Citation: *DM v Canada Employment Insurance Commission*, 2023 SST 281

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated September 29, 2022 (GE-22-1811)

Tribunal member:	Neil Nawaz
Decision date:	March 15, 2023
File number:	AD-23-19

Decision

[1] I am granting the Claimant an extension of time to apply to leave to appeal. However, I am refusing him permission to appeal because he does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant, D. M., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] The Claimant is a computer support technician for a federal government agency. On November 12, 2021, his employer placed him on an unpaid leave of absence after he refused to get vaccinated for COVID-19 by a specified deadline. 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 maintains that he is not guilty of misconduct and argues that the General Division made the following errors:

- It failed to follow the logic of a recent General Division decision called *A.L.*;
- It failed to recognize that nothing in federal or provincial law requires anyone to submit to the COVID-19 vaccination; and
- It failed to appreciate that, under Canadian common law, individuals have the right to control what happens to their bodies and to refuse any medical treatment.

Issues

[6] After reviewing the Claimant's request for leave to appeal, I had to decide the following questions:

- Was the Claimant's application for leave to appeal filed late?
- If so, should I grant the Claimant an extension of time?
- Does the Claimant have a reasonable chance of success on appeal?

[7] I have concluded that, although the Claimant was late in submitting his application for leave to appeal, he had a reasonable explanation for doing so. However, I am refusing him permission to proceed, because his appeal does not have a reasonable chance of success.

Analysis

The Claimant's request for leave to appeal was late

[8] An application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the applicant.[1] The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[9] In this case, the General Division issued its decision on September 29, 2022. On October 3, 2022, the Tribunal sent the decision to the Claimant by email and regular mail. However, the Appeal Division did not receive the Claimant's application for leave to appeal until January 3, 2023—three months later and approximately two months past the filing deadline. I find that the Claimant's application for leave to appeal was late.

[1] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).

The Claimant had a reasonable explanation for the delay

[10] When an application for leave to appeal is submitted late, the Tribunal may grant the applicant an extension of time if they have a reasonable explanation for the delay.[2] In deciding whether to grant an extension, the interests of justice must be served.[3]

[11] The Tribunal invited the Claimant to explain why his application was late.[4] He responded with an email saying that he did not become aware of the *A.L.* decision until late December. When he reviewed it, he realized that it involved a situation similar to his own and thus might serve as the basis for an appeal.

[12] Under the circumstances, I find this explanation reasonable. That's why I'm considering the Claimant's application even though it was late.

The Claimant's appeal has no reasonable chance of success

[13] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[5]

[14] Before the Claimant can move ahead with his appeal, I have to decide whether it has a reasonable chance of success.[6] Having a reasonable chance of success is the same thing as having an arguable case.[7] If the Claimant doesn't have an arguable case, this matter ends now.

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[2] See section 27 of the *Social Security Tribunal Rules of Procedure*.
[3] See *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[4] See Tribunal's letter to Claimant dated February 23, 2023, AD1B.
[5] See DESDA, section 58(1).
[6] See DESDA, section 58(2).
[7] See *Fancy* v *Canada (Attorney General)*, 2010 FCA 63.

– **There is no arguable case that the General Division misinterpreted the law**

[15] 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 suspension or dismissal, his employer infringed his rights. He maintains that he should not have been disqualified from receiving EI benefits, because he did nothing illegal.

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

[17] The General Division defined misconduct as follows:

> 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 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 let go because of that.[8]

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.[9]

[18] A recent decision has reaffirmed this principle in the 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.[10] 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

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[8] See General Division decision, paragraphs 23 and 24.
[9] See General Division decision, paragraph 31, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[10] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

vaccination policy, the claimant had lost his job because of misconduct under the *Employment Insurance Act*. The Court said that there were ways other than the EI claims process by which the claimant could advance his human rights or wrongful dismissal claims.

[19] 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 disregarded binding precedents

[20] 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.[11] The Claimant argues that the General Division member who heard his case should have followed an analysis similar to the one in *A.L*.

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

[22] First, *A.L.* was issued on November 15, 2022, several weeks after General Division issued its decision in this proceeding. The member who heard the Claimant's appeal can't be blamed for failing to consider a precedent that didn't yet exist.

[23] Second, *A.L.,* like the Claimant's case, was decided by the General Division. It is not a binding precedent. Even if the member who heard the Claimant's case had considered *A.L.*, she would have been under no obligation to follow it.

[24] 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, it appears, explicitly prevented his employer from forcing him to get vaccinated. According to my review of the file, the Claimant has never

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[11] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76.

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]

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

[25] The Claimant argues that getting vaccinated was never a condition of his employment. He also argues that his refusal to get vaccinated did not harm his employer's interests because, working from home, he had no contact with clients or other co-workers.

[26] 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;
- 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.

[27] 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 for EI purposes, because his actions were deliberate, and they foreseeably

[12] See *Cecchetto*, note 10, at paragraph 43.

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

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

Neil Nawaz
Member, Appeal Division