Citation: *TP v Canada Employment Insurance Commission*, 2023 SST 525

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	T. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 8, 2023 (GE-22-3545)

Tribunal member:	Neil Nawaz
Decision date:	April 27, 2023
File number:	AD-23-240

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, T. P., worked as an aide at a retirement home. On October 13, 2021, Claimant's employer placed her on an unpaid leave of absence after she refused to disclose whether she had been vaccinated for COVID-19. 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.

[3] 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 loss of employment.

[4] The Claimant is now asking for permission to appeal the General Division's decision. She maintains that she is not guilty of misconduct and argues that the General Division made the following errors:

- It misinterpreted the meaning of "misconduct" as set out in the *Employment Insurance Act* (EI Act);
- It based its decision on non-existent evidence — her employer's supposed mandatory vaccination policy, which she says she has never seen;
- It ignored the fact that her employer never notified her that she had to be vaccinated by a certain date;
- It ignored the fact that her collective agreement said nothing about a vaccine requirement;

- It ignored the fact that her employer attempted to impose a new condition of employment without her consent; and
- It issued its decision only 24 hours after hearing her appeal, which suggests that it gave her evidence and arguments little consideration.

Issue

[5] 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 use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

[6] Before the Claimant can proceed, I have to decide whether her 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.

[7] At this preliminary stage, I have to answer this question: Is there an arguable case that the General Division erred in finding the Claimant lost her job because of 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.

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

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

[9] At the General Division, the Claimant insisted that she did nothing wrong by refusing to get vaccinated. She maintained that, by forcing her to do so under threat of dismissal, her employer infringed her rights.

[10] Given the law surrounding misconduct, I don't see how the General Division made a mistake in rejecting these arguments.

– There was evidence that the Claimant knew about her employer's mandatory vaccination policy

[11] The Claimant says that she had no knowledge of her employer's vaccination policy and had no idea she'd be suspended if she failed to get the injection by October 12, 2021. She alleges that the General Division decided her case without ever having seen the policy.

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

[13] It's true that the employer's mandatory vaccination policy is not on file. The Commission requested it, but the Claimant's employer apparently never followed through on its promise to forward a copy. Still, the General Division had available to it considerable evidence that (i) the policy existed and (ii) the Claimant knew about the policy in advance of the vaccination deadline:

- In a phone conversation documented by a Service Canada agent, the Claimant said that her employer told her about the mandatory COVID-19 vaccination policy around the end of September 2021 and the deadline to get fully vaccinated was October 12, 2021;[4]

[4] See Service Canada Supplementary Record of Claim by Eunbee Chae dated January 19, 2022, GD3-18.

- In phone conversation with another Service Canada agent, the Claimant again said that she was told about the vaccination policy in September 2021;[5]
- In her testimony, the Claimant confirmed that, in September 2021, she received an email from her employer's general manager announcing the vaccination policy and the deadline to comply with it.[6]

[14] At the General Division, the Claimant insisted that her supervisors had not actually "told" her about the vaccination policy until after the October 12, 2021, deadline. She said that the first time anyone spoke to her about the policy was on October 13, 2021, when the general manager and director of care called her into a meeting to inform her that she was under suspension.

[15] However, it appears the Claimant was attempting to make an artificial distinction between being verbally "told" about the policy and being "notified" of it in writing. The evidence, including her own, clearly indicated that her employer notified her of the policy by email well in advance of the day by which she was expected to be fully vaccinated.

– The General Division considered all relevant factors

[16] When the General Division reviewed the available evidence, it 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 policy requiring employees to provide proof that they had been fully vaccinated;
- The Claimant knew, or should have known, that failure to comply with the policy by a certain date would cause loss of employment; and

[5] See Service Canada Supplementary Record of Claim dated March 25, 2022, by Prabhjot Chahal, GD3-27.
[6] Refer to recording of General Division hearing at 21:30.

- The Claimant intentionally refused to get vaccinated within the timeline demanded by her employer.

[17] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. 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 follow her employer's vaccination policy was not doing it any harm but, from an EI standpoint, that was not her call to make.

There is no case that the General Division misinterpreted the law

[18] This Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act may seem unfair to the Claimant, but it is one that the courts have repeatedly adopted and that the General Division had no choice but to follow.

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

[19] At the General Division, the Claimant argued that her employer didn't have to implement a mandatory vaccination policy. She maintained that getting tested or vaccinated were never conditions of her employment.

[20] I don't see how the General Division erred in dismissing these arguments.

[21] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't necessarily correspond to the word's everyday usage. The General Division defined misconduct as follows:

> To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful.
>
> The Claimant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered 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 towards her employer and that there was a real possibility of being suspended because of it [emphasis in original].[7]

[22] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, when determining EI entitlement, it doesn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.

– Employment contracts don't have to explicitly define misconduct

[23] The Claimant argued that nothing in her employment contract and collective agreement 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:

> The Claimant argues that the employer's policy had the effect of forcing her to choose between working and getting a vaccine that she believed was "experimental" and could have a negative effect on her health. She says the policy violated her collective agreement and many of her rights.
>
> I make no findings with respect to the validity of the policy or any violations of the Claimant's rights. She is free to make these arguments before the appropriate adjudicative bodies and seek relief there.[8]

[24] This passage echoes a case called *Lemire*, in which the Federal Court of Appeal 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

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[7] See General Division decision, paragraphs 22–24, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and A*ttorney General of Canada v Secours*, A-352-94.
[8] See General Division decision, paragraphs 38–39.

> normally foresee that it would be likely to result in his or her dismissal.[9]

[25] The court in *Lemire* went on to find that an employer was justified in finding misconduct when a food delivery employee to 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

[26] A recent Federal Court 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.[10] 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.[11]

[27] 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 EI Act. The Court said that there were other ways under the legal system in which the claimant could have advanced his wrongful dismissal or human rights claims.

[28] 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.

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[9] See *Canada (Attorney General) v Lemire*, 2010 FCA.
[10] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[11] 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 was biased

[29] The Claimant alleges that the General Division was biased. She points to the fact that the General Division issued its decision only a day after its hearing. In her view, that suggests that the General Division failed to give her appeal due consideration.

[30] Again, I don't see an arguable case here. The General Division didn't arrive at the Claimant's desired outcome, but that doesn't mean it was biased. The quick turnaround time does not by itself suggest that the Claimant had an unfair hearing.

[31] 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.

[32] 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?"[12] An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[13]

[33] I have reviewed the recording of the hearing and heard nothing in the tone or content of the member's remarks that suggested bias against the Claimant. The mere fact that the General Division prepared and finalized its decision within a day of the hearing doesn't necessarily mean that it inadequately considered the Claimant's evidence and arguments. It should be kept in mind that the work of reviewing documents in a case file can (and should) be done in advance of the hearing. In any event, the proof of whether a particular decision can be justified can be found in the reasons for that decision.

[34] My review of the written reasons for General Division's decision indicates that it analyzed the Claimant's submissions in detail — in particular, her argument that she didn't receive adequate notice of her employer's vaccination policy. The General

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[12] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[13] See *Arthur v Canada (Attorney General),* 2001 FCA 223.

Division concluded — correctly, in my view — that the Claimant knew about the policy and knew that there would be consequences if she did not follow it. I see nothing to suggest that the General Division disregarded the evidence or the law in coming to this conclusion.

Conclusion

[35] 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