Citation: *XH v Canada Employment Insurance Commission*, 2023 SST 316

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	X. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 26, 2022 (GE-22-2932)

Tribunal member:	Neil Nawaz
Decision date:	March 20, 2023
File number:	AD-23-114

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, X. H., used to work for an investment fund. On January 31, 2022, the Claimant's employer dismissed her after she refused to confirm 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.

[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 her dismissal.

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

- It ignored the fact that nothing in the law required her employer to establish and enforce a COVID-19 vaccination policy;
- It ignored the fact that her employer imposed a new condition of employment without her agreement;
- It ignored the protections contained in the *Canadian Bill of Rights*; and
- It ignored the fact that she was working remotely from home and thus posed no threat to her colleagues.

[5] Before the Claimant can proceed, I have to decide whether her appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same

[1] See section 58(1) of the *Department of Employment and Social Development Act*.

thing as having an arguable case.[2] If the Claimant doesn't have an arguable case, this matter ends now.

Issue

[6] Is there an arguable case that the General Division erred when it found that the Claimant's refusal to accept the COVID-19 vaccination amounted to misconduct?

Analysis

[7] 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

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

[9] 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;

[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- The Claimant intentionally refused to get vaccinated within the reasonable timelines demanded by her employer; and
- The Claimant failed to satisfy her employer that she fell under one of the exceptions permitted under the policy.

[10] 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 dismissal. The Claimant may have believed that her refusal to get vaccinated was not doing her employer any harm, but that was not her 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 she did nothing wrong by refusing to disclose her vaccination status. She suggests that, by forcing her to do so under threat of dismissal, her employer infringed her rights. She maintains that she should not have been disqualified from receiving EI benefits, because all she was trying to do was protect her 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, 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 disciplined because of that.[3]

[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.[4]

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

[15] The Claimant argues that there was nothing in her employment contract 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 have to focus on the EI law only. I can't make decisions about whether the Claimant has options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[5]

[16] In a case called *Lemire*, the Federal Court of Appeal said:

> [It] 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.[6]

[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

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[3] See General Division decision, paragraphs 16–17.
[4] 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.
[5] See General Division decision, paragraph 19.
[6] See *Canada (Attorney General) v Lemire*, 2010 FCA.

didn't have an explicit policy against such conduct. To support her appeal, the Claimant cited several cases, but they involved wrongful dismissal or human rights claims that have no relevance to misconduct as it is defined for EI purposes.

– **A new case validates the General Division's interpretation of the law**

[18] A recent decision has reaffirmed the General Division's 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.[7] 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.[8]

[19] The Federal Court agreed that, by making a deliberate choice not to follow his 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 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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[7] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[8] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

Conclusion

[21] 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