



[TRANSLATION]

Citation: *NS v Canada Employment Insurance Commission*, 2022 SST 1280

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

# **Leave to Appeal Decision**

**Applicant:** N. S.  
**Representative :** J r mie Dhavernas

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated  
October 12, 2022 (GE-22-1448)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** November 28, 2022  
**File number:** AD-22-810

## Decision

[1] Permission to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant (Claimant) was suspended because she refused to follow the employer's COVID-19 vaccination policy. She applied for Employment Insurance (EI) benefits.

[3] The Respondent (Commission) denied her EI benefits because it found that the Claimant voluntarily took a leave of absence without just cause. Because of this, it disentitled her from receiving Employment Insurance (EI) benefits. The Claimant asked the Commission to reconsider its decision. The Commission upheld its initial decision. The Claimant appealed to the General Division.

[4] The General Division found that it was not a leave of absence without just cause, but a suspension for misconduct. It found that the Claimant refused to comply with the employer's policy. It decided that the Claimant knew or should have known that the employer was likely to suspend her in these circumstances and that her refusal was voluntary, conscious, and deliberate. The General Division found that the Claimant was suspended because of misconduct.

[5] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. The Claimant says that the General Division had to decide whether it was reasonable for the employer to apply the policy to her when she worked from home. She argues that the General Division had to decide whether the Claimant had the psychological element needed for misconduct, by refusing to follow a directive that was reasonable but not reasonably applied to her,

[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 had to decide whether it was reasonable for the employer to apply the policy to her when she worked from home. She argues that the General Division had to decide whether, by refusing to follow a directive that was reasonable but not reasonably applied to her, the Claimant had the psychological element needed for misconduct.

[13] The Claimant worked from home under an agreement with the employer from August 23, 2021, to December 31, 2022. In October 2021, the employer implemented a policy to protect the health and safety of workers from the dangers of COVID-19. The policy applies to employees working on site, remotely, and in hybrid mode. The Claimant did not comply with the employer's policy. The employer suspended her.

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

[15] 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, 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 suspending the Claimant in such a way that her suspension was unjustified. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[17] The General Division found that the Claimant was suspended because she failed to comply with the employer's policy in response to the pandemic. The employer told the Claimant about the policy it put in place to protect the health and safety of staff and she had time to comply with it. The General Division found that the Claimant wilfully

refused to follow the policy and that she did not get a medical exemption or an exemption for religious reasons. This was the direct cause of her suspension. The General Division found that the Claimant knew that her refusal to comply with the policy could lead to her suspension.

[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 within the meaning of the *Employment Insurance Act* (EI Act).<sup>1</sup>

[20] The issue of whether it was reasonable for the employer to impose a policy against COVID-19 for employees working from home during the pandemic is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.<sup>2</sup>

[21] It is not really in dispute that an employer is legally required to take all reasonable precautions to protect the health and safety of its employees in the workplace. It is not for the Tribunal to decide whether it was reasonable for the employer to extend that protection to employees working from home during the pandemic.

[22] As the Federal Court pointed out in *Paradis*, there are remedies to penalize an employer's behaviour other than having taxpayers pay for the employer's actions through EI benefits.<sup>3</sup>

[23] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant, who was working from home. She did not want to disclose to

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<sup>1</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>2</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; see also *RG v Canada Employment Insurance Commission*, AD-22-246; *SP v Canada Employment Insurance Commission*, AD-22-420.

<sup>3</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282: The Court said that there are remedies to penalize an employer's behaviour other than having taxpayers pay for the employer's actions through Employment Insurance (EI) benefits.

her employer whether she was vaccinated because she felt that this was private medical information. So, she refused to comply with the policy. She knew or should have known that the employer was likely to suspend her in these circumstances, and her refusal was intentional, conscious, and deliberate.

[24] The Claimant made a **personal and deliberate choice** not to follow the employer's policy in response to the exceptional circumstances created by the pandemic, and her employer suspended her because of this. The General Division could not find, on a balance of probabilities, that the Claimant's conduct was not conscious and deliberate.

[25] 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.<sup>4</sup>

[26] I am fully aware that the Claimant can seek compensation in another forum, if a violation is established. 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 for misconduct.

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

## **Conclusion**

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

Pierre Lafontaine  
Member, Appeal Division

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<sup>4</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.