Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 169

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 8, 2022 (GE-22-2379)

Tribunal member:	Neil Nawaz
Decision date:	February 16, 2022
File number:	AD-23-16

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, M. D., is appealing a decision of this Tribunal's General Division to deny him Employment Insurance (EI) benefits.

[3] The Claimant was employed as a X with X. On November 27, 2021, his employer placed him on an unpaid leave of absence after he refused to provide proof that he 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 his failure to comply with his employer's vaccination policy amounted to misconduct.

[4] The General Division agreed with the Commission. 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 his suspension.

[5] The Claimant is now seeking permission to appeal the General Division's decision. He says that the General Division made procedural, legal, and factual errors when it decided that he was disentitled to EI benefits, specifically:

- It displayed bias by relying on the Commission's submissions while disregarding the Claimant's;
- It disregarded the protections contained in the *Canadian Human Rights Act* and the *Canadian Charter of Rights and Freedoms*;
- It ignored the collective agreement between the Claimant's employer and his union, which says nothing about requiring a COVID-19 vaccination as a condition of employment;

- It failed to consider a recent General Division decision recognizing that the imposition of mandatory vaccination policy changes the terms of the contract between employee and employer;[1]
- It contradicted itself by saying, on one hand, that the Claimant had refused to say whether he had been vaccinated and, on the other, that he had refused to get vaccinated altogether. In fact, he has never refused to be vaccinated and only objects to disclosing personal medical information.

[6] Before the Claimant can move ahead with his appeal, I have to decide whether it 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.

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.

There is no arguable case that the General Division disregarded the Claimant's submissions

[9] The Claimant accuses the General Division of bias, but he offers no evidence other than the fact that his appeal went against him. Bias suggests a closed mind that is predisposed to a particular result. The threshold for a finding of bias is high, and the burden of establishing it lies with the party alleging its existence. Whether bias exists depends on the particular facts of a case.

---

[1] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[2] See section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[10] The Supreme Court of Canada has stated the test for bias as follows: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[4] An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[5]

[11] The Claimant complains that he was not given an opportunity to put questions to the Commission. However, the Commission, like any party, was under no obligation to attend the hearing. The Commission did submit a written argument defending its position, and the Claimant was free to bring any deficiencies in it to the General Division's attention. Contrary to the Claimant's allegations, the General Division did not ignore his submissions but engaged with them at some length in its decision.[6] The General Division did not draw the conclusions that the Claimant would have liked, but that does not mean it was predisposed against him.

There is no arguable case that the General Division ignored the Charter or other human rights laws

[12] The Claimant argues that there was no misconduct because he had no obligation to show proof of vaccination to his employer. He says that, by forcing him to do so under threat of suspension or dismissal, his employer infringed his constitutional rights.

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

[14] The General Division described its approach to misconduct this way:

> [T]his Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.
>
> Claimant may have other recourse to pursue his claims that the employer's policy violated his rights. But, these matters must be

[4] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[5] See *Arthur v Canada (Attorney General),* 2001 FCA 223.
[6] See General Division decision, paragraphs 11, 13, 16, 31, 34, 35, and 39.

> addressed by the correct court or tribunal. They are not within my jurisdiction to decide.[7]

These paragraphs accurately summarize the law around misconduct. The courts have consistently held that decision-makers tasked with assessing misconduct under the *Employment Insurance Act* (EI Act) do not have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.[8]

[15] A recent decision has reaffirmed this principle in the context of COVID-19 vaccination mandates. *Cecchetto*, as in this case, involved a claimant's refusal to follow his employer's COVID-19 vaccination policy.[9] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law. 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 EI Act. The Court said that there were other ways in which the Claimant could advance his human rights claims under the legal system.

[16] Here, as in *Cecchetto*, the only questions that matter are whether the Claimant breached his employer's vaccination 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.

There is no arguable case that the General Division ignored the Claimant's collective agreement

[17] The Claimant alleges that the General Division failed to consider the terms of his employment contract, which includes the collective agreement that his union negotiated with X. The Claimant notes that neither document says anything about requiring a COVID-19 vaccination as a condition of employment.

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

---

[7] See General Division decision, paragraphs 43 and 44.
[8] See, for instance, *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[9] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[19] From what I can see, the General Division was aware of the Claimant's argument on this point but found that it was barred from considering it:

> I do not have the authority to decide whether the employer breached the Claimant's collective agreement by implementing the vaccination policy or suspending the Claimant from his job. If the Claimant believed the employer's practice violated his collective agreement, filing a grievance through his union is a more appropriate venue to address that allegation.[10]

[20] Again, this passage reflects prevailing case law, which restricts this Tribunal from determining whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable accommodations for the Claimant.[11] The Tribunal can only consider whether what the Claimant did or failed to do is misconduct under the narrow parameters of EI Act.

There is no arguable case that the General Division disregarded a key precedent

[21] The Claimant argues that the General Division failed to follow the logic of a recently decided case called *A.L.*, in which an EI claimant was found to be entitled to benefits even though he disobeyed his employer's mandatory COVID-19 vaccination policy.[12]

[22] I don't see a reasonable chance of success for this argument.

[23] First, *A.L.* was issued on November 15, 2022, only a week before the General Division heard the Claimant's appeal. Moreover, the Claimant does not appear to have raised *A.L.* in any of his arguments before the General Division, so the member who heard his appeal can't be blamed for failing to consider it.

---

[10] See General Division decision, paragraph 38.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See note 1.

[24] Second, *A.L.,* like the Claimant's case, was decided by the General Division. Even if the member who heard the Claimant's case had considered *A.L.*, she would have been under no obligation to follow it.

[25] Finally, *A.L.* does not, as the Claimant seems to think it does, give EI claimants a blanket exemption from their employers' mandatory vaccine policies. *A.L.* involved a claimant whose collective agreement explicitly prevented his employer from forcing him to get vaccinated. According to my review of the file, the Claimant has never pointed to a comparable provision in his own employment contract. *Cecchetto*, the recent Federal Court case that considered employer vaccinate mandates, also considered *A.L.* and found that it did not have broad applicability.[13]

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

[26] The Claimant argues that the General Division contradicted itself about the nature of his alleged misconduct: in paragraph 3 of its decision, the General Division said that he was suspended because he refused to say whether he was vaccinated; in paragraph 47, the General Division said that his refusal to be vaccinated led to his suspension. The Claimant maintains that he has never refused a vaccination.

[27] I don't see an arguable case that this inconsistency amounts to an error under the permitted grounds of appeal. It must be remembered that a factual error will warrant overturning a General Division decision only if the error is "made in a perverse or capricious manner or without regard for the material" and if the decision is **based** on that error. In short, the error must be significant.[14] In this case, I don't see how the General Division's slip, if that's what it was, had any effect on the outcome of its decision. The Claimant admitted that, one way or another, he didn't comply with his employer's policy, and it makes no difference whether that noncompliance lay in his refusal to get vaccinated or his refusal to disclose as much.

---

[13] See *Cecchetto*, note 9, at paragraph 43.
[14] See section 58(1)(c) of the DESDA.

[28] The Claimant also argues that his refusal to get vaccinated did not harm his employer's interests because, as an outside X worker, he had almost no contact with clients or other co-workers.

[29] Again, I don't see how this argument 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; and
- The Claimant intentionally refused to disclose his vaccination status.

[30] 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 his actions were deliberate, and they foreseeably led to his dismissal. The Claimant may have believed that his refusal to disclose his vaccination status was not doing his employer any harm, but that was not his call to make.

Conclusion

[31] I am not satisfied that this 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