Citation: *NE v Canada Employment Insurance Commission*, 2022 SST 1494

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated November 30, 2022 (GE-22-2718)

Tribunal member:	Pierre Lafontaine
Decision date:	December 19, 2022
File number:	AD-22-900

Decision

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

Overview

[2] The Applicant (Claimant) was suspended from his job because he did not comply with the employer's COVID-19 policy (Policy). He was not granted an exemption for medical or religious reasons. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits. 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 Claimant was suspended from his job because he did not comply with the employer's Policy. It found that the Claimant knew or should have known that the employer was likely to suspend him in these circumstances. The General Division found that the non-compliance with the Policy was the cause of his suspension. It concluded that the Claimant was suspended 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 did not send him documents despite saying that it would. He submits that the General Division did not make the employer's communications available to him. The Claimant submits that the Claimant rejected evidence that contradict its decision. He submits that the General Division based its decision on evidence that did not exist. The Claimant submits that the Commission did not meet its burden of proving 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 did not send him documents despite saying that it would. He submits that the General Division did not make the employer's communications available to him. The Claimant submits that the Claimant rejected evidence that contradict its decision. He submits that the General Division based its decision on evidence that did not exist. The Claimants submits that the Commission did not meet its burden of proving misconduct.

[13] In view of the Claimant's grounds of appeal, I proceeded to listen to the General Division hearing.

[14] The Claimant mentioned to the General Division that he was no longer in possession of the docket of appeal. The General Division member offered the Claimant the possibility to adjourn the hearing in order for him to receive another copy of the docket. The Claimant advised the member that he was comfortable in proceeding and declined to adjourn the hearing. The General Division member then advised the Claimant to bring up any issues during the hearing. The Claimant did not raise any issues before or after the hearing. I therefore find no violation of a principle of natural justice. This ground of appeal has no reasonable chance of success.

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

[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] 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 his suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to his suspension.[1]

[18] The evidence shows that the Claimant was suspended (prevented from working) because he refused to follow the employer's Policy. He had been informed of the employer's Policy and was given time to comply. He was not granted an exemption for medical or religious reasons. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of his suspension. The General Division found that the Claimant knew or should have known that his refusal to comply with the policy could lead to his suspension.[2]

[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 raises the question of whether the General Division refused to exercise its jurisdiction by not deciding whether applying the employer's Policy to him was reasonable given the fact that he worked from home.

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[1] *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.
[2] See GD3-28:The client stated he was aware that if he did not comply with the company policy he would be terminated. See also GD3-29: The employer also explained that the Claimant was verbally advised on 09/09/2021 that he would be placed on leave for failure to comply with the policy.
[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[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. It is not for the Tribunal to decide whether it was reasonable for the employer to extend this protection to employees working from home during the pandemic.

[23] I therefore find no error in the General Division's determination that it has no jurisdiction to decide questions about the efficiency or reasonableness of the employer's Policy that applies to workers working remotely and teleworking.

[24] The question of whether the employer failed to accommodate the Claimant, or whether the Policy violated his rights and employment contract, 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.[4]

[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 him being suspended from work.

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[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.

[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.[5]

[29] 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 because of his misconduct.

[30] 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.

[31] 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.

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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.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division