



Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 225

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

# **Leave to Appeal Decision**

**Applicant:** J. B.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated December 8, 2022  
(GE-22-3511)

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**Tribunal member:** Neil Nawaz

**Decision date:** March 2, 2023

**File number:** AD-23-58

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

[3] The Claimant used to work in the shipping and receiving department of a machine shop. On October 22, 2021, his employer terminated his employment after he refused to accept the COVID-19 vaccination or, alternatively, undergo twice-weekly antigen testing. 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 Appeal Division struck down the General Division's decision because it had not given the Claimant a full hearing.<sup>1</sup> The matter was returned to the General Division for reconsideration before a different member.

[6] The General Division held a hearing by teleconference. Once again, it dismissed the Claimant's appeal.

[7] The Claimant is now seeking permission to appeal the General Division's second decision. He argues that the General Division did not apply the law properly and makes the following points:

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<sup>1</sup> See Appeal Division's decision dated October 25, 2022.

- He is refusing COVID-19 vaccinations because his research tells him that they are ineffective and dangerous;
- He never signed anything saying that he had to be vaccinated to do his job;
- Coercing employees to undergo vaccination under threat of dismissal is contrary to Canadian rights and freedoms; and
- The General Division failed to follow the logic of the recent General Division decisions, *T.C.* and *A.L.*<sup>2</sup>

[8] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.<sup>3</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>4</sup> If the Claimant doesn't have an arguable case, this matter ends now.

## Issue

[9] 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

[10] 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**

[11] The Claimant argues that there was no misconduct because nothing in the law requires him to receive 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

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<sup>2</sup> See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891 and *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

<sup>3</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

<sup>4</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

should not have been disqualified from receiving EI benefits, because he did nothing illegal.

[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 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, 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.<sup>5</sup>

[14] 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>6</sup>

[15] A recent decision has reaffirmed this principle 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>7</sup> 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 his employer's vaccination policy, the claimant 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>5</sup> See General Division decision, paragraphs 15 and 16.

<sup>6</sup> See General Division decision, paragraph 31, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>7</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[16] These principles hold true in this case too. Here, as in *Cecchetto*, 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 dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

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

[17] 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.<sup>8</sup> 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.*

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

[19] First, it does not appear that the Claimant raised *A.L.* before the General Division.<sup>9</sup> 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.

[20] 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, but they are not bound by decisions of their peers.

[21] 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

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<sup>8</sup> See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76.

<sup>9</sup> This may be because *A.L.* was issued on November 15, 2022 — only three weeks before the General Division heard this appeal.

Court case that considered employer vaccinate mandates, also considered *A.L.* and found that it did not have broad applicability.<sup>10</sup>

[22] The Claimant also argues that the General Division ignored a case called *T.C.*<sup>11</sup> Again, that case does not help the Claimant because it is another non-binding General Division decision. And although *T.C.* involved an EI claimant whose refusal to be vaccinated was found not to be misconduct, that case contained circumstances that are not present here. *T.C.* turned on the fact that the claimant's employer gave him a mere two days to comply with a vaccination policy that hadn't been written down. Since the policy hadn't been adequately communicated, the General Division found the claimant's failure to get vaccinated to be not wilful. By contrast, the Claimant in this case received clear written notice of his employer's vaccination policy. As well, he received ample warning to comply with the policy, and he understood the consequences if he did not.

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

[23] The Claimant argues that getting vaccinated was never a condition of his employment. He suggests that employee safety was a guise for the real reason his employer wanted to dismiss him from his job.

[24] Again, 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;
- The Claimant's employer adopted and communicated a clear mandatory vaccination policy requiring employees to provide proof that they had been vaccinated;

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<sup>10</sup> See *Cecchetto*, note 5, at paragraph 43.

<sup>11</sup> See note 2 for citation.

- 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; and
- The Claimant didn't attempt to show 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.

## **Conclusion**

[25] I am not satisfied that the 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