



Citation: *HK v Canada Employment Insurance Commission*, 2023 SST 487

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: H. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 6, 2023
(GE-22-3434)

Tribunal member: Neil Nawaz

Decision date: April 21, 2023

File number: AD-23-301

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, H. K., works as a X for X. On April 22, 2022, the Claimant was placed on an unpaid leave of absence after he refused to comply with X's mandatory COVID-19 vaccination policy. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his refusal to get vaccinated amounted to misconduct.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken his employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in loss of employment.

[4] The Claimant is now asking for permission to appeal the General Division's decision. He argues that the General Division made the following errors:

- It ignored evidence that X failed to take his request for a religious exemption seriously; and
- It ignored the fact that, by forcing him to get vaccinated under threat of suspension, X infringed his Charter rights.

Issue

[5] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or

- based its decision on an important error of fact.¹

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.² Having a reasonable chance of success is the same thing as having an arguable case.³ If the Claimant doesn't have an arguable case, this matter ends now.

[7] At this preliminary stage, I have to answer this question: Is there an arguable case that the General Division erred in finding the Claimant lost his job because of 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 ignored or misunderstood the evidence

[9] At the General Division, the Claimant argued that he did nothing wrong by refusing to get vaccinated. He maintained that, by forcing him to do so under threat of dismissal, X infringed his rights.

[10] Given the law surrounding misconduct, I don't see how the General Division made a mistake in rejecting these arguments.

– The General Division considered all relevant factors

[11] When the General Division reviewed the available evidence, it came to the following findings:

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

² See DESDA, section 58(2).

³ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- X was free to establish and enforce vaccination and testing policies as it saw fit;
- X adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date would cause loss of employment; and
- The Claimant intentionally refused to get vaccinated within the reasonable timelines demanded by his employer.

[12] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The Claimant insists that he had good reason not to get vaccinated, but, for X, the bottom line was that he broke its rules. The General Division concluded that the Claimant was guilty of misconduct because his actions were deliberate, and they foreseeably led to his suspension. The Claimant may have believed that refusing to follow his employer's vaccination policy would not do it any harm but, from an EI standpoint, that was not his call to make.

– **The General Division did not ignore the Claimant's request for exemption**

[13] The Claimant accuses the General Division of failing to consider his attempt to be exempted from vaccination on religious grounds. He complains that X never explained why it turned down his request for an exemption.

[14] I don't see an argument here.

[15] The General Division did not disregard the Claimant's attempt to get a religious exemption and, in fact, addressed it at length.⁴ In its decision, the General Division took note of these facts:

⁴ See General Division decision, paragraphs 31–35.

- The Claimant supported his request for a religious exemption with an affidavit and two letters from his church;⁵
- The documents attested to the Claimant's objection to the vaccine based on his belief that it was produced from the cell lines of aborted fetuses;
- X refused the Claimant's request for religious exemption because it didn't meet its threshold for an accommodation; and
- The Claimant felt that X didn't give him an adequate explanation for its refusal and never did anything more than pretend to give him a chance for accommodation.

[16] The General Division conceded that X may not have given the Claimant's request due consideration but concluded there was nothing it could do about it:

I acknowledge the Claimant's frustration with his experience. This is especially so since he says two months after he was suspended, his employer said it's okay and recalled him to work. But I don't have the authority to decide whether the employer's decision to deny him a religious accommodation violated his rights. That's for another court or tribunal to decide. me.⁶

[17] In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.⁷ In this case, the General Division examined the evidence around the Claimant's request for an exemption but concluded it didn't have the jurisdiction to assess whether X's response was right or wrong. As we will now see, this conclusion was in keeping with the law.

There is no case that the General Division misinterpreted the law

[18] When it comes to assessing misconduct, this Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act

⁵ See Claimant's affidavit dated October 12, 2021 (GD3-31) and letters dated October 28, 2021 by Father Marcin Serwin of St. Maximillian Kolbe Church (GD3-32 and GD3-33).

⁶ See General Division decision, paragraph 34.

⁷ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

may strike the Claimant as unfair, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

– **Misconduct is any action that is intentional and likely to result in loss of employment**

[19] At the General Division, the Claimant argued that nothing in the law required X to implement a mandatory vaccination policy. He maintained that getting tested or vaccinated were never conditions of his employment.

[20] I don't see a case that the General Division erred in dismissing these arguments.

[21] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't necessarily correspond to the word's everyday usage. The General Division defined misconduct as follows:

[T]o be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost willful. 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.⁸

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

⁸ See General Division decision, paragraphs 15–16, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and *Attorney General of Canada v Secours*, A-352-94.

– **Employment contracts don't have to explicitly define misconduct**

[23] The Claimant argues that nothing in his employment contract and collective agreement required him to get the COVID-19 vaccination. However, case law says that is not the issue. What matters is whether the employer has a policy and whether the employee deliberately disregarded it.

[24] In a case called *Lemire*, the Federal Court of Appeal had this to say:

However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal.⁹

[25] The court in *Lemire* confirmed that it was misconduct for a food delivery employee to set up a side business selling cigarettes to customers. The court found that this was so even if the employer didn't have an explicit policy against such conduct.

– **A new case validates the General Division's interpretation of the law**

[26] A recent Federal Court decision has reaffirmed this approach to misconduct 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.¹⁰ The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

Despite the Applicant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6 [the Ontario government's COVID-19 vaccine policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.¹¹

⁹ See *Canada (Attorney General) v Lemire*, 2010 FCA.

¹⁰ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

¹¹ See *Cecchetto*, note 6, at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

[27] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, Mr. Cecchetto had lost his job because of misconduct under the EI Act. The Court said that there were other ways under the legal system in which the claimant could have advanced his wrongful dismissal or human rights claims.

[28] Here, as in *Cecchetto*, all that matters is whether the Claimant breached his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

Conclusion

[29] 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