Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 362

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 22, 2023 (GE-22-2790)

Tribunal member:	Neil Nawaz
Decision date:	March 28, 2023
File number:	AD-23-131

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. S., worked as a field service technician for a telecommunications company. On January 31, 2022, the Claimant's employer placed him on an unpaid leave of absence after he refused to disclose whether he had received a COVID-19 vaccine. 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.

[3] This Tribunal's General Division 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 loss of employment.

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

- It ignored the fact that nothing in the law required his employer to establish and enforce a COVID-19 vaccination policy;
- It ignored the fact that neither his employment contract nor collective agreement said anything about a vaccine requirement;
- It ignored the protections contained in the *Canadian Charter of Rights and Freedoms* (Charter);
- It ignored the fact that he worked from home and posed no threat to any clients or co-workers; and
- It ignored previous cases that awarded EI to claimants who refused to submit to employer policies that violated their rights.

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 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.

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

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

[9] The Claimant insists that there was no misconduct because he had no obligation to disclose his medical information to his employer. He says that, by forcing him to do so under threat of suspension or dismissal, his employer violated the terms of his employment contract and collective agreement.

[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.

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

[11] When the General Division reviewed the available evidence, it came to the following findings:

- The Claimant's employer was free to establish and enforce vaccination and testing policies 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 was aware that failure to comply with the policy by a certain date would cause loss of employment;
- The Claimant intentionally refused to disclose his vaccination status within the timelines demanded by his employer; and
- The Claimant failed to satisfy his employer that he fell under one of the exceptions permitted under the policy.

[12] 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 his actions were deliberate, and they foreseeably led to his suspension. The Claimant may have believed that his refusal to follow the policy was not doing his employer any harm but, from an EI standpoint, that was not his 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

[13] The Claimant argues that nothing in the law required his employer to implement a mandatory vaccination policy. He maintains that getting tested or vaccinated were never conditions of his employment.

[14] I don't see a case for these arguments.

[15] 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 use. The General Division defined misconduct as follows:

> To 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 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.
>
> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended because of that.[4]

[16] 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**

[17] The Claimant argues that his employment contract and collective agreement didn't require him 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:

> It is also important to know that I can't make any decisions about whether the Claimant had other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can consider only one thing: whether the Claimant's actions or inaction is misconduct under the EI Act.[5]

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[4] See General Division decision, paragraphs 18–20, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and *Attorney General of Canada v Secours*, A-352-94.

[5] See General Division decision, paragraph 16, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[18] The Claimant argues that he can’t be guilty of misconduct unless he breached an expressed or implied duty in his employment contract. But a case called *Lemire* 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]

[19] 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 new case validates the General Division’s interpretation of the law**

[20] 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]

[21] 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

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[6] See *Canada (Attorney General) v Lemire*, 2010 FCA at paragraph 15.
[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 legal system in which the claimant could have advanced his wrongful dismissal or human rights claims.

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

– **The General Division didn't ignore relevant or binding precedents**

[23] At the General Division, the Claimant cited a number of cases in support of his argument that his employer had no right to force him to submit to vaccination against his will. Several of those cases upheld the common-law right to bodily integrity,[9] which is now enshrined in Charter. However, I don't see how these cases have any relevance to employment cases and employment insurance cases in particular.

[24] Employees often voluntarily subordinate their rights when they take a job. For example, an employee might agree to submit to regular drug testing. Or an employee might knowingly give up an aspect of their right to free speech — such as their right to publicly criticize their employer. During the term of employment, the employer may try to impose policies that encroach on their employees' rights, but employees are free to quit their jobs if they want to fully exercise those rights. If they believe that a new policy violates the terms of their employment contract, they are also free to take their employers to court. However, the EI claims process is not the appropriate place to litigate a dispute.

[25] The Claimant also relied on two EI cases from this Tribunal, However, they weren't much help to him because they were not binding and because they were not on point.

[26] As the member who heard the Claimant's case rightly noted, she was under no obligation to follow cases decided by members of her own tribunal. Members of the

[9] In this vein, the Claimant referred to *Hopp v Lepp*, [1980] 2 SCR 192; *Malette v Shulman*, (1990) 72 O.R. (2d) 417; and *R v Morgentaler*, [1988] 1 SCR 30.

General Division are bound by decisions of the Federal Court and the Federal Court of Appeal, but they are not bound by decisions of their peers.

[27] The Claimant cited a case called *M.L.*, in which an employee's disclosure of confidential information was found not to be misconduct.[10] However, the facts in that case significantly differed from those of the Claimant. In *M.L.*, the General Division had before it a settlement agreement, the result of a grievance brought by his union, in which the claimant was found (i) **not** to have wilfully breached his employer's confidentiality policy and (ii) **not** to have known that his disclosure would likely result in loss of employment. In this case, the Claimant cannot benefit from comparable findings.

[28] The Claimant also cited 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] However, as the General Division noted, this case has limited relevance to the Claimant's situation.

[29] *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 this file, the Claimant has never pointed to a comparable provision in his own employment contract.

[30] Moreover, *A.L.* was decided before *Cecchetto*, the recent case that provided clear guidance on employer vaccination mandates in an EI context. In *Cecchetto*, the Federal Court considered *A.L.* in passing and suggested that it would not have broad applicability because it stood on a very particular set of facts.[12]

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[10] See *M.L. v Canada Employment Insurance Commission, 2015 SSTDEI 51.* In his submissions, the Claimant referred to *M.L.* by its file number, GE-15-3093.
[11] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76. In his submissions, the Claimant referred to *A.L.* by its file number, GE-22-1889.
[12] See *Cecchetto*, note 7, at paragraph 43

Conclusion

[31] 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