Citation: *FS v Canada Employment Insurance Commission*, 2023 SST 382

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	F. S.
Representative:	F. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 4, 2023 (GE-22-2765)

Tribunal member:	Neil Nawaz
Decision date:	April 4, 2023
File number:	AD-23-142

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, F. S., works as a clerk for X. On November 27, 2021, his employer suspended him 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 wrongly found that the Claimant was "well aware" of the consequences of not complying with his employer's vaccination policy;
- It ignored the fact that neither his employment contract nor collective agreement said anything about a vaccine requirement;
- It ignored the fact that his employer attempted to impose a new condition of employment without his consent;
- It disregarded the fact that his employer ignored his request for a religious exemption to the policy; and
- It disregarded a recent General Division decision that awarded EI to a claimant, even though he refused to submit to his employer's mandatory vaccine policy.

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 was suspended 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 misinterpreted the law

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

[9] The Claimant has always argued that nothing in the law required his employer to implement a mandatory vaccination policy. He maintains that getting vaccinated was never a condition of his employment.

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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.

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

[11] 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 under the law, 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 or ley go because of that.[4]

[12] 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**

[13] 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:

> The Claimant's representative submitted that the Claimant had a "right to an exemption" and the employer had a duty to accommodate. However, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. The only issue before me was whether the Claimant was suspended from his job because of misconduct. On this matter I must apply the

[4] See General Division decision, paragraphs 14–14, 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.

> legal test for misconduct. In other words, I cannot ignore the law even in the most sympathetic cases.[5]

[14] 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]

[15] *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**

[16] 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]

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[5] See General Division decision, paragraph 23, citing *Paradis v Canada (Attorney General)*, 2016 FC 1281 and *Knee v Canada (Attorney General)*, 2011 FCA 301.
[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.

[17] 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* (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.

[18] 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 did not ignore a relevant or binding precedent**

[19] At the General Division, the Claimant cited a 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.[9] The Claimant argues that the General Division dismissed this case even though it was applicable to his own.

[20] However, as the General Division rightly noted, it is under no obligation to follow decisions from the same tribunal. Members of the 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 colleagues.

[21] Moreover, *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.

[22] *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

[9] 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.

considered *A.L.* in passing and suggested that it would not have broad applicability because it was based on a very particular set of facts.[10]

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

[23] The Claimant argues that the General Division got its facts wrong. He maintains that he is not guilty of misconduct because neither his employment contract nor collective agreement required him to get vaccinated. He insists that he had no way of knowing that he would be suspended if he failed to comply with his employer's new policy. He maintains that, although he qualified for a religious exemption, but X ignored his request.

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

– The General Division considered all relevant factors

[25] 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 confirm that he had been vaccinated 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.

[10] See *Cecchetto*, note 7, at paragraph 43.

[26] 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.

– The General Division had reason to find that the Claimant knew he'd be disciplined for noncompliance

[27] The Claimant says that he didn't realize his failure to get vaccinated would result in his being suspended. He says that, since the vaccination policy was "something that had never happened before," he assumed that his employment contract and collective agreement would take precedence.

[28] I don't see an arguable case here. The General Division considered these arguments and decided that it didn't matter whether his employer's vaccination policy was fair or reasonable; what mattered was whether the Claimant deliberately violated the policy and whether the Claimant knew or should have known that the violation would likely result in disciplinary measures. In this this case, the evidence showed that X's vaccination policy was circulated to employees on October 28, 2021, and that full compliance with it was expected by November 26, 2021.[11]

– The General Division considered the Claimant's request for a religious exemption

[29] The Claimant maintains that he has a deeply held religious objection to vaccination. He accuses the General Division of ignoring that objection, along with evidence that he qualified for an exemption under his employer's vaccination policy.

[30] However, the General Division didn't ignore the Claimant's attempt to secure a religious exemption. In its decision, the General Division wrote:

> I recognize the Claimant further testified that the employer never responded to his request for a religious exemption. I

[11] See X's new mandatory vaccination practice dated October 28, 2021, GD3-54.

> realize the Claimant was frustrated and unhappy about this situation. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for the Claimant to make these arguments.[12]

[31] The Claimant may find it unfair, even illogical, but the General Division was barred from considering what his employer did or didn't do. Instead, the General Division was required to focus on the Claimant's behaviour and whether that behaviour amounted to misconduct, as defined by the EI Act and related case law.

[32] I note that the Claimant did not attempt to request a religious exemption until November 25, 2021, the day before the final compliance deadline. X might not have responded to Claimant's request as quickly as he would have liked, but its conduct was not relevant to the General Division's inquiry.[13]

Conclusion

[33] 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

[12] See General Division decision, paragraph 20.
[13] A memo on file suggests that X eventually rejected the Claimant's request for an exemption on religious grounds. See Service Canada supplementary record of claim dated July 22, 2022, GD3-53.