



Citation: *BV v Canada Employment Insurance Commission*, 2022 SST 1267

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

# **Leave to Appeal Decision**

**Applicant:** B. S.  
**Representative:** D. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated October 11, 2022  
(GE-22-2091)

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**Tribunal member:** Pierre Lafontaine

**Decision date:** November 28, 2022  
**File number:** AD-22-821

## Decision

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

## Overview

[2] The Applicant (Claimant) lost 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) determined that the Claimant lost her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost her job following her refusal to follow the employer's Policy. The employer did not grant her an exemption. It found that the Claimant knew that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant lost her job because of misconduct.

[5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. She submits that the General Division made an error in its interpretation of misconduct when considering Canadian case law. She argues that not every incident of misconduct constitutes cause for dismissal. She submits that a simple refusal to get a COVID-19 vaccine is not an illegal activity and does not suffice as willful misconduct, particularly when an employer has not offered to accommodate any employee who refuses to disclose their status or to get vaccinated. The Claimant submits that her employer's Policy violated her constitutional rights.

[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 made an error in its interpretation of misconduct when considering Canadian case law. She argues that not every incident of misconduct constitutes cause for dismissal. She submits that a simple refusal to get a COVID-19 vaccine is not an illegal activity and does not suffice as willful misconduct, particularly when an employer has not offered to accommodate any employee who refuses to disclose their status or to get vaccinated. The Claimant submits that her employer's Policy violated her constitutional rights.

[13] The General Division had to decide whether the Claimant lost her job because of her misconduct.

[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 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 her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.<sup>1</sup>

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<sup>1</sup> *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[16] The General Division determined that the Claimant lost her job because she refused to be vaccinated in accordance with the employer's Policy. She had been informed several times of the employer's Policy and was given time to comply. She was not granted an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her dismissal.

[17] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

[18] 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).<sup>2</sup>

[19] The Claimant submits that the General Division refused to exercise its jurisdiction on the issues of whether the employer failed to accommodate her and whether the employer's Policy violated her rights.

[20] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated her rights, or whether the employer should have accepted her request for an exemption, 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.<sup>3</sup>

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

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<sup>2</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>3</sup> 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.

matter for another forum. The 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.

[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 employer's Policy in response to the exceptional circumstances created by the pandemic and this resulted in her being dismissed from work.

[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.<sup>4</sup>

[25] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.<sup>5</sup> 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 from her job because of her misconduct.

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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.

<sup>5</sup> 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 *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; 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.

[26] 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.

[27] 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**

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

Pierre Lafontaine  
Member, Appeal Division