



[TRANSLATION]

Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 1145

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: J. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated
September 23, 2022 (GE-22-1836)

Tribunal member: Pierre Lafontaine

Decision date: November 2, 2022

File number: AD-22-779

Decision

[1] Leave to appeal is refused. 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. Then, she applied for benefits.

[3] The Respondent (Commission) accepted the employer's reason for the dismissal. The Commission found that the Claimant stopped working because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving Employment Insurance (EI) benefits. The Claimant asked it 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 was let go because of misconduct.

[5] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. She says the decision [*sic*] made an error of jurisdiction because the General Division decision says that her appeal was allowed.

[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 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 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 says that the General Division made an error of jurisdiction, since the General Division decision says that her appeal was allowed.

[13] The Claimant was a personal care worker in a seniors' residence. The employer implemented a policy to protect workers from the dangers of COVID-19. The Claimant went against the employer's policy. The employer let her go.

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

[15] 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.

[16] 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.

[17] 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. The Claimant was told about the employer's policy to protect the health and safety of all staff members and had the 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. That is what led directly to her dismissal. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her dismissal.

[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 under 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] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant. She refused to comply with the policy. She knew that the employer was likely to let her go in these circumstances, and her non-compliance was intentional, conscious, and deliberate.

[22] 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.

[23] 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.³

[24] I am fully aware that the Claimant may seek relief in another forum, if a violation is established.⁴ This does not change the fact that, under the EI Act, the Commission

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. The Court also said that there are remedies to penalize an employer's behaviour other than having Canadian taxpayers pay for that behaviour through unemployment benefits. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court said that the employer's duty to accommodate is not relevant to determining misconduct under the *Employment Insurance Act*.

³ *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A; CUB 58491; CUB 49373.

⁴ 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.

has proven, on a balance of probabilities, that the Claimant was let go because of misconduct.

[25] The Claimant says that the General Division made an error of jurisdiction, since the General Division decision says that her appeal was allowed. I see that the General Division has since corrected its decision to say that the appeal has been dismissed. It is also clear from the General Division's analysis that the appeal had been dismissed. The appeal does not have a reasonable chance of success based on this ground.

[26] 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.

[27] The Claimant has not raised any issue that could justify setting aside the decision under review.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division