Citation: *KW v Canada Employment Insurance Commission*, 2023 SST 271

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | K. W. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated December 16, 2022 (GE-22-2398) |

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| **Tribunal member:** | Neil Nawaz |
| **Decision date:** | March 13, 2023 |
| **File number:** | AD-23-76 |

## 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, K. W., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] The Claimant works for a municipal water authority. On November 15, 2021, his employer placed him on an unpaid leave of absence after he refused to confirm that he had received the COVID-19 vaccination.[1] 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] 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 his dismissal.

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

- It ignored a precedent saying that an EI claimant's refusal to follow his employer's policy was not misconduct if the policy was unreasonable;
- It ignored the fact that nothing in the law required his employer to establish and enforce a COVID-19 vaccination policy;
- It ignored the fact that neither his employment contract nor his collective agreement said anything about a vaccine mandate; and

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[1] Later, after his employer relaxed its vaccination policy, the Claimant's suspension was lifted and he returned to work.

- It failed to follow a recent General Division decision that awarded E.I. to a Claimant who refused to submit to her employer's mandatory vaccine policy.

[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.

# 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 ignored or misunderstood the evidence

[9] The Claimant insists that he did nothing wrong by refusing to get vaccinated. He argues that getting a shot was never a condition of his employment. He says that nothing in the law required his employer to implement a mandatory vaccination policy.

[10] 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;

[2] See section 58(1) of the *Department of Employment and Social Development Act*.
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- 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 his employer; and
- The Claimant failed to satisfy his employer that he 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 his actions were deliberate, and they foreseeably led to his dismissal. The Claimant may have believed that his refusal to get vaccinated was not doing his employer any harm, but that was not his call to make.

## 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

[11] The Claimant argues that there was no misconduct because nothing in his employment contract or collective agreement required him to accept the COVID-19 vaccination. He suggests that, by forcing him to do so under threat of dismissal, his employer infringed his rights. He maintains that he should not have been disqualified from receiving EI benefits, because all he was trying to do was protect his health.

[12] I don’t see a case for this argument.

[13] 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.
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> 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 disciplined because of that.[4]

[14] 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.[5]

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

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

> I have to focus on the Act only. I can't make decisions about whether the Claimant has options under other laws. Issues about whether the employer should have allowed the Claimant's exemption request, the employer's decision about the exemption request, and whether the policy breached the collective agreement aren't for me to decide. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[6]

[16] Citing a case called *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:

> 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

[4] See General Division decision, paragraphs 15–16.
[5] See General Division decision, paragraph 17, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and C*anada (Attorney General) v McNamara*, 2007 FCA 107.
[6] See General Division decision, paragraph 29.

> normally foresee that it would be likely to result in his or her dismissal.[7]

[17] 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 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**

[18] 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.[8] 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.[9]

[19] 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 have advanced his human rights claims.

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

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[7] See *Canada (Attorney General) v Lemire*, 2010 FCA.
[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[9] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

## There is no case that the General Division disregarded binding precedents

[21] The Claimant relies on a recent General Division 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.[10] The Claimant appears to be suggesting that the General Division member who heard his case should have followed an analysis similar to the one in *A.L*.

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

[23] First, it does not appear that the Claimant raised *A.L*. before the General Division.[11] The member who heard the Claimant's appeal therefore can't be blamed for failing to consider a precedent that wasn't presented to her.

[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. Members of the General Division are bound by decisions of the Federal Court and Federal Court of Appeal, but they are not bound by decisions of their peers.

[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.* appears to have 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.[12]

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[10] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76.
[11] This may be because *A.L.* was issued on November 15, 2022 — only four weeks before the General Division heard this appeal.
[12] See *Cecchetto*, note 8, at paragraph 43.

[26] The Claimant also argues that the General Division ignored a case from the Appeal Division's predecessor, the Office of the Umpire for Employment Insurance.[13]

[27] That case involved an EI claimant who broke her employer's policy by refusing to remove her wedding ring on a production line. As the Claimant notes, the Umpire found no misconduct because the employer's policy against wearing jewellery while on the job was unreasonable.

[28] Again, this case does not help the Claimant because, like *A.L.* it comes from a tribunal and is thus non-binding on the General Division. Moreover, the case appears to be an outlier. In the more than 20 years since it was issued, numerous cases from the Federal Court and the Federal Court of Appeal have come to the opposite conclusion. Those cases say that, for the purpose of determining whether an EI claimant engaged in misconduct, the reasonableness of an employer policy is not the issue.[14]

[29] As the Federal Court of Appeal noted, "There are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits." In *Cecchetto*, the Court reinforced this message by pointing out that there are other ways in which challenges to COVID-19 policies and legal mandates can properly be advanced under the legal system.[15]

## Conclusion

[30] 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

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[13] See CUB 53982.
[14] See *Paradis* and *McNamara*, note 5. See also *Caul*, note 9, at paragraph 6 and *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5.
[15] See *Cecchetto*, note 8, at paragraph 49.