



Citation: *KW v Canada Employment Insurance Commission*, 2023 SST 61

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: K. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 27, 2022
(GE-22-1896)

Tribunal member: Pierre Lafontaine

Decision date: January 24, 2023

File number: AD-22-845

Decision

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

Overview

[2] The Applicant (Claimant) was suspended and dismissed 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 dismissed from her 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 she did not comply with their Policy. It found that the Claimant knew or should have known that the employer was likely to dismiss her in these circumstances. The General Division found that the non-compliance with the Policy was the cause of her dismissal. It concluded that the Claimant was dismissed 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 she had the right to refuse the vaccination as a free Canadian. She submits that workplace policies in place and deemed reasonable one year ago are likely no longer considered reasonable and haven't been for months. It is now documented that vaccinated people can give and catch COVID.

[6] The Claimant submits that she lost her job based on wrong information provided by Health Canada. She submits that the employer should have accommodated her by allowing her to work from home like other staff. The Claimant submits that she was not treated equally by her employer.

[7] I must decide whether the Claimant has raised some reviewable error of the General Division upon which the appeal might succeed.

[8] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[9] 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.

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

[13] The Claimant is requesting leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that she had the right to refuse the vaccination as a free Canadian. She submits that workplace policies in place and deemed reasonable one year ago are likely no longer considered reasonable and haven't been for months. It is now documented that vaccinated people can give and catch COVID.

[14] The Claimant submits that she lost her job based on wrong information provided by Health Canada. She submits that the employer unilaterally changed her contract of employment. The Claimant submits that the employer should have accommodated her by allowing her to work from home like other staff. She submits that she was not treated equally by her employer.

[15] The General Division had to decide whether the Claimant was dismissed because of misconduct.¹

[16] 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.

[17] 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 dismissing the Claimant in such a way that her dismissal was unjustified, but rather

¹ Within the meaning of sections 29 and 30 of the Employment Insurance Act.

of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.²

[18] The evidence shows that the Claimant was suspended and dismissed because she refused to follow the employer's Policy that had been implemented to protect staff and students 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 Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal. The General Division found that the Claimant knew or should have known that her refusal to comply with the Policy could lead to her dismissal.

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

[20] 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

[21] The Claimant submits that the General Division made an error in determining that the Policy was part of her contract of employment. She never gave her consent to the new Policy. Therefore, no breach occurred. There can be no misconduct when a unilaterally introduced Policy is not recognized.

[22] 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 were efficient or reasonable. The Policy was in effect when the Claimant was suspended and dismissed.

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

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

[23] Employees cannot change a policy, amend or ignore it, because of their personal view on the safety guidelines. If every worker were allowed to apply their subjective view to public safety, it would be impossible for an employer to manage their day-to-day operations. It is considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.⁴

[24] The question of whether the employer failed to accommodate the Claimant, or whether the employer's Policy violated the Claimant's human 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.⁵

[25] 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.

[26] 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.

[27] 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.

[28] 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.⁶

⁴ CUB 71744, CUB 74884.

⁵ 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.

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

[29] I am fully aware that the Claimant may seek relief before another forum, if a violation is established.⁷ 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 her misconduct.

[30] The Claimant submitted a General Division decision in support of her position. However, that case does not apply to the Claimant because she clearly knew that she would be terminated if she was not fully vaccinated or refused to follow the testing rules.⁸

[31] 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.

[32] 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.

⁷ 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.

⁸ *DL v Canada Employment Insurance Commission*, 2022 SST 281. The other case cited by the Claimant, *AL v Canada Employment Insurance Commission* - 2022 SST 1428, is contrary to the Appeal Division case law. The Commission has filed an application for leave to appeal to the Appeal Division.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division