



Citation: *NS v Canada Employment Insurance Commission*, 2023 SST 162

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: N. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated November 30, 2022
(GE-22-2648)

Tribunal member: Neil Nawaz

Decision date: February 15, 2023

File number: AD-23-12

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, N. S., is appealing a decision of this Tribunal's General Division to deny her Employment Insurance (EI) benefits.

[3] The Claimant was a contract employer with the federal government. On January 7, 2022, her employer placed her on an unpaid leave of absence after she refused to provide proof that she had received the COVID-19 vaccination. The following week, she received notice that her contract would not be renewed. 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 says that the General Division made legal errors when it decided that she was disentitled to EI benefits. She also makes the following points:

- Her employer should have allowed her an exemption to its vaccination policy based on her religion, which is protected under the Canadian Charter of Rights and Freedoms; and
- The General Division found that she was dismissed for misconduct, but it failed to explain how she was subject to a vaccination policy that her employer imposed on her after she was hired.

[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 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 she had no obligation to show proof of vaccination to her employer. She says that, by forcing her to do so under threat of suspension or dismissal, her employer infringed her 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.

There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her 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 her 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 the employer's policy was fair or violated the Claimant's employment contract or human rights are matters for other forums. Here, where EI benefits are at issue, the only questions that matter are whether the Claimant breached her employer's 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 that her employer should have exempted her from its vaccination policy because of her religious beliefs.

[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 16 and 17.

⁴ See General Division decision, paragraph 19, 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 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 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 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.

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