



Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 1073

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

# **Leave to Appeal Decision**

**Applicant:** C. B.  
**Representative:** M. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated September 1, 2022  
(GE-22-1219)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** October 21, 2022  
**File number:** AD-22-716

## Decision

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

## Overview

[2] The Applicant (Claimant) worked at a hospital on a part-time basis. The employer dismissed her on October 22, 2021, because she did not comply with their COVID-19 vaccination policy (Policy) at work. The Claimant then applied for Employment Insurance (EI) benefits. The Respondent (Commission) decided that the Claimant was not entitled to receive EI benefits because she 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.

[3] The General Division determined that the Claimant was dismissed following her refusal to follow the employer's Policy. It found that the Claimant knew or ought to have known that the employer was likely to dismiss her in these circumstances. The General Division found that the non-compliance with the Policy was the cause of her dismissal. It concluded that the Claimant was dismissed from her job because of misconduct.

[4] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division did not decide if the employer's Policy was lawful or if it contravened any legal statutes. She puts forward that she listed many Provincial and Federal laws, which the policy contravened. The Claimant submits that Directive 6 only stated that employers have a COVID-19 policy and not that employees must receive the vaccine. She puts forward that she could not know that she would be let go because she performed her duties, asked for accommodation and raised

concerns that were not answered regarding the policy. The Claimant submits that her refusal to disclose her vaccination status does not establish misconduct.

[5] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[6] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

## **Issue**

[7] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

## **Analysis**

[8] 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.

[9] 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.

[10] 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?**

[11] The Claimant submits that the General Division did not decide if the employer's Policy was lawful or if it contravened any legal statutes. She puts forward that she listed many Provincial and Federal laws, which the Policy contravened. The Claimant submits that the Directive 6 only stated that employers have a COVID-19 policy and not that employees must receive the vaccine. She puts forward that she could not know that she would be let go by her employer because she performed her duties, asked for accommodation, and raised concerns that were not answered. The Claimant submits that her refusal to disclose her vaccination status does not establish misconduct under the law.

[12] The Claimant worked at a hospital on a part-time basis. The employer dismissed her on October 22, 2021, because she did not comply with the Policy at work. She was not exempt from the Policy.

[13] The General Division had to decide whether the Claimant was dismissed because of her 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 dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.<sup>1</sup>

[16] The General Division found that the Claimant was dismissed because she refused to follow the Policy at her workplace.

[17] The Ontario's Chief Medical Officer of Health issued Directive 6 under the *Health Protection and Promotion Act*, directing health care organizations to develop, implement and ensure compliance with a COVID-19 vaccination policy, effective September 7, 2021. This directive aimed to protect health care workers, patients and healthcare system capacity.

[18] The employer implemented a Policy. It indicates that a staff member that refuses to disclose their vaccination status or to comply with the Policy, without an approved exemption, may be disciplined up to and including termination of employment. It further states that a staff member, without an approved exemption, will be terminated if they refuse to be fully vaccinated after October 22, 2022.<sup>2</sup>

[19] The General Division found that the employer did not engage in a practice contrary to law by implementing a Policy and by applying the measures set out in the Policy. The Policy reflects the employer's obligations as a health care organization during the pandemic and is in line with Directive 6 from the Office of the Chief Medical Officer of Health for Ontario.<sup>3</sup>

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<sup>1</sup> *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

<sup>2</sup> See GD3-42 to GD3-43.

<sup>3</sup> See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675: In a constructive dismissal case, the Supreme Court of British Columbia found that the employer's mandatory vaccine 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.

[20] The General Division found that the Claimant had been informed of the Policy and was given time to comply. The Claimant did not have an approved exemption. The General Division found that the Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her dismissal.

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

[22] 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).<sup>4</sup>

[23] 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 he is seeking.<sup>5</sup>

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

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<sup>4</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>5</sup> 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.

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

[26] 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.<sup>6</sup>

[27] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.<sup>7</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 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.

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<sup>6</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

<sup>7</sup> 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.

## **Conclusion**

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

Pierre Lafontaine  
Member, Appeal Division