Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 1103

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated September 14, 2022 (GE-22-1746)

Tribunal member:	Pierre Lafontaine
Decision date:	October 28, 2022
File number:	AD-22-735

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. The employer dismissed him because he did not comply with its mandatory COVID-19 vaccination policy (Policy). The Claimant then applied for Employment Insurance (EI) benefits. The Respondent (Commission) decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his 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 his refusal to follow the employer's Policy. It found that the Claimant knew or should have known that the employer was likely to dismiss him in these circumstances. The General Division found that the non-compliance with the Policy was the cause of his dismissal. It concluded that the Claimant was dismissed from his job because of misconduct.

[4] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. He submits that the employer wrongfully denied his religious request for exemption and that he will not go against his religious faith to receive the vaccine. He submits that the employer's Policy was not part of his work contract and goes against his collective agreement. It also violates his Human Rights and Constitutional Rights. He submits that the employer did not even attempt to accommodate him. The Claimant puts forward that he is challenging the employer's policy through arbitration. The Claimants submits that the General Division made an error in law in its interpretation of 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 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.

[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 is requesting leave to appeal of the General Division's decision to the Appeal Division. He submits that the employer wrongfully denied his religious request for exemption and that he will not go against his religious faith to receive the vaccine. He submits that the employer's Policy was not part of his work contract and goes against his collective agreement. It also violates his Human Rights and Constitutional Rights. He submits that the employer did not even attempt to accommodate him. The Claimant puts forward that he is challenging the employer's policy through arbitration. The Claimants submits that the General Division made an error in law in its interpretation of misconduct.

[12] The evidence shows that the Claimant lost his job. The employer dismissed him because he did not comply with the Policy at work. The employer did not grant him a religious exemption from the Policy.[1]

[13] The General Division had to decide whether the Claimant was dismissed because of his misconduct.[2]

[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

[1] See GD7-6.
[2] Pursuant to sections 29 and 30 of the *Employment Insurance Act* that apply when a claimant loses his job because of misconduct. The General Division did not have to decide whether the Claimant voluntary left his employment under section 29(c) of the *Employment Insurance Act*.

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 his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.[3]

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

[17] The employer implemented a Policy for the protection of the health and safety of its workers, in accordance with its obligations under the *Occupational Health and Safety Act*. The employer's Policy indicates that employees who do not comply with the Policy may be subject to discipline, up to and including termination.[4] The employer sent an email, dated November 17, 2021, to all employees, stating that effective December 31, 2021, employees who remained unvaccinated would be terminated with cause, except for those with an approved accommodation or medical exemption.[5]

[18] The General Division found that the Claimant had been informed of the policy and was given time to comply. The employer did not grant the Claimant a religious exemption. The General Division found that the Claimant refused intentionally; this refusal was wilful. This was the direct cause of his dismissal. The General Division found that the Claimant knew or should have known that his refusal to comply with the Policy could lead to his dismissal.

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[3] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[4] See GD3-37 to GD3-42.
[5] See GD3-44. See also *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.

[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).[6]

[21] The Claimant submits that the employer should have accepted his request for an exemption from the vaccination policy based on his religious beliefs and that the employer failed to accommodate him, discriminated against him, and violated his constitutional rights, by forcing him to follow its Policy. Unfortunately, for the Claimant, 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.[7]

[22] 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.

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

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[6] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[7] 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.

[24] 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.[8]

[25] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[9] 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 his misconduct.

[26] 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.

[27] 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

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

Pierre Lafontaine
Member, Appeal Division

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

[9] 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.