Citation: *MV v Canada Employment Insurance Commission*, 2023 SST 158

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated November 29, 2022 (GE-22-2090)

Tribunal member:	Neil Nawaz
Decision date:	February 14, 2023
File number:	AD-23-7

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, M. V., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as a clerk for X's civil service. On November 24, 2021, her employer placed her on an unpaid leave of absence after she refused to provide proof that she had had received the COVID-19 vaccination (she was later terminated from her job altogether). 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 vaccination 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 her suspension.

[5] The Claimant is now seeking permission to appeal the General Division's decision. She argues that the General Division failed to consider the following points:

- Under Canadian law, every individual has the right to bodily security;
- Her employer imposed a new condition of employment without her agreement;
- Her employer had no right to force a medical experiment on her without her informed consent;
- She did not feel comfortable disclosing her private medical information to her employer; and

- The vaccine's long-term effects were unknown when her employer implemented its policy.

[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.

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 rights and treated her unfairly.

[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.

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

> 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.
>
> 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 suspended and let go because of that.[3]

[12] These passages 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;
- The Claimant confirmed that she later refused to get tested or confirm that she had been vaccinated; and
- The Claimant didn't attempt to show that she fell under one of the exemptions permitted under the policy.

[13] The General Division concluded that the Claimant was guilty of misconduct: "This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that failing to comply with the policy was likely to cause her to be suspended and lose her job."[4]

The General Division did not ignore the Claimant's arguments

[14] The Claimant alleges that the General Division ignored her allegations that her employer's vaccination policy is unfair, illegal, unconstitutional. She says that, because

[3] See General Division decision, paragraphs 18–20.
[4] See General Division decision, paragraph 44.

the vaccination policy is illegitimate, her refusal to follow it cannot be characterized as misconduct.

[15] Again, I don't see how this argument can succeed given the law surrounding misconduct.

[16] The General Division did not ignore the Claimant's allegations and indeed summarized her many complaints about her employer's vaccination policy in paragraph 45 of its decision. However, the General Division went on to say that the fairness or legality of an employer's policy was irrelevant for the purpose of determining EI entitlement:

> I acknowledge the Claimant's additional arguments, but her recourse is to pursue an action in court, or any other Tribunal that may deal with her specific arguments. I can only decide whether what the Claimant did or failed to do is misconduct under the Act. I have already decided that it was misconduct in this case.[5]

[17] This statement accurately reflects the law. That is because the Federal Court of Appeal has ruled that the legitimacy of an employer's workplace policies is beyond the Tribunal's jurisdiction.[6] Whether her employer's policy violated, say, the Claimant's 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

[18] 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, paragraph 46.

[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.