Citation: *WK v Canada Employment Insurance Commission*, 2022 SST 1532

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | W. K. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated November 8, 2022 (GE-22-2750) |

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| **Tribunal member:** | Pierre Lafontaine |
| **Decision date:** | December 23, 2022 |
| **File number:** | AD-22-887 |

## Decision

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

## Overview

[2] The Applicant (Claimant) lost his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant him an exemption for religious of medical reasons. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant lost his job 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 dismissed the Claimant because he did not comply with their Policy. It found that the Claimant knew that the employer was likely to dismiss him in these circumstances. The General Division found that the non-compliance with the Policy was the cause of his dismissal. It concluded that the Claimant was dismissed from his 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 he had lost his 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 his 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 he had lost his job because of misconduct.

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

> - The General Division made an error by ignoring that the employer acted in bad faith by not following through with their obligation on Covid-19 exemptions;
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> - The General Division did not consider that the employer never intended to accommodate in good faith and in accordance with their communications, staff working remotely;
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> - The exit interview shows that the employer never meant to remain faithful to their announcements from August 25 and September 13, 2021, on vaccination requirement not mandatory for remote workers;
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> - The employer deliberately neglected to follow a process of duty to accommodate under the *Ontario Human Rights Code* (OHRC) and the *Canadian Human Rights Act* (CHRA);
>
> - - The General Division neglected to consider section 29(c) of *Employment Insurance Act* (EI Act);
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> - The employer's blanket response in their exemption denial letter lacks credible science, is ambiguous, biased, and evident for not meaning to accommodate to the point of undue hardship;
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> - The employer violated sections 57, 58, of the *Employment Standards Act* by not meeting the requirements of reasonable termination notice in a mass termination event;
>
> - The employer illegally reduced his wages or altered another term or condition of employment during the notice period;
>
> - The General Division failed, in its decision, to meet the criteria of 'misconduct', as it relates to an act of violation of his obligations set out in his employment contract, and failed to establish the relevance on how his conduct got in a way of carrying out his duties owed to his employer, especially when he has demonstrated that he can perform all his duties working exclusively from home, effectively and safely since March 2020;

- Recent court rulings have found mandatory vaccine policies contrary to law and called them unreasonable to the extent that its provisions allow for discipline, up to including a discharge of employees who remain unvaccinated while working from home;

- To this day, no scientific medical evidence exists to support the employer's claim. To the contrary, it is abundantly clear that Covid-19 vaccination neither protects nor prevents Covid-19 infection or transmission;

- The implementation of a disciplinary dismissal clause in the Covid-19 policy contravenes the *Occupational Health and Safety Act*, which states the employee is not required to participate in any communicable disease surveillance protocol (i.e., Covid-19 policy is an infection surveillance, prevention, and control program), unless the employee consents to do so;

- The employer's Covid-19 policy provisions force the disclosure of employee's mRNA gene treatment and/or results from antigen and/or PCR testing which are genetic in nature and prohibited under the CHRA;

- Medical testing has been found to be a violation of employee rights under OHRC similar to drug and alcohol testing; The prohibition of such practice is further underlined by the *Canada labour Code*;

- The enforcement of Covid-19 testing does not have any benefit in stopping the spread or transmission of virus as we know it and, more importantly, has no impact on performance;

- The disciplinary dismissal provision of the policy gives the employer no legal ground for terminating his employment for 'just cause' as Covid-19 treatment is neither an obligation under his employment contract nor was it ever part of the corporate immunization policy;

- The policy is unreasonable and excessive as it offers no alternative and legitimate choices, especially for employees who do not work in a high-risk clinical setting and work exclusively from home;

- Health decisions are personal and private in nature and are not owed to anyone, not even an employer; therefore his actions must not be judged as 'misconduct' by the very fundamental virtue of the Constitution and *Charter Rights and Freedoms*;

[14] The Claimant puts forward that the General Division made an error when it neglected to consider section 29(c) of the EI Act.

[15] The Claimant's Record of Employment indicates that he was dismissed from his job. The employer confirmed to the Commission that the Claimant was terminated for not following its Policy. The Claimant mentioned on several occasions that he was dismissed because he did not follow the Policy.

[16] It is clear from the preponderant evidence that the Claimant did not voluntarily leave his employment. The employer ended his contract of employment. Therefore, section 29(c) of the EI Act does not apply in his case.

[17] The General Division had to decide whether the Claimant lost his job because of misconduct.[1]

[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 such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[19] The Federal Court of Appeal has 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 dismissing the Claimant in such a way that his dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal.[2]

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[1] Within the meaning of sections 29 and 30 of the *Employment Insurance Act*.
[2] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[20] The General Division found that the Claimant worked for the employer as an Information Technology (IT) Analyst. He was dismissed because he refused to follow the employer's Policy that had been implemented to protect staff and clients during the pandemic. It found that he had been informed of the employer's Policy that was in effect and was given time to comply. He was not granted an exemption for religious or medical reasons. The General Division found that the Claimant refused intentionally; this refusal was wilful. This was the direct cause of his dismissal.

[21] The General Division found that the Claimant knew or ought to have known that his refusal to comply with the Policy could lead to his dismissal.

[22] The General Division based its finding on the employer's update dated September 22, 2021, that says that employees who are not vaccinated by the October 22, 2021 deadline, and do not have an approved exemption, will be dismissed from their employment.

[23] The General Division considered that on October 4, 2021, the Claimant's request for an exemption was denied on the following basis: incomplete submissions, personal choice and not creed or religion. It considered that the employer did not accommodate the Claimant because he worked from home. The General Division considered that the Claimant did not provide the employer with proof of vaccination by the deadline and, in the November 2, 2021 letter, the employer told him that his employment was terminated.[3]

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

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[3] The Claimant relies on the case of *DL v Canada Employment Insurance Commission* - 2022 SST 281. This case is not binding on other General Division members nor the Appeal Division. Furthermore, in that case, the employer did not seriously consider the Claimant's request for an exemption based on religious beliefs, even though she had a letter from her religious leader. In the present case, the employer did consider the Claimant's request and denied it because not based on religious or medical reasons. The request was rather seeking an accommodation to work from home. See GD3-57 to GD3-59.

[25] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[4]

[26] The Claimant submits that the General Division made an error in determining that the Policy was part of his contract of employment. He submits that he did not breach his employment contract. He was able to perform his duties owed to his employer.

[27] 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. It is not for the Tribunal to decide questions about the vaccine's effectiveness or the reasonableness of the employer's Policy that applies to workers working remotely and teleworking.

[28] However, I note that in their previous announcements from August 25 and September 13, 2021, the employer stated that employees might be recalled back to the worksite at any given time. The Claimant also stated that prior to the pandemic, he worked two or three days a week at the office.[5] The employer confirmed that although the Claimant worked from home during the pandemic, he could be mandated to return to the worksite, and therefore needed to be vaccinated.[6]

[29] In the present case, the employer followed the Ontario's Chief Medical Officer of Health recommendations in order to implement its own Policy to protect the health of all employees and clients during the pandemic. The Policy applied to the Claimant working from home and was in effect when the Claimant was dismissed. It is considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.[7]

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[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[5] See GD3-46.
[6] See GD3-67.
[7] CUB 71744, CUB 74884.

[30] The question of whether the employer failed to accommodate the Claimant by not allowing him to work from home, or whether the employer's Policy violated the Claimant's human and constitutional rights, or whether the employer violated other work related legislation, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.[8]

[31] 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. 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.

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

[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 him being dismissed 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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[8] 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.

[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 dismissed because of misconduct.

[36] In his 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. He 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 his 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 the Claimant has instituted legal action against his former employer: See GD3-25 to GD3-45.