Citation: *DM v Canada Employment Insurance Commission*, 2023 SST 256

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 5, 2023 (GE-22-2551)

Tribunal member:	Neil Nawaz
Decision date:	March 9, 2023
File number:	AD-23-74

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

[3] The Claimant worked as a coordinator for a community care and support agency. On November 1, 2021, his employer terminated his employment after he refused to get vaccinated for COVID-19. 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 held a hearing by teleconference and 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 factual errors:

- It disregarded the reason he didn't want to get vaccinated: he was only trying to protect his health after a heart attack in 2016 left him with reduced cardiac functioning; and
- It found that Directive 6 required his employer to impose a vaccine mandate.[1] In fact, Directive 6 does not require anyone to get vaccinated and, in any

[1] According to the letter terminating the Claimant's employment (GD3-42), "Ontario's Chief Medical Officer of Health issued Directive 6 under section 77.7(1) of the Health Protection and Promotion Act mandating that public hospitals, home and community care service provider organizations, Home and Community Care Support Services organizations and ambulance services hospitals have a COVID-19 vaccination program for employees, physicians, contractors, students/learners and volunteers."

> case, does not supersede his employment contract and collective agreement, both of which give him the right to refuse vaccination.

[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 misinterpreted the law

– **Misconduct occurs when an employee deliberately breaks his employer's rules**

[9] The Claimant argues that there was no misconduct because nothing in his employment contract or collective agreement required 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.

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

[11] 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

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

> 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.[4]

[12] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division also found that the Claimant's employer was free to establish a policy requiring all its employees to be vaccinated.[5]

– **The General Division had a right to assess the Claimant's terms of employment as it saw fit**

[13] The Claimant argues that his employment contract and collective agreement relieved him from having to get the COVID-19 vaccination. However, the Claimant made the same argument to the General Division, and the General Division found no merit in it.

[14] The Claimant clearly disagrees with the General Division's interpretation of his employment contract and collective agreement. However, this by itself is not enough to justify overturning the General Division's decision. That is because the Appeal Division usually gives the General Division some leeway in how it weighs and assess the available evidence. In this case, the General Division made these findings:

- The employer's COVID-19 vaccination policy did not breach the collective agreement or unilaterally change the Claimant's conditions of employment;
- The collective agreement gave employees the right to refuse influenza vaccinations, but it did not allow them to refuse all vaccinations; and

[4] See General Division decision, paragraphs 15 and 16, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See General Division decision, paragraphs 8 and 9, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

- Although Directive 6 did not require dismissal for noncompliance, the employer had wide latitude to ensure its employees complied with its COVID-19 vaccination policy.

[15] In the absence of a "perverse or capricious" factual error, or one that was "made without regard for the material," I see no reason to interfere with the General Division's findings on these points.

– **Misconduct is not restricted to the explicit terms of employment**

[16] The General Division found that the Claimant's employer did not breach the terms of his employment. However, it didn't have to make this finding to get to the same result. There is case law saying that, for the purpose of determining EI entitlement, the only things that matter are whether the employer has a policy and whether the employee deliberately disregarded it. Whether the policy reasonable or even legal is beside the point.

[17] 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]

[18] 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 recent case gives employers wide latitude to implement COVID-19 policies**

[19] A recent decision has reaffirmed *Lemire*'s approach to misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved a

[6] See *Canada (Attorney General) v Lemire*, 2010 FCA.

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:

> 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. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[8]

[20] The Federal Court agreed that, by making a deliberate choice not to get vaccinated, Mr. Cecchetto 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.

[21] Here, as in *Cecchetto*, the only issues 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 dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

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

[22] The Claimant argues that getting vaccinated was never a condition of his employment. He alleges that his employer's imposition of the vaccine policy represented a unilateral change to his employment contract made without his consent.

[23] Again, I don't see how these arguments can succeed given the law surrounding misconduct. The Claimant made similar points to the General Division, which reviewed the available evidence and made the following findings:

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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.

- 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 comply with the policy; and
- The Claimant was unable to show that he fell under one of the exceptions permitted under the policy.

[24] 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 follow his employer's vaccination policy 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 appeal will not proceed.

Neil Nawaz
Member, Appeal Division