Citation: *NN v Canada Employment Insurance Commission*, 2022 SST 1069

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. N.
Representative:	I. O.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 31, 2022 (GE-22-1249)

Tribunal member:	Pierre Lafontaine
Decision date:	October 21, 2022
File number:	AD-22-715

Decision

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

Overview

[2] The Applicant (Claimant) was put on a mandatory and unpaid leave of absence, and later dismissed from work, because she did not comply with the *Provincial Health Officer*'s (PHO) vaccine order at work. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was not entitled to receive EI benefits because she was suspended and lost her employment due to her own misconduct. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division determined that the Claimant was suspended and dismissed following her refusal to follow the POH's order. It found that the Claimant knew that the employer was likely to suspend and dismiss her in these circumstances. The General Division found that the non-compliance with the order was the cause of her suspension and dismissal. It concluded that the Claimant was suspended and dismissed from her job because of misconduct.

[5] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. She submits that refusing to get a COVID-19 vaccine is not an illegal act and does not constitute misconduct, particularly when the employer has not offered to accommodate and employee who refuses to follow the order. She submits that the employer is required to accommodate the medical conditions or sincerely held religious beliefs of employees. The Claimant submits that the refusal to grant her EI benefits is illegal and in violation of her

constitutional rights. She argues that the Tribunal has already found that refusing to get the COVID-19 vaccine does 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 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.

[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 refusing to get a COVID-19 vaccine is not an illegal act and does not constitute misconduct, particularly when the employer has not offered to accommodate and employee who refuses to follow the order. She submits that the employer is required to accommodate the medical conditions or sincerely held religious beliefs of employees.

[13] The Claimant further submits that the refusal to grant her EI benefits is illegal and in violation of her constitutional rights. She argues that the Tribunal already found that refusing to get the COVID-19 vaccine does not constitute misconduct.

[14] The Claimant worked as a caregiver aide in the employer's residence home. The Claimant did not comply with the PHO’s order at her workplace. She was not exempt from the order. The employer put her on a mandatory and unpaid leave of absence, and then dismissed her.

[15] The General Division had to decide whether the Claimant was suspended and dismissed 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 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 and dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension and dismissal.[1]

[18] The General Division found that the Claimant was suspended (prevented from working), and then dismissed, because she refused to follow the PHO's order at her workplace. She had been informed of the PHO's order and was given time to comply. The General Division found that the Claimant did not provide any proof of exemption. It found that the Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension and dismissal. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her suspension and dismissal.

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

[20] 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]

[21] The Claimant submits that the employer failed to accommodate her, discriminated against her, and violated her constitutional rights. These questions are for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she 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, where the Court stated that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

[22] 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 or 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.

[23] The preponderant evidence before the General Division shows that the Claimant **made a personal and deliberate choice** not to follow the PHO's order in response to the exceptional circumstances created by the pandemic and this resulted in her being suspended and dismissed from work.

[24] 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.[4]

[25] The Claimant submits that the Tribunal has already set a precedent by concluding that not being vaccinated with COVID-19 vaccine does not constitute misconduct.[5]

[26] In that case, the General Division found that the claimant did not lose his job because of misconduct because the employer did not give him enough time to comply with the employer's verbal vaccination policy. He was not informed that he would be dismissed from his job if he failed to follow the policy. The facts in the present case are different and do not support such a conclusion.

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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] The Claimant is referring to the decision: *TC v Canada Employment Insurance Commission*, 2022 SST 891.

[27] 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 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

[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, where the Court stated that the *Canadian Human Rights Act* does not apply to personal choices or preferences.