



Citation: *CB v Canada Employment Insurance Commission*, 2023 SST 189

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: C. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 2, 2022
(GE-22-2400)

Tribunal member: Neil Nawaz

Decision date: February 21, 2023

File number: AD-23-17

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

[3] The Claimant worked as a flight attendant for X. On October 31, 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. 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 says that she has heard of other people in her position who have been approved for EI, even though they were let go for not being vaccinated.

[6] Before the Claimant can proceed, I have to decide whether her appeal 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.

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

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

Issue

[7] Is there an arguable case that the General Division erred in finding 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 ignore or misunderstand the evidence

[9] The Claimant argues that she never refused to get vaccinated. She claims that she was waiting to see medical specialists so that she could better assess the risks and benefits of getting the vaccine. She notes that she eventually did consult with her specialists and eventually did get the vaccine.

[10] I don't see an arguable case that the General Division erred, given the law surrounding misconduct.

[11] The Claimant raised these same points to the General Division, which reviewed the available evidence and made the following findings:

- 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 deadline would cause loss of employment;
- The Claimant intentionally refused to get vaccinated by the specified deadline; and

- The Claimant failed to persuade her employer that she fell under one of the exceptions permitted under the policy.

[12] 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.

The General Division did not misinterpret the law

[13] The Claimant argues that she had a right to seek medical advice before deciding whether to get vaccinated. She insists that her refusal to follow her employer's vaccination policy was not deliberate, intentional, or reckless.

[14] I don't see a case for this argument.

[15] The General Division defined misconduct as follows:

The Claimant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct. To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful.

There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer, and knew or should have known there was a real possibility of being let go or suspended 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 or justifiable.⁴

³ See General Division decision, paragraphs 33–33.

⁴ See General Division decision, paragraph 31, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. The principle from these cases was

[16] Whether her employer's policy violated the Claimant's 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.

Conclusion

[17] 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

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.