of the doubt regarding the issue of misconduct;
- The General Division did not explain why her employer did not have the duty to accommodate her by allowing her to continue to work from home as her work operations were never impacted;
- The Commission and the General Division did not investigate how many unvaccinated employees remained employed for months;

- The Commission committed procedural unfairness by causing unnecessary delays in the treatment of her application for benefits;
- Her right to life, liberty and security of person (right to informed consent for medical procedures, right to body integrity and autonomy, right to privacy, and right to not end up homeless for exercising her rights) cannot be ignored by federal agents, the General Division, or the Commission;
- The exercise of her rights cannot be construed as "misconduct" pursuant to section 1(a) of the *Canadian Bill of Rights* that is equated to section 7 of the *Canadian Charter of Rights*;
- She requests that the Tribunal and the Commission remove the wrongful accusation of misconduct immediately and pay out her EI Entitlements. She reserves her right to pursue civil action against all appropriate parties.

### **The General Division's role**

[14] The Claimant submits that the General Division did not investigate the Commission's conduct to ensure they treated her equally to her employer and obtained the evidence to support their allegation of misconduct. She submits that the Commission and the General Division did not investigate how many unvaccinated employees remained employed for months.

[15] The General Division's role, within the meaning of the *DESD Act* and the *Social Security Regulations*, does not include an investigative privilege. It is the sole burden of the Commission to have the privilege of investigating and that of a claimant to provide necessary testimony and supporting documents, whether written or oral, at the hearing, to prove what they are advancing.<sup>1</sup>

[16] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before

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<sup>1</sup> *A. T. v Canada Employment Insurance Commission*, 2017 CanLII 40918.

it, and to articulate, in its written decision, its own independent decision with respect thereto.

[17] Therefore, the General Division did not err when it did not investigate the Commission's conduct or how many unvaccinated employees remained employed. The General Division proceeded correctly to render its own decision based on the evidence presented by both parties.

[18] This ground of appeal has no reasonable chance of success.

### **Misconduct**

[19] The Claimant submits that her right to life, liberty and security of person (right to informed consent for medical procedures, right to body integrity and autonomy, right to privacy, and right to not end up homeless for exercising her rights) cannot be ignored by federal agents, the Commission, or the General Division.

[20] The Claimant submits that the exercise of her rights cannot be construed as "misconduct" pursuant to section 1(a) of the *Canadian Bill of Rights* that is equated to section 7 of the *Canadian Charter of Rights*.

[21] The Claimant worked eight years for a hospital. Prior to the pandemic, she worked on site. Her agreement to work from home was temporary. The employer implemented a policy for the protection of the health and safety of all its workers and patients from the hazard of COVID-19.<sup>2</sup> The policy became effective around September 7, 2021. The Claimant refused to reveal her vaccination status to her employer. She did not comply with the policy. The employer suspended and dismissed her.

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

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<sup>2</sup> See GD3-82.

[23] 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.

[24] 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 her 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>3</sup>

[25] The preponderant evidence shows that on August 17, 2021, the Chief Medical Officer of Health issued Directive 6. On September 7, 2021, the employer replaced the earlier policy with a new one. It applied to all employees, including those who temporarily worked from home. The recommendation that all employees receive the vaccine was replaced by a requirement that all employees receive the COVID-19 vaccine. All employees were required to declare their vaccination status by October 20, 2021. The policy stated that an employee's failure to comply with this policy would result in progressive action up to and including suspension or termination of employment.

[26] Based on this evidence, the General Division determined that the Claimant was 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 to reveal her vaccination status; this refusal was wilful. This was the direct cause of her dismissal.

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<sup>3</sup> *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[27] The General Division found that in the face of the many warnings from the employer about the consequences of non-compliance with the policy, the Claimant knew that her refusal to comply with the policy could lead to her dismissal.

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

[29] As stated by the General Division, 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>4</sup>

[30] The Claimant raises the arguments that the employer failed to accommodate her and that the employer's policy went against her constitutional rights. These questions must be decided by another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.<sup>5</sup>

[31] 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.

[32] The preponderant evidence before the General Division shows that the Claimant **made a personal and deliberate choice** not to follow the employer's policy in response to the exceptional circumstances created by the pandemic and this resulted in her losing her job.

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<sup>4</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>5</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; See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, regarding the relevancy of the employer's duty to accommodate in deciding the issue of misconduct under the *Employment Insurance Act*.



[33] As stated by the General Division, the benefit of the doubt rule does not apply in the present case since the evidence is not equally balanced on each side of the issue.<sup>6</sup>

[34] 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>7</sup>

[35] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.<sup>8</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.

**Unnecessary delays in the treatment of the Claimant's application for benefits.**

[36] The Claimant submits that the Commission did not consider that she was facing homelessness and acted in bad faith in withholding her EI entitlements for over nine months. She submits that the Commission did not treat her fairly and that there is no evidence to validate the Commission's determination of misconduct. She reserves her right to pursue civil action against all parties.

[37] I note that the Claimant applied for EI benefits November 24, 2021. The Commission rendered its initial decision on January 25, 2022. The Claimant requested reconsideration of the initial decision on February 22, 2022. The Commission's reconsideration decision was rendered on March 18, 2022.

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<sup>6</sup> Section 49(2) of the *Employment Insurance Act*.

<sup>7</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

<sup>8</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).

[38] The Claimant then filed her appeal to the General Division on April 15, 2022. The hearing before the General Division took place on July 18, 2022.

[39] Although I understand the Claimant's situation, I cannot find that the delay before the General Division was unacceptable. The Claimant filed her voluminous written submissions and had the opportunity to present her case before the General Division three months after filing her notice of appeal. The delay was clearly not too long in its duration and did not prevent the Claimant from presenting her case.

[40] I cannot find that the delay before the Commission is unreasonable. The delay is mostly the result of the Claimant going through the normal appeal process after an unfavorable initial decision. As mentioned previously, the preponderant evidence supports the Commission's decision that the Claimant lost her job because of her misconduct.

[41] If the Claimant believes the Commission mishandled her application for benefits and caused her damages in doing so, her recourse is before another forum.<sup>9</sup>

[42] I find that this ground of appeal has no reasonable chance of success.

### **Allegation of bias**

[43] The Claimant submits that the General Division member appears to have been influenced by another person or source in rendering his decision. She relies on the "General Division EI Decision" dismissal letter she received that was authored by another person than the General Division member.

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<sup>9</sup> *TT v Canada Employment Insurance Commission*, 2018 SST 43; *Canada (Attorney General) v Romero*, A-815-96; *Canada (Attorney General) v Tjong*, A-672-95.

[44] The Claimant submits that to rule out any possibility of bias, the General Division member had to disclose what choice he made to remain employed himself.

[45] The Claimant further submits that the General Division member might have been influenced by the fact that he was nominated by the Minister of *Employment Workforce Development and Disability Inclusion* who stated her opinion multiple times regarding EI Entitlements with regard to the mandates in the vaccination policies.

[46] An allegation of bias against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.<sup>10</sup>

[47] The General Division member proceeded to listen in full to the testimony and presentation of the Claimant that lasted almost three hours. He clarified certain points and arguments raised by the Claimant during the hearing. He clearly explained to the Claimant what facts he had to review in order to determine if she had lost her employment because of her misconduct.

[48] The General Division member who conducted the hearing rendered a detailed and complete decision supported by the evidence. He authored the decision. There is no material evidence filed by the Claimant that would demonstrate that the member was influenced by someone or any other source in rendering his decision.

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<sup>10</sup> *Arthur v Canada (Attorney General)*, 2001 FCA 223; *H. E. v Canada Employment Insurance Commission*, 2019 SST 439; *A. J. v Canada Employment Insurance Commission*, 2017 CanLII 37100 (SST).

[49] The Claimant's allegation that the General Division member might be biased because of his vaccination status is not supported by any evidence extrinsic to the case and rests on mere suspicions and impressions. The same goes for the allegation that the member might be biased because he was nominated by a minister who supports the mandates in the vaccination policies.

[50] I cannot find any material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such a serious allegation cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of a claimant.

[51] In view of the above, I find that this ground of appeal has no reasonable chance of success.

### **Principle of natural justice**

[52] The Claimant submits that the General Division did not follow principles of natural justice. She puts forward that the member did not print her file as a hardcopy and only relied on his computer that ended up not working during the hearing. This prevented the member from accessing all documents.

[53] In view of the Claimant's arguments, I proceeded to listen to the recording of the General Division hearing.

[54] I note that the General Division hearing lasted almost three hours. The Claimant was given every opportunity to present her case. The member explained the legal test for misconduct. He listened to the Claimant's testimony and exercised his role of trier of fact. The member referred to the Claimant's arguments and to the appeal docket exhibits when he questioned the Claimant on her position. I cannot find that the hearing was not fair because the General Division member did not have access to his computer and documents during the hearing.

[55] I note that the Claimant did not raise any objections during the hearing regarding the fact that the General Division member did not have access to his computer and all documents.

[56] In regards to the document submitted by the Claimant after the hearing, the General Division member did address in its decision the Claimant's arguments regarding the application to her case of the *Canadian Bill of Rights* and the *Canadian Criminal Code*. I note that the document that was unsolicited and refused by the General Division was a repetition of the Claimant's testimony and written submissions.

[57] I therefore see no breach of natural justice committed by the General Division. This ground of appeal has no reasonable chance of success.

### **Disposition**

[58] I am of the view that, 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 on the issue of misconduct.

[59] 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**

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

Pierre Lafontaine  
Member, Appeal Division