Citation: *JD v Canada Employment Insurance Commission*, 2022 SST 1143

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated October 13, 2022 (GE-22-1706)

Tribunal member:	Pierre Lafontaine
Decision date:	November 1, 2022
File number:	AD-22-745

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. He did not comply with the employer's COVID-19 vaccination policy (Policy) because he was concerned about the security of his personal medical information. The Claimant was placed on an unpaid leave of absence after his last paid day on October 29, 2021, because he failed to submit proof he had received two doses of a COVID-19 vaccine and was unwilling to participate in the employer's rapid testing program, as required by the Policy. On January 26, 2022, the employer dismissed the Claimant because he remained non-compliant with the Policy. The Claimant applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended and subsequently dismissed from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the employer put the Claimant on an unpaid leave of absence and subsequently dismissed him because he did not comply with their Policy. It found that the Claimant knew that the employer was likely to suspend and dismiss him in these circumstances. The General Division found that the non-compliance with the Policy was the cause of his suspension and dismissal. It concluded that the Claimant was suspended and dismissed from his job because of misconduct.

[5] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. He submits that the employer had no secure means of delivering and keeping his personal information safe. He submits that he had no choice but to refuse to give up personal information because there were no security/privacy procedures in place. The Claimant submits that his actions do not constitute misconduct.

[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 his 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 employer had no secure means of delivering and keeping his personal information safe. He submits that he had no choice but to refuse to give up personal information because there were no security/privacy procedures in place. The Claimant submits that his actions do not constitute misconduct.

[13] The General Division had to decide whether the Claimant was suspended and dismissed because of his misconduct.

[14] 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.

[15] 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 and dismissing the Claimant in such a way that his suspension and

dismissal were unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension and dismissal.[1]

[16] The evidence shows that the Claimant was suspended (prevented from working) because he refused to follow the employer's Policy. He 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 his suspension and dismissal. The General Division found that the Claimant knew that his refusal to comply with the Policy could lead to his suspension and dismissal.

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

[18] 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).[2]

[19] The Claimant submitted before the General Division that the employer refused to accommodate him, did not respect the collective agreement, and violated his human rights and constitutional rights. These questions are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[3]

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[1] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[2] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[3] 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; The Court also stated that there are available 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 *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

[20] The Claimant submits that the employer had no secure means of delivering and keeping his personal information safe. He submits that refusing to give up personal information without any security/privacy procedures in place does not constitute misconduct.

[21] The evidence shows that the Claimant was provided with an alternative to being vaccinated and refused to provide the employer with test results according to their Policy. The Claimant did not want to show negative test results and did not want to report to his employer if he had COVID-19.[4]

[22] I note that the Policy indicates that the information being collected is managed and protected pursuant to the *Freedom of information and Protection of Privacy Act*. It indicates that any issues can be raised in writing to the Director of Safety Systems and Health Services. There is no evidence before the General Division that the Claimant used this avenue to raise his concerns regarding the privacy and security of his personal information.

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

[24] 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 unique and exceptional circumstances created by the pandemic and this resulted in him being suspended and dismissed from work.

[4] See GD3-41.

[25] I see no reviewable error made by the General Division when it decided the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[5]

[26] I am fully aware that the Claimant may seek relief before 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 and dismissed because of his misconduct.

[27] In his 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. He 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.

[28] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, I find that the appeal has no reasonable chance of success.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division

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

[6] 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); See also *Canadian National Railway Company v Seeley*, 2014 FCA 111, the Court stated that the *Canadian Human Rights Act* does not apply to personal choices or preferences.