Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 141

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 9, 2022 (GE-22-2381)

Tribunal member:	Neil Nawaz
Decision date:	February 10, 2023
File number:	AD-23-3

Decision

[1] I am refusing the Claimant permission to appeal because she does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant, J. M., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant works in an administrative support role for X. She was suspended after she refused to disclose to her employer whether she had received the COVID-19 vaccination. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her employer's policy amounted to misconduct.

[4] The General Division agreed with the Commission. It found that the Claimant had deliberately broken her employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in a suspension.

[5] The Claimant is now seeking permission to appeal the General Division's decision. She says that the General Division made legal errors when it decided that she was disentitled to EI benefits. She argues that the General Division failed to realize that sections 30 and 31 of the *Employment insurance Act* violate the doctrine against vagueness implicit in the *Canadian Charter of Rights and Freedoms* (Charter).

[6] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the Claimant doesn't have an arguable case, this matter ends now.

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[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] See *Fancy* v *Canada (Attorney General)*, 2010 FCA 63.

Issue

[7] Is there an arguable case that the General Division made an error when it found that the Claimant's refusal to disclose her vaccination status amounted to misconduct?

Analysis

[8] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

The General Division did not misinterpret the law

[9] The Claimant argues that there was no misconduct because she had no obligation to disclose her medical information to her employer. She says that, by forcing her to do so under threat of suspension or dismissal, her employer infringed her Charter rights.

[10] I don't see a case for this argument.

[11] The General Division defined misconduct as follows:

> Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.
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> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[3]

[3] See General Division decision, paragraphs 17 and 18.

These extracts show that the General Division accurately summarized the law around misconduct. The General Division then correctly applied that law to the following findings:

- The Claimant's employer adopted and communicated a clear mandatory vaccination policy requiring employees to attest to their vaccination status;
- The Claimant was aware that failure to comply with the policy by a certain date would cause a loss of employment;
- The Claimant confirmed that she refused to disclose to her employer whether she had been vaccinated; and
- The Claimant confirmed that she later refused to get tested or confirm that she had been vaccinated.

[12] The General Division concluded that the Claimant was guilty of misconduct because her actions were deliberate, and they led to her dismissal: "She knew that refusing to follow the testing rules was likely to cause her to lose her job."[4]

The General Division did not ignore the Claimant's arguments

[13] The Claimant alleges that the General Division failed to address her allegation that her employer's vaccination policy is unconstitutional. She also alleges that, because the vaccination policy is illegal, her refusal to follow it cannot be characterized as misconduct.

[14] I don't see an arguable case for these allegations.

[15] The General Division referred to the Claimant's Charter argument in paragraph 7 of its decision. The General Division didn't explicitly address that argument, but it suggested that the legality of an employer policy was irrelevant for the purpose of determining EI entitlement:

> The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or

[4] See General Division decision, paragraph 30.

> failed to do and whether that amounts to misconduct under the Act.
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> I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[5]

[16] These statements accurately reflect the law. That is because the Federal Court of Appeal has ruled that the legitimacy of an employer policy is beyond the Tribunal's jurisdiction.[6] Whether Claimant's employer policy violated her constitutional rights to bodily autonomy and freedom of choice is a matter for another forum. Here, the only questions that matter are whether the Claimant breached the policy and whether that breach was wilful and foreseeably likely to result in dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

Conclusion

[17] I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This means that the appeal will not proceed.

Neil Nawaz
Member, Appeal Division

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[5] See General Division decision, paragraphs 19 and 20.
[6] See *Canada (Attorney General) v Marion,* 2002 FCA 185 and *Canada (Attorney General) v Caul*, 2006 FCA 251. The principle from these cases was recently reaffirmed in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.