



Citation: *GM v Canada Employment Insurance Commission*, 2023 SST 154

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: G. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 9, 2022
(GE-22-2870)

Tribunal member: Neil Nawaz

Decision date: February 14, 2023

File number: AD-23-4

Decision

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

Overview

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

[3] The Claimant worked as technical support analyst for a telecommunications company. On February 1, 2022, his employer placed him on an unpaid leave of absence after he refused to provide proof that he had 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 his failure to comply with his employer's vaccination policy amounted to misconduct.

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

[5] The Claimant is now seeking permission to appeal the General Division's decision. He says that the General Division made legal errors when it decided that he was disentitled to EI benefits. He argues that the General Division did not apply the law properly and makes the following points:

- He never signed anything saying that he had to be vaccinated to do his job;
- His employer's code of conduct said nothing about disclosing his health history or having to get vaccinated;
- He worked from home after March 2020 and had no contact with clients or other co-workers; and
- The General Division never specified what law permits an employer to demand that their employees be vaccinated, even if they work from home.

[6] Before the Claimant can move ahead with his 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.

Issue

[7] Is there an arguable case that the General Division made an error when it found that the Claimant's refusal to show proof of vaccination 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 he had no obligation to show proof of vaccination to his employer. He says that, by forcing him to do so under threat of suspension or dismissal, his employer infringed his 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.

There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out his duties

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

² See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

toward his employer and that there was a real possibility of being let go because of that.³

These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it does not have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.⁴

[12] Whether his employer's policy violated the Claimant's human rights is a matter for another forum. Here, the only questions that matter are whether the Claimant breached the policy and, if so, whether that breach was deliberate and foreseeably likely to result in dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

The General Division did not ignore or misunderstand the evidence

[13] The Claimant argues that getting vaccinated was never a condition of his employment. He also argues that his refusal to get vaccinated did not harm his employer's interests because, working from home, he had no contact with clients or other co-workers.

[14] Again, I don't see how these arguments can succeed given the law surrounding misconduct. The Claimant made the same points to the General Division, which reviewed the available evidence and came to the following findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;

³ See General Division decision, paragraphs 13 and 14.

⁴ See General Division decision, paragraph 29, citing *Canada (Attorney General) v Caul*, 2006 FCA 251. The principle from this case was recently reaffirmed in *Cecchetto v Canada (Attorney General)*, 2023 FC 102, which addressed an COVID-19 vaccination policy similar to the one imposed by the Claimant's employer. See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- The Claimant's employer adopted and communicated a clear mandatory vaccination policy requiring employees to provide proof that they had been vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date would cause loss of employment;
- The Claimant intentionally refused to get vaccinated; and
- The Claimant didn't attempt to show that he fell under one of the exceptions permitted under the policy.

[15] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. The General Division concluded that the Claimant was guilty of misconduct because his actions were deliberate, and they foreseeably led to his dismissal. The Claimant may have believed that his refusal to get vaccinated was not doing his employer any harm, but that was not his call to make.⁵

Conclusion

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

Neil Nawaz
Member, Appeal Division

⁵ See General Division decision, paragraph 30.