



Citation: *KF v Canada Employment Insurance Commission*, 2023 SST 228

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: K. F.
Representative: F. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 14, 2022
(GE-22-2368)

Tribunal member: Neil Nawaz
Decision date: March 2, 2023
File number: AD-23-73

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

[3] The Claimant works as a medical secretary in a hospital. On October 30, 2021, her employer placed her on an unpaid leave of absence after she refused to accept 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] This Tribunal's General Division dismissed the Claimant's appeal. 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 dismissal.

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

- It disregarded the protections contained in the *Canadian Charter of Rights and Freedoms*, in particular, section 7, which guarantees life, liberty, and security of the person; and
- It ignored medical evidence — doctor's notes placing her on a stress/sick leave as of October 28, 2021 — demonstrating that her termination was illegal.

[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.

Issue

[7] Is there an arguable case that the General Division erred in finding that the Claimant's refusal to accept the COVID-19 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.

There is no case that the General Division misinterpreted the law

[9] The Claimant argues that there was no misconduct because nothing in the law requires her to accept the COVID-19 vaccination. She suggests that, by forcing her to do so under threat of dismissal, her employer infringed her rights. She maintains that she should not have been disqualified from receiving EI benefits, because she did nothing illegal.

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

[11] The General Division defined misconduct as follows:

[T]o 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 let go because of that.³

[12] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it didn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.⁴

[13] A recent decision has reaffirmed this principle in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved a claimant's refusal to follow his employer's COVID-19 vaccination policy.⁵ The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted by law to address these questions. The Court agreed that by making a deliberate choice not to follow the employer's vaccination policy, the claimant had lost his job because of misconduct under the *Employment Insurance Act*. The Court said that there were other ways under the legal system in which the claimant could advance his human rights claims.

[14] That holds true for this case too. Here, as in *Cecchetto*, the only questions that matter are whether the Claimant breached her employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in her dismissal. In this case, the General Division had good reason to answer "yes" to both questions. So long as there were other avenues of recourse available to the Claimant, it didn't matter whether her employer's vaccination policy was fair or legal, or whether the penalties for breaching the policy were unduly harsh.

³ See General Division decision, paragraphs 21 to 23.

⁴ See General Division decision, paragraph 36, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁵ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

There is no case that the General Division ignored or misunderstood the evidence

[15] The Claimant argues that getting vaccinated was never a condition of her employment. She says that she never should have been fired because she was already on sick leave. She alleges that the General Division ignored a doctor's note recommending that she take time off for stress.

[16] 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;
- 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 within the reasonable timelines demanded by her employer; and
- The Claimant failed to satisfy her employer that she fell under one of the exceptions permitted under the policy.

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.

[17] The Claimant alleges that the General Division disregarded evidence that she was fired while on stress leave. I don't agree. The General Division was plainly aware of

such evidence because it explicitly referred to it in its decision.⁶ The problem for the Claimant was that the General Division found that the Claimant's suspension, later dismissal, had nothing to do with stress and was instead directly connected to her refusal to get vaccinated. The Claimant obviously feels that her employer treated her unfairly but, again, it was never within the General Division's power to take that into account for the purpose of determining whether she had engaged in misconduct.

Conclusion

[18] For the above reasons, I am not satisfied that this appeal has a reasonable chance of success. Permission to appeal is therefore refused. That means the appeal will not proceed.

Neil Nawaz
Member, Appeal Division

⁶ See General Division decision, subparagraphs 21(e) and (f), referring to doctor's notes dated November 1, 2021 (GD3-32) and November 22, 2021 (GD3-33) recommending that the Claimant stay off work for medical reasons.