[TRANSLATION]

Citation: *CG v Canada Employment Insurance Commission*, 2022 SST 1077

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 31, 2022 (GE-22-1589)

Tribunal member:	Pierre Lafontaine
Decision date:	October 24, 2022
File number:	AD-22-709

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) was suspended because she refused to follow the employer's COVID-19 vaccination policy (policy). The Claimant has been back to work since June 20, 2022.

[3] The Respondent (Commission) accepted the employer's reason for the suspension. The Commission found that the Claimant had temporarily stopped working because of misconduct. Because of this, it disentitled her from receiving Employment Insurance (EI) benefits. The Claimant made a request for reconsideration. The Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to follow the employer's policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her refusal was intentional, conscious, and deliberate. The General Division found that the Claimant was suspended because of misconduct.

[5] The Claimant seeks leave to appeal the General Division decision to the Appeal Division. She argues that the employer's policy was unreasonable, abusive, and discriminatory and was not part of her conditions of employment. She says that failing to comply with the employer's request to protect her own health cannot be considered misconduct.

[6] I have to decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[7] I am refusing leave to appeal because the Claimant has not raised a ground of appeal based on which the appeal has a reasonable chance of success.

Issue

[8] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

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 the following:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue 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] The 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 at the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success. In other words, she must show that there is arguably a reviewable error based on which the appeal might succeed.

[11] I will grant leave to appeal if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success.

Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

[12] The Claimant argues that the employer's policy was unreasonable, abusive, and discriminatory and was not part of her conditions of employment. She says that failing to

comply with the employer's request to protect her own health cannot be considered misconduct.

[13] The Claimant was working from home. The employer established a policy to protect the health and safety of employees against the danger of COVID-19. The Claimant failed to comply with the employer's policy. The employer suspended her.

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

[15] 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, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the employee wilfully disregarded the effects their actions would have on their performance.

[16] 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.

[17] The General Division determined that the Claimant was suspended because she failed to comply with the employer's policy in response to the pandemic. The Claimant was informed of the policy the employer put in place to protect the health and safety of staff and had time to comply with it. The General Division determined that the Claimant voluntarily refused to follow the policy and that she had not obtained a medical or religious exemption. That is what directly caused her suspension. The General Division determined that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

[18] The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[19] It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the *Employment Insurance Act* (EI Act).[1]

[20] The question of whether the employer's policy was unreasonable, abusive, and discriminatory is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[2]

[21] There is no dispute that an employer is required to take all reasonable precautions to protect the health and safety of its employees in the workplace. It is not for the Tribunal to decide whether it was reasonable for the employer to extend that protection to employees working from home during the pandemic.

[22] In other words, it was not for the General Division to decide the issues of vaccine efficacy or the reasonableness of the employer's policy, which applied to employees working from home.[3]

[23] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant, who was working from home. She refused to follow the policy. She knew that the employer was likely to suspend her in these circumstances, and her refusal was intentional, conscious, and deliberate.

[24] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the unique and exceptional circumstances created by the pandemic, and her employer suspended her because of this.

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[1] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[2] See *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 decided that that issue was for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court indicated that the employer's duty to accommodate is not relevant to determining misconduct under the *Employment Insurance Act*.
[3] See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The Court said that there are remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits. See also *Parmar v Tribe Management Inc.*, 2022 CSCB 1675: In a constructive dismissal case, the Supreme Court of British Columbia found that the employer's mandatory vaccination policy was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information that was then available to it.

[25] I see no reviewable error made by the General Division when deciding the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[4]

[26] Even though the Claimant argues that her employer called her back to work, this does not change the misconduct that initially led to the suspension.[5]

[27] I am fully aware that the Claimant may seek relief in another forum if a violation is established.[6] 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 for misconduct.

[28] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I am of the view that the appeal has no reasonable chance of success. The Claimant has not raised any question that could justify setting aside the decision under review.

Conclusion

[29] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

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[4] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[5] *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.
[6] See *Canadian National Railway Company v Seeley*, 2014 FCA 111, where the Court indicated that human rights legislation does not apply to an individual's choices or preferences. I also note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights* [*sic*] despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.