



Citation: *MC v Canada Employment Insurance Commission*, 2023 SST 226

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** M. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated December 16, 2022  
(GE-22-2370)

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**Tribunal member:** Neil Nawaz

**Decision date:** March 2, 2023

**File number:** AD-23-72

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

[3] The Claimant works as a screening officer at a X. On November 14, 2021, her employer placed her on an unpaid leave of absence after she failed 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] 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 suspension or dismissal.

[5] The Claimant is now seeking permission to appeal the General Division's decision. She argues that the General Division made an error of law by failing to apply the appropriate test for misconduct. In particular, she makes the following points:

- According to a case called *Lemire*, misconduct is a breach of an expressed or implied duty arising out of an employment contract;<sup>1</sup>
- Her collective bargaining agreement does not contain an implicit or explicit duty to submit to vaccinations; and

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<sup>1</sup> See *Canada (Attorney General) v Lemire*, 2010 FCA.

- The imposition of a COVID-19 vaccination requirement amounted to a unilateral change to her employment contract made without her consent.

[6] Before the Claimant can proceed, I have to decide whether her appeal has a reasonable chance of success.<sup>2</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>3</sup> 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 provide proof of 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**

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

[9] The Claimant argues that there was no misconduct because nothing in her employment contract or collective agreement required her to receive the COVID-19 vaccination. She suggests that, by forcing her to do so under threat of dismissal, her employer infringed her rights.

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

[11] The General Division defined misconduct as follows:

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<sup>2</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

<sup>3</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[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. 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.<sup>4</sup>

[12] 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, justifiable, or even legal.<sup>5</sup>

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

[13] The Claimant argues that there was nothing in either her employment contract or collective agreement that required her 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. In its decision, the General Division put it this way:

[I]t is not my role to decide whether the Claimant's employer violated her collective agreement by not re-negotiating it to include the requirement for the COVID- 19 vaccine. My role is to decide whether the Claimant's decision not to say if she took the vaccine is misconduct within the meaning of the Act.<sup>6</sup>

[14] Citing *Lemire*, the Claimant linked misconduct to a breach of an expressed or implied duty in an employment contract. But *Lemire* also had this to say:

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<sup>4</sup> See General Division decision, paragraphs 29 and 30.

<sup>5</sup> See General Division decision, paragraph 31, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>6</sup> See General Division decision, paragraph 47.

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.<sup>7</sup>

[15] The court in *Lemire* went on to find that an employer was justified in finding that it was misconduct when one of their food delivery employees set up a side business selling cigarettes on the side 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**

[16] A recent 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.<sup>8</sup> 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 employer's COVID-19 vaccine policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.<sup>9</sup>

[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 *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.

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<sup>7</sup> See *Lemire*, note 1, at paragraph 15.

<sup>8</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>9</sup> See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

[18] 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 suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

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

[19] The Claimant argues that getting vaccinated was never a condition of her employment. She alleges that her employer's imposition of the vaccine policy represented a unilateral change to her employment contract made without her consent.

[20] Again, I don't see how these arguments can succeed given the law surrounding misconduct. The Claimant made similar 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 date would cause loss of employment; and
- The Claimant intentionally refused to say whether she had been vaccinated.

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 suspension. The Claimant may have believed that her refusal to disclose her vaccination status was not doing her employer any harm, but that was not her call to make.

## **Conclusion**

[21] I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This appeal will not proceed.

Neil Nawaz  
Member, Appeal Division