



[TRANSLATION]

Citation: *SA v Canada Employment Insurance Commission*, 2022 SST 1212

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

# **Extension of Time and Leave to Appeal Decision**

**Applicant:** S. A.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
September 8, 2022 (GE-22-1425)

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**Tribunal member:** Pierre Lafontaine  
**Decision date:** November 1, 2022  
**File number:** AD-22-759

## Decision

[1] An extension of time is granted. Leave (permission) to appeal is refused. This means that the appeal will not proceed.

## Overview

[2] The Applicant (Claimant) lost her job because she refused to comply with the COVID-19 vaccination policy (policy) her employer had put in place.

[3] The Respondent (Commission) accepted the employer's reason for the dismissal. The Commission decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving Employment Insurance (EI) benefits. The Claimant asked the Commission to reconsider. It upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer's policy. It found that the Claimant knew that the employer was likely to let her go in these circumstances and that her non-compliance was intentional, conscious, and deliberate. The General Division decided that the Claimant lost her job because of misconduct.

[5] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. She says that the employer's policy is discriminatory and infringes human rights and freedoms. She argues that her choice not to get vaccinated 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.

## Issues

[8] **Issue 1:** Was the Claimant's application for leave to appeal filed on time? If not, should an extension of time be granted?

[9] **Issue 2:** Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?

## 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 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.

[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 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.

[12] 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.

**Issue 1: Was the Claimant's application for leave to appeal filed on time? If not, should an extension of time be granted?**

[13] The General Division decision was communicated to the Claimant on September 8, 2022. The Claimant filed her application for leave to appeal late—on October 24, 2022. But the Claimant contacted the Tribunal on September 20, 2022, so that she could get the form to file her application for leave to appeal. It was not until October 3, 2022, that the form was sent to her by mail.

[14] Given the circumstances of the case, I find that it is in the interests of justice to grant the Claimant an extension of time to apply for leave to appeal. The delay is not excessive, and an extension would not cause any prejudice to the Commission.<sup>1</sup>

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

[15] The Claimant says that the employer's policy is discriminatory and infringes human rights and freedoms. She argues that her choice not to get vaccinated cannot be considered misconduct.

[16] The Claimant worked in health care. The employer put a policy in place to protect residents and employees during the pandemic. The Claimant did not comply with the employer's policy. The employer let her go.

[17] The General Division had to decide whether the Claimant lost her job because of misconduct.

[18] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent; it is enough 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 person wilfully disregarded the effects their actions would have on their performance.

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<sup>1</sup> *X (Re)*, 2014 FCA 249; *Grewal v Minister of Employment and Immigration*, [1985] 2 FC 263 (FCA).

[19] The General Division's role is not to rule on the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[20] The General Division found that the Claimant was let go because she did not comply with the employer's policy in response to the pandemic. She had been told about the employer's policy and had time to comply with it. The General Division found that the Claimant deliberately refused to follow the policy and that she did not get a medical exemption or an exemption for religious reasons. This directly led to her dismissal.

[21] The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her dismissal. The General Division found, on a balance of probabilities, that the Claimant's behaviour amounted to misconduct.

[22] It is well established that a deliberate violation of an employer's policy is considered misconduct under the *Employment Insurance Act* (EI Act).<sup>2</sup>

[23] The question of whether the employer discriminated against the Claimant and failed to respect her rights and freedoms is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.<sup>3</sup>

[24] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant, who worked in health care. She refused to comply with the

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<sup>2</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>3</sup> 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. The Court also 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.

policy. She knew that the employer was likely to let her go in these circumstances, and her non-compliance was intentional, conscious, and deliberate.

[25] 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 she was let go because of this.

[26] 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.<sup>4</sup> Even though the Claimant argues that her employer called her back to work, this does not change the nature of the misconduct that initially led to her dismissal.<sup>5</sup>

[27] I am fully aware that the Claimant may seek relief in 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 let go because of misconduct.

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

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<sup>4</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.

<sup>5</sup> *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.

<sup>6</sup> See *Canadian National Railway Company v Seeley*, 2014 FCA 111, where the Court indicated that human rights legislation does not apply to personal 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.

## **Conclusion**

[29] An extension of time is granted. Leave to appeal is refused. This means that the appeal will not proceed.

Pierre Lafontaine  
Member, Appeal Division