Citation: *RK v Canada Employment Insurance Commission*, 2023 SST 142

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: R. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 1, 2022 (GE-22-2725)

Tribunal member: Neil Nawaz

Decision date: February 10, 2023
File number: AD-22-977

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, R. K., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] The Claimant is a civil servant who refused to disclose his vaccination status to his employer. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his refusal 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 his conduct would likely result in him being let go.

[5] The Claimant is now seeking permission to appeal the General Division's decision. He argues that the General Division made legal errors when it decided that he was disentitled to EI benefits.

[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 disclose his vaccination status amounted to misconduct?

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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.

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 ignore the Claimant's arguments

[9] The Claimant argues that the General Division failed to address his allegation that his employer's vaccination policy violated the Nuremberg Code. He also argues that the General Division ignored a recent Social Security Tribunal decision awarding EI to an employee even though she refused a Covid vaccination.

[10] I don't see a case for these arguments.

[11] The General Division referred to the Claimant's Nuremberg Code argument in paragraph 22 of its decision. It didn't explain why it rejected that argument but, then again, decision-makers don't have to address each and every point, however trivial, that a claimant raises. The fact remains that, while the Claimant might have invoked the Nuremberg Code, he did not explain how this set of ethical principles, developed by a U.S. court following World War II, had force of law in Canada. He also did not explain how, even if the Nuremberg Code applied in this country, his employer violated it.

[12] As for the Social Security Tribunal decision that supposedly supports his case, the Claimant appears to be referring to another General Division decision, *A.L.*, which was issued on December 14, 2022.[3] In my view, this decision does not help the Claimant for three reasons:

- Members of the General Division member are not bound by their colleagues' decisions.

[3] See *A.L.* v *Canada Employment Insurance Commission*, 2022 SST 1428.

- *A.L.* came out nearly two weeks after the decision that is under appeal in this proceeding. The General Division can't be blamed for failing to rely on a decision that didn't exist at the time of hearing.
- Even if *A.L.* had existed at the time of hearing, it would not have applied to the Claimant's case. The claimant in *A.L.*, unlike the Claimant in this case, was subject to a collective agreement that gave employees the right to refuse **any** recommended or required vaccination.

The General Division did not misinterpret the law

[13] The Claimant argues that there was no misconduct because he had no obligation to disclose his medical information to his employer. He says that, by forcing him to do so under threat of suspension or dismissal, his employer violated, not just the Nuremberg Code, but the Criminal Code, human rights laws, and privacy laws, as well as his original employment contract.

[14] Again, I don't see an arguable case here.

[15] 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 his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.

[16] 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 he intentionally refused to disclose to his employer whether he had been vaccinated; and
- The Claimant didn’t attempt to show that he fell under one of the exceptions permitted under the policy.

[17] The General Division concluded that the Claimant was guilty of misconduct because “he knew that refusing to say whether he had been vaccinated was likely to cause him to be suspended from his job.”[4]

[18] The General Division didn’t assess whether the employer’s vaccination policy was unreasonable or illegal. That’s because it didn’t have to. The Federal Court of Appeal has said that such questions are beyond the Tribunal’s jurisdiction.[5] The only questions that matter are whether a claimant’s breached their employer’s 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

[19] 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

[4] See General Division decision, paragraph 30.
[5] 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.