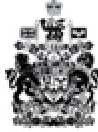

Citation: *MC v Canada Employment Insurance Commission*, 2022 SST 1502

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	M. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 23, 2022 (GE-22-1606)

Tribunal member:	Pierre Lafontaine
Decision date:	December 20, 2022
File number:	AD-22-881

Decision

[1] An extension of time to file the application for leave to appeal is granted. However, leave to appeal is refused. This means the appeal will not proceed.

Overview

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

[3] The Respondent (Commission) determined that the Claimant was suspended and 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 was suspended and lost her job following her refusal to follow the employer's Policy. It found that her request for an exemption based on her religious beliefs was denied. It found that the Claimant knew that the employer was likely to suspend and dismiss her in these circumstances. The General Division concluded that the Claimant was suspended and 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 she was wrongfully dismissed. It was not part of her employment contract to receive the COVID-19 vaccine. The Claimant submits that her request for a religious exemption was ignored. She submits that the employer could have accommodated her with ongoing testing. The Claimants submits that the Policy violated her human and constitutional rights.

[6] I must decide whether I will grant the Claimant an extension of time to file her application for leave to appeal, and if so, whether she has raised some reviewable error of the General Division upon which the appeal might succeed.

[7] I am granting the Claimant an extension of time to file her application. However, I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issues

[8] Should an extension of time to file the leave application be granted?

[9] If so, does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[10] 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.

[11] 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.

[12] 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.

Should an extension of time to file the leave application be granted?

[13] The Claimant received the General Division decision on September 23, 2022. She filed her application for leave to appeal on November 26, 2022. The Claimant did not file her application within 30 days after she received the General Division decision. Her application is late.

[14] The Tribunal gives more time to appeal if a claimant has a reasonable explanation for why they are late.[1]

[15] The Claimant explains that she was under the impression she had won her appeal to the General Division because of its favorable conclusion on the other issue of availability. She was later informed by the Tribunal that she had lost on the issue of misconduct. She therefore needed to appeal that decision.

[16] I find that the Claimant has a reasonable explanation for why she is late in filing her application for leave to appeal.

[17] I am therefore granting her an extension of time to file the leave to appeal application.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[18] The Claimant submits that she was wrongfully dismissed. It was not part of her employment contract to receive the COVID-19 vaccine. The Claimant

[1] See article 27(2) of the *Social Security Tribunal Rules of Procedure*.

submits that her employer ignored her request for a religious exemption. She submits that the employer could have accommodated her with ongoing testing. The Claimants submits that the Policy violated her human and constitutional rights.

[19] The General Division had to decide whether the Claimant was suspended and lost her job because of misconduct.

[20] 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.

[21] 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 and dismissing the Claimant in such a way that her suspension and dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension and dismissal.[2]

[22] The General Division determined that the Claimant was suspended and lost her job because she refused to be vaccinated in accordance with the employer's Policy. She had been informed 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 suspension and dismissal. The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her suspension and dismissal.

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

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[2] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[24] 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).[3]

[25] 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.

[26] The question of whether the employer failed to accommodate the Claimant by refusing her request for an exemption based on her religious beliefs or by not allowing ongoing testing, or whether the Policy violated her human 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.[4]

[27] 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.

[28] 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.

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[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

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

[29] 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 and dismissed from work.

[30] 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]

[31] 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 and dismissed because of misconduct.

[32] 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.

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[5] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[6] 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.

[33] 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

[34] An extension of time to file the Claimant's application for leave to appeal is granted. However, leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division