Citation: *JK v Canada Employment Insurance Commission*, 2023 SST 939

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 24, 2023 (GE-22-3660 and GE-22-3661)

Tribunal member:	Neil Nawaz
Decision date:	July 19, 2023
File numbers:	AD-23-378 AD-23-379

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, J. K., was employed as a technician for a national telecommunications company. On April 14, 2022, the company suspended the Claimant from work after he refused to get vaccinated for COVID-19. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his failure to comply with his employer's vaccination policy amounted to misconduct. It also decided that the Claimant was disentitled from receiving EI benefits because he wasn't available for work.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken his employer's vaccination policy and that he knew or should have known that disregarding the policy would likely result in loss of employment. It also agreed with the Commission that the Claimant did not make himself available for work after his suspension.

[4] The Claimant is now asking for permission to appeal the General Division's decision. He alleges that the General Division was wrong to find that he was unavailable for work — he was merely waiting to be called back by his employer.

Issue

[5] There are four grounds of appeal to the Appeal Division. An appellant 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 decide whether there is an arguable case that the General Division erred when it found that the Claimant (i) lost his job because of misconduct; and (ii) failed to make himself available for work.

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 erred when it found the Claimant committed misconduct

[9] 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 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

[10] At the General Division, the Claimant argued that he did not commit misconduct because he did nothing wrong. He suggested that, by forcing him to get vaccinated under threat of dismissal, his employer infringed his rights.

---

[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.

[11] I can understand the Claimant's frustration, but I don't see how the General Division misinterpreted the relevant law.

[12] 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:

> 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 Appellant 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 Appellant 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.[4]

[13] 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.

– Employment contracts don't have to explicitly define misconduct

[14] The Claimant has argued that his employer's mandatory vaccination policy violated his rights, but that is not the issue here. What matters is whether the employer had a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide. I can consider only one thing: whether

[4] See General Division decision, paragraphs 20–21, 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.

> what the Appellant did or failed to do is misconduct under the Act.[5]

[15] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether his employer's policy contradicted the Claimant's employment contract or violated his legal rights.

– A recent case validates the General Division's interpretation of misconduct

[16] 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 an appellant's refusal to follow his employer's COVID-19 vaccination policy.[6] 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.[7]

[17] 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 Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

[18] That's also true in this case. Here, the only questions that mattered were whether the Claimant breached his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in his suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

---

[5] See General Division decision, paragraph 24, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.
[6] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

– The General Division considered all relevant factors that led to the Claimant's suspension

[19] At the General Division, the Claimant said that he refused to get vaccinated because he had a fear of needles and because he believed that he already had immunity to COVID19. He also said that, after coming off a sick leave, he didn't think that getting vaccinated would be necessary, because the federal government was already dropping its mandates, and he expected his employer to do the same.

[20] The General Division gave these explanations little weight. Given the law surrounding misconduct, I don't see how the General Division erred in doing so.

[21] The General Division based its decision on the following findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;
- The employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated by a specified deadline;
- The Claimant knew, or should have known, that failure to comply with the policy by the specified deadline would cause loss of employment; and
- The Claimant intentionally refused to get vaccinated within the specified deadline.

[22] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The General Division concluded that the Claimant had committed misconduct because his refusal to follow his employer's policy was deliberate, and it foreseeably led to his suspension. The Claimant may have believed that refusing to comply with the policy would not do his employer any harm but, from an EI standpoint, that was not his call to make.

There is no case that the General Division erred when it found the Claimant failed to make himself available for work

– The General Division accurately summarized the law around availability

[23] Under section 18(1)(a) of the EI Act, claimants are not entitled to benefits unless they are capable of and available for work. The Federal Court of Appeal says that this requires decision-makers to consider whether a claimant:

- wanted to return to work as soon as a suitable job was available;
- tried to do so by making efforts to find a suitable job; and
- set unreasonable conditions that limited their chances of finding a job.[8]

[24] I am satisfied that the General Division accurately summarized the law around availability.

– The General Division did not ignore or mischaracterize the evidence around the Claimant's attempt – or lack of thereof – to find another job

[25] The General Division reviewed the Claimant's written and oral submissions and, after applying the law to the available evidence, came to the following findings:

- The Claimant was waiting to return to his old job – he expected his employer to drop its mandates since the federal government was doing the same;
- The Claimant believed he was still bound by his employer – he said that according to its code of ethics, he couldn't work for another company; and
- The Claimant set unreasonable personal conditions – he was afraid he would lose his severance if he left his employer for another job.

[8] See *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA).

[26] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. I see no reason to interfere with the General Division's conclusion that the Claimant was capable of work but unavailable for work.

– Claimants cannot succeed by rearguing their case

[27] The Claimant's argument at the Appeal Division mirrors the argument that he made at the General Division. He insists that he was available for work.

[28] However, the General Division heard this argument and, after applying the law to the evidence, decided that it had no merit.

[29] To succeed at the Appeal Division, claimants must do more than simply disagree with the General Division. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. A hearing at the Appeal Division is not meant to be a "redo" of the hearing at the General Division.

[30] 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.[9] In this case, the General Division examined what the Claimant did after losing his job and concluded that he was unavailable for work. In the absence of a significant legal or factual error, I see no reason to second-guess this finding.[10]

Conclusion

[31] 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

---

[9] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[10] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.