[TRANSLATION]

Citation: *DB v Canada Employment Insurance Commission*, 2022 SST 1399

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 10, 2022 (GE-22-1932)

Tribunal member:	Pierre Lafontaine
Decision date:	December 6, 2022
File number:	AD-22-864

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) lost her job because she refused to follow the employer's COVID-19 vaccination policy (policy).

[3] The Respondent (Commission) decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving Employment Insurance (EI) benefits. The Claimant asked the Commission 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 or should have known that the employer was likely to dismiss her in these circumstances and that her non-compliance was intentional, conscious, and deliberate. The General Division decided that the Claimant lost her job because of misconduct.

[5] The Claimant seeks leave from the Appeal Division to appeal the General Division decision. She says that the employer's policy was discriminatory and violated human rights and freedoms and the *Canadian Charter of Rights and Freedoms* (Charter). She argues that her choice not to get vaccinated cannot be considered misconduct.

[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 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 employer's policy was discriminatory and violated human rights and freedoms and the Charter. She argues that her choice not to get vaccinated cannot be considered misconduct.

[13] The Claimant worked in health care. The employer put a policy in place to protect patients and employees during the pandemic. The Claimant did not comply with the employer's policy. The employer suspended and dismissed her.

[14] The General Division had to decide whether the Claimant lost her job 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 decide whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[17] The General Division found that the Claimant was dismissed because she did not comply with the employer's policy in response to the pandemic. She had been informed of the employer's policy and was given time to comply. The General Division found that the Claimant deliberately refused to follow the policy and that she did not get an exemption from her employer. This directly led to her dismissal. The General Division found that the Claimant knew or should have known 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 discriminated against the Claimant and failed to respect her rights and freedoms is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[2]

[21] In a recent case called *Paradis*, the claimant applied for judicial review of a decision by the Tribunal's Appeal Division. He argued that he did not commit misconduct, since the employer's drug and alcohol policy violated the *Alberta Human Rights Act*.

[22] The Federal Court decided that it was a matter for another forum. It noted that there are available remedies to sanction the behaviour of an employer other than by way of EI benefits.[3]

[23] The evidence shows, on a balance of probabilities, that the employer's policy applied to the Claimant, who worked in health care. She refused to comply with the policy. She knew or should have known that the employer was likely to dismiss her in these circumstances, and her non-compliance 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 this resulted in her dismissal.

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[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 found that it was a matter for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36: The Court indicated that the employer's duty to accommodate is not relevant to determining misconduct under the *Employment Insurance Act*.
[3] See *Paradis*, above, at para 34.

[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.[4]

[26] I am fully aware that the Claimant may seek relief in another forum if a violation is established.[5] 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 misconduct.

[27] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, I find 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] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

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