Citation: *TV v Canada Employment Insurance Commission*, 2023 SST 275

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	T. V.
Representative:	J. V.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 27, 2022 (GE-22-2624)

Tribunal member:	Neil Nawaz
Decision date:	March 14, 2023
File number:	AD-23-88

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. V., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as an aqua-fitness instructor in a municipal community centre. On October 13, 2021, the municipality placed her on an unpaid leave of absence after she refused to provide proof 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.

[4] The General Division agreed with the Commission. 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 disciplinary measures.

[5] The Claimant is now seeking permission to appeal the General Division's decision. She maintains that she did not commit misconduct and argues that the General Division made the following errors:

- It ignored the fact that her employer imposed a new condition of employment without her agreement;
- It failed to follow a recent case called *A.L.*; and
- It disregarded the protections contained in the *Canadian Bill of Rights*.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the Claimant doesn't have an arguable case, this matter ends now.

Issue

[7] Is there an arguable case that the General Division made an error when it found that the Claimant's refusal to disclose her vaccination status 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.

The General Division did not ignore or misunderstand the evidence

[9] The Claimant argues that getting vaccinated was never a condition of her employment. She argues that her employer's insistence that she get vaccinated or submit to resting was a breach of her employment contract.

[10] 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;

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

- The Claimant intentionally refused to disclose her vaccination status or, alternatively, submit to regular testing; and
- The Claimant was aware that failure to comply with her employer's policy by a certain date would lead to "employment consequences," including a real possibility of suspension.

[11] 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.[3]

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

[12] The Claimant argues that there was no misconduct because she had no obligation to disclose her vaccination to her employer. She says that, by forcing her to do so under threat of suspension or dismissal, her employer infringed her rights and treated her unfairly.

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

[14] 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, 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

[3] See General Division decision, paragraph 30.

> toward her employer and that there was a real possibility of being let go because of that.[4]

[15] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to find that it does not 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**

[16] 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 I recognize the Claimant further argued that the employer changed her hiring agreement when they introduced their vaccination policy. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.[5]

[17] In a case called *Lemire*, 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 normally foresee that it would be likely to result in his or her dismissal.[6]

[18] The Court 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

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[4] See General Division decision, paragraphs 17 and 18.
[5] See General Division decision, paragraph 23, citing *Paradis v Canada (Attorney General)*, 2016 FC 1281. See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[6] See *Canada (Attorney General) v Lemire*, 2010 FCA.

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**

[19] A recent 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.[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]

[20] 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 *Employment Insurance 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.

[21] 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 his suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

– **The General Division didn't disregard a binding precedent**

[22] 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

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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.

mandatory COVID-19 vaccination policy.[9] 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*.

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

[24] First, it does not appear that the Claimant raised *A.L*. before the General Division.[10] The member who heard the Claimant's appeal therefore can't be blamed for failing to consider a precedent that wasn't presented to him.

[25] Second, *A.L.,* like the Claimant's case, was decided by the General Division. Even if the member who heard the Claimant's appeal had considered *A.L.*, he would have been under no obligation to follow it. Members of the General Division are bound by decisions of the Federal Court and Federal Court of Appeal, but they are not bound by decisions of their peers.

[26] 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.* appears to have 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 her 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.[11]

Conclusion

[27] 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

[9] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76.
[10] This may be because *A.L.* was issued on November 15, 2022 — only three weeks before the General Division heard this appeal.
[11] See *Cecchetto*, note 7, at paragraph 43.