Citation: *SV v Canada Employment Insurance Commission*, 2022 SST 1250

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. V.
Representative:	James S.M. Kitchen
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 12, 2022 (GE-22-1628)

Tribunal member:	Pierre Lafontaine
Decision date:	November 14, 2022
File number:	AD-22-740

Decision

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

Overview

[2] The Applicant (Claimant) was put on an unpaid leave of absence from work because she did not comply with the employer's COVID-19 vaccination policy (Policy). The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the employer put the Claimant on an unpaid leave of absence because the Claimant did not comply with their Policy. It determined that the Claimant was suspended following her refusal to follow the employer's Policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances. The General Division found that the non-compliance with the Policy was the cause of her suspension. It concluded that the Claimant was suspended from her job because of misconduct.

[5] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division committed both errors of law and jurisdiction when it concluded that she had lost her job because of 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 the General Division committed both errors of law and jurisdiction when it concluded that she had lost her job because of misconduct.

[13] More precisely, the Claimant submits the following:

> - The General Division made a finding of misconduct notwithstanding the Claimant's employer did not dismiss her or take any other disciplinary action against her;
>
> - The employer did not regard the Claimant's "choice" to decline the COVID vaccines as warranting discipline and did not "suspend" her as a means to enforce its new requirement through discipline, but rather placed her on an indefinite administrative leave until circumstances changed;
>
> - The mere spectre of dismissal from a statement in a policy that is not referred to or relied upon by the employer in dealing with an employee is not enough—it is not a "real possibility" of dismissal;
>
> - Declining to receive the COVID vaccine is, objectively, not behaviour which is incompatible with a continuing employment relationship. If it were, the Claimant's employer would have disciplined the Claimant and eventually dismissed her;
>
> - It is beyond the jurisdiction of the General Division to make a determination as to whether an "unpaid leave" imposed by an employer on an employee is administrative in nature or disciplinary in nature. Such a determination is for a judge or a labour arbitrator to determine;
>
> - The General Division Member engaged in a results-oriented decision-making by her "personal convictions" that a workforce COVID vaccine mandate is good policy and the Claimant deserved to be disciplined for not receiving the COVID vaccines.

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

[16] 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 was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.[1]

[17] The evidence shows that the Claimant was suspended (prevented from working) because she refused to follow the employer's Policy. She had been informed of the employer's Policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. 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 concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

[19] 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]

---

[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.

[20] The Claimant submits that it is beyond the jurisdiction of the General Division to make a determination as to whether an "unpaid leave" imposed by an employer on an employee is administrative in nature or disciplinary in nature. She puts forward that such a determination is for a judge or a labour arbitrator to determine.

[21] The Claimant further submits that the General Division made a finding of misconduct notwithstanding the Claimant's employer did not dismiss her or take any other disciplinary action against her. She puts forward that the employer did not regard the Claimant's "choice" to decline the COVID vaccines as warranting discipline and did not "suspend" her as a means to enforce its new requirement through discipline, but rather placed her on an indefinite administrative leave until circumstances changed.

[22] I see no reviewable error because it was up to the General Division to verify and interpret the facts of the present case and make its own assessment on the issue of misconduct under the EI Act. The reasons given by an employer in no way binds the General Division.[3] Furthermore, it was not necessary for the General Division to make a determination as to whether the "unpaid leave" imposed by the employer on an employee was administrative in nature or disciplinary in nature. An employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[4]

[23] The Claimant submits that the mere spectre of dismissal from a statement in a policy that is not referred to or relied upon by the employer in dealing with an employee is not enough—it is not a "real possibility" of dismissal.

[24] I note that the Claimant testified before the General Division that she knew she could be placed on an unpaid leave of absence and possibly lose her job if

[3] *J. S. v Canada Employment Insurance Commission*, 2015 SSTAD 447
[4] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.

she did not receive the vaccine and did not have an exemption. This ground of appeal has no reasonable chance of success.

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

[26] The preponderant evidence before the General Division shows that 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 being suspended from work.

[27] 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.[5]

[28] 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 because of her misconduct.

[29] The Claimant further submits that the General Division Member engaged in a results-oriented decision-making by her "personal convictions" that a workforce COVID vaccine mandate is good policy and the Claimant deserved to be disciplined for not receiving the COVID vaccines.

---

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

[6] 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.

[30] An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.[7]

[31] The Claimant bases her allegation of bias on paragraphs 16 and 49 of the General Division decision, and on the General Division Member's repeated references to and reliance upon comments that the Claimant made at various points in time, but did not form any part of the submissions of her counsel at the hearing.[8]

[32] I note that the Claimant's representative argued that the Claimant's employer placed her on an administrative leave that is not disciplinary. In support of this position, he relied on a *Supreme Court of Canada* (SCC) decision.[9] In that case, the employer placed the employee on an administrative suspension. It did so to protect their business interest pending the outcome of criminal charges against their employee not related to the employer.

[33] In paragraph 16 of its decision, the General Division Member determined that in the Claimant's case, her employer required her to do something that she declined to do. Because of this, the employer put the Claimant on an unpaid leave of absence. She concluded that the SCC decision did not apply to the Claimant's situation.

---

[7] *Arthur v Canada (Attorney General)*, 2001 FCA 223.
[8] The Claimant refers to paragraphs 40-42 and 49 of the General Division Decision.
[9] *Cabiakman v Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, 2004 SCC 55.

[34] In paragraph 49, the General Division Member found it reasonable that the employer implemented a policy in line with the directive from provincial health authorities "to protect the health and safety of its staff and patients".

[35] In regards to paragraphs 40, 42 and 49 of its decision, the Member refers to the testimony of the Claimant to determine that the Claimant did not agree with the employer's Policy and wished the employer had accommodated her by allowing her to take rapid antigen tests.

[36] I see no error made by the General Division Member when it refers in its decision to oral evidence presented by the Claimant during the hearing. The counsel's submissions cannot prevent the General Division Member from considering in its decision the evidence presented to her.

[37] I see no evidence to support a conclusion that the Member engaged in a results-oriented decision-making based on her "personal convictions".

[38] I am of the view that there is no material evidence demonstrating conduct from the General Division member that derogates from the standard. I must reiterate that such an allegation cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of a claimant.

[39] 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.

[40] 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

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

Pierre Lafontaine
Member, Appeal Division