Citation: *AJ v Canada Employment Insurance Commission*, 2022 SST 936

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated June 24, 2022 (GE-22-832)

Tribunal member:	Pierre Lafontaine
Decision date:	September 26, 2022
File number:	AD-22-457

Decision

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

Overview

[2] The Applicant (Claimant) was put on an unpaid and mandatory leave of absence by her employer because she did not follow their COVID-19 vaccination policy (policy). The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) initially determined that the Claimant took a voluntary leave from her job on November 15, 2021 without just cause. Upon reconsideration, the Commission decided that she voluntarily left her job without just cause or lost her job because of misconduct. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the employer imposed a mandatory unpaid leave of absence because the Claimant did not comply with their policy. It found that there was no evidence to suggest that the Claimant voluntarily chose to take a leave of absence. The General Division determined 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 found that the non-compliance with the policy was the cause of her suspension. It 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. The Claimant was granted an extension of time to file her submissions in support of her application for leave to appeal.

[6] The Claimant is requesting leave to appeal on the basis that there was an error of fact made with regard to the labelling of the decision, namely as "misconduct", but also "voluntary leave of absence". Both of which she does not agree with.[1]

[7] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[8] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

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

Analysis

[10] 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.

[11] 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

[1] See AD1B-1.

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.

[12] 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?

[13] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division on the basis that there was an error of fact made with regard to the labelling of the decision, namely as "misconduct", but also "voluntary leave of absence". Both of which she does not agree with.[2]

[14] The evidence shows that the employer implemented a policy for the protection of the health and safety of all its members from the hazard of COVID-19.[3] The policy became effective around September 20, 2021. The Claimant refused to comply with the policy. The Claimant stopped working for the employer as of November 16, 2021.

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

[2] See AD1B-1.
[3] See purpose of policy at GD3-39.

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.[4]

[18] Based on the evidence before it, the General Division determined that the Claimant did not take a voluntary leave from work. It found that the employer suspended the Claimant from her job.

[19] The Claimant received an email from the employer advising her that she was put on a mandatory unpaid leave of absence. The employer advised the Claimant that should her situation in regards to the vaccination policy change during her leave of absence, to let them know as soon as possible.[5] The Claimant replied that it was unfortunate that the employer was taking this position.[6] This evidence supports the General Division's conclusion that the Claimant is not the one who initiated the work interruption.

[20] The evidence shows that the Claimant was suspended by her employer (prevented from working) 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. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

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

[5]

[6] See GD3-46.

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

[22] 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).[7]

[23] The Claimant submitted to the General Division that the employer failed to accommodate her, discriminated against her and violated her constitutional rights. This question 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.[8]

[24] As stated previously, the question submitted to the General Division was not whether the employer was guilty of misconduct by suspending the Claimant such that this would constitute an unjust suspension, but whether the Claimant was guilty of misconduct under the EI Act and whether this misconduct resulted in the Claimant being suspended from work.

[25] 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 being suspended from work.

[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.[9]

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[7] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[8] 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, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.
[9] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[27] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[10] 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.

[28] 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.

[29] 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

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

Pierre Lafontaine
Member, Appeal Division

[10] 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).