



Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 160

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** A. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated November 30, 2022  
(GE-22-3137)

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**Tribunal member:** Neil Nawaz

**Decision date:** February 15, 2023

**File number:** AD-23-11

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

[3] The Claimant worked as an accounting clerk for a provincial health services authority. On October 25, 2021, her employer placed her on an unpaid leave of absence after she refused to provide proof that she 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 maintains that she was not guilty of misconduct and argues that the General Division failed to consider the following points:

- She had good reason not to expose herself to the risks associated with the COVID-19 vaccine;
- No Canadian law compelled anyone to get the vaccine;
- Every individual has the right to freedom of conscience and bodily security under the *Canadian Charter of Rights and Freedoms*;
- Her employer imposed a new condition of employment without her agreement; and

- She did not feel comfortable disclosing her private medical information to her employer.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.<sup>1</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>2</sup> 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 get vaccinated 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 vaccination 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. The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean

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

<sup>2</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

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 let go because of that.<sup>3</sup>

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.<sup>4</sup>

[12] Whether her 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 her employment. She also argues that her refusal to get vaccinated did not harm her employer's interests because, working from home, she 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:

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<sup>3</sup> See General Division decision, paragraphs 17 and 18.

<sup>4</sup> See General Division decision, paragraph 20, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107. 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 was free to establish and enforce a vaccination policy as it saw fit;
- 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 failed to show that she fell under one of the exemptions 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 her actions were deliberate, and they foreseeably led to her dismissal. The Claimant may have believed that her refusal to get vaccinated was not doing her employer any harm, but that was not her call to make.<sup>5</sup>

## **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 that the appeal will not proceed.

Neil Nawaz  
Member, Appeal Division

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<sup>5</sup> See General Division decision, paragraph 30.