Citation: *RN v Canada Employment Insurance Commission*, 2022 SST 1536

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 6, 2022 (GE-22-2689)

Tribunal member:	Pierre Lafontaine
Decision date:	December 29, 2022
File number:	AD-22-798

Decision

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

Overview

[2] The Applicant (Claimant) was suspended from her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant her an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended because of misconduct. 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 suspended the Claimant because she did not comply with their 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 errors of fact and law when it concluded that she was suspended 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 errors of fact and law when it concluded that she was suspended from her job because of misconduct.

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

- She is still an employee with an active grievance in place;

- Only a non-unionized employee can be deemed to be on unpaid infectious disease emergency leave. She is a member of union and did not request a leave;

- She is protected by privacy laws;

- Being unvaccinated is not a behavior and she was still able to carry out her work duties.

- She has the right to an informed consent and refraining from medical treatment is not misconduct;

- The vaccination requirement was not part of her employment contract. There has been no amendment of the collective agreement to include a COVID vaccination requirement;

- Using threats and coercion to force a vaccine is a breach of her employment contract by the employer;

- The employer offered no reasonable alternatives;

- Section 29(c) of the *Employment Insurance Act* (EI Act) should apply to her case;

- She did not request leave, and became unemployed by no fault of her own; her employer had no right to require her to be vaccinated as it was not part of her contract of employment at the time of hire;

-She deserves the same treatment as a vaccinated person and every government decision in Canada is required by common law and due process to be fair and reasonable;

- According to the Service Canada website, if a leave is imposed by the employer, it is considered a lay-off. A disentitlement is not to be imposed;

[14] The Claimant puts forward that the General Division made an error when it did not apply section 29(c) of the EI Act to her situation. She also argues that according to the Service Canada website, if a leave is imposed by the employer, it is considered a lay-off. A disentitlement is not to be imposed.

[15] It is important to reiterate that the Service Canada website is an interpretive guide that is not legally binding on the Tribunal. A policy simply reflects the opinion of the administrator who acts under the law. That opinion does not necessarily correspond to the law.[1] 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 before it.

[16] The evidence shows that the employer prevented the Claimant from working starting October 15, 2021. The employer stopped the Claimant from working despite the fact that there was work. The Claimant recognized that she did not request a leave of absence and would have continued working if not for the Policy.

[17] It is clear from the preponderant evidence that the Claimant did not request leave and that she did not voluntary leave her employment. Section 29(c) of the EI Act does not apply in her case. The Claimant could have continued work if not for her refusal to follow the Policy. Therefore, the General Division had to decide whether the Claimant was suspended from her job because of misconduct.[2]

[18] 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

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[1] *Canada (Attorney General) v Greey*, 2009 FCA 296, *Canada (Attorney General) v Savard*, 2006 FCA 327.
[2] Within the meaning of sections 29 and 30 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.

[19] It is well established that 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.[3]

[20] The evidence shows that the Claimant worked as a nurse for more than 20 years. The General Division found that she was suspended because she refused to follow the employer's Policy that had been implemented to protect staff and clients during the pandemic. She had been informed of the employer's Policy that was in effect and was given time to comply. She was not granted an exemption. The General Division found that 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.

[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 EI Act.[4]

[23] The Claimant submits that she did not request leave and that only a non-unionized employee could be deemed to be on unpaid infectious disease emergency leave.

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[3] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[24] It was not necessary for the General Division to make a determination as to whether the employer could put the Claimant on an "unpaid leave" for refusing to follow their Policy. It is well established that an employer's discipline procedure is irrelevant to determine misconduct under the EI Act.[5]

[25] The Claimant further submits that the General Division did not consider that the employer failed to accommodate her, and that the Policy was unreasonable, ineffective, and violated her collective agreement and constitutional rights.

[26] It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace. This Tribunal does not have the jurisdiction to decide whether the employer's health and safety measures regarding COVID-19 where efficient or reasonable.

[27] In the present case, the employer followed the Ontario Chief Medical Officer of Health's recommendations in order to implement its own Policy to protect the health of all employees and clients during the pandemic. The Policy was in effect when the Claimant was suspended. It is considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.[6]

[28] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated her collective agreement and constitutional rights, 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.[7]

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[5] *Houle v Canada (Attorney General)*, 2020 FC 1157; *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[6] CUB 71744, CUB 74884.
[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

[29] In the recent *Paradis* case, the Claimant was refused EI benefits because of misconduct. He argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[30] The Federal Court also stated that there are available remedies for a claimant to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Employment Insurance Program.[8]

[31] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[32] I must reiterate that 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 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.

[33] 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.

[34] 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.[9]

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forum; See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

[8] I note that the Claimant has filed a grievance alleging that the employer violated her collective agreement and requesting that all leaves of absence under the policies to be rescinded and all employees be reinstated.

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

[35] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.[10] 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 misconduct.

[36] 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.

[37] 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

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

Pierre Lafontaine
Member, Appeal Division

[10] 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);