Citation: *KT v Canada Employment Insurance Commission*, 2023 SST 456

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 20, 2023 (GE-22-1827)

Tribunal member:	Neil Nawaz
Decision date:	April 19, 2023
File number:	AD-23-177

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, K. T., worked as a technician for a national telecommunications company. On December 2, 2021, the Claimant's employer dismissed him after he refused to provide proof that 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] The Social Security 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 asking for permission to appeal the General Division's decision. He argues that the General Division made the following errors:

- It misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act);
- 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 fact that his employer attempted to impose a new condition of employment without his consent; and
- It mischaracterized his reasons for not wanting to submit to rapid testing.

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 preliminary 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 argues that the General Division ignored important aspects of his evidence. He maintains that he is not guilty of misconduct because his employment contract and collective agreement didn't require him to get vaccinated. He suggests that, by forcing him to do so under threat of dismissal, his employer infringed his rights.

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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] From what I can see, the General Division didn't ignore these points. It simply didn't give them as much weight as the Claimant thought they were worth.

– The General Division considered all relevant factors

[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 get fully vaccinated by a certain date;
- The Claimant was aware that failure to comply with the policy by that 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 refused to submit to rapid testing, which his employer had introduced as short-term measure for employees who needed additional time to get fully vaccinated.

[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 dismissal. The Claimant may have believed that his refusal to follow his employer's policy was reasonable but, from an EI standpoint, that was not his call to make.

– The General Division did not mischaracterize the employer's rapid testing protocol

[13] The Claimant alleges that the General Division ignored evidence that his employer misrepresented its testing policy. He maintains that his employer at first told him that he could undergo regular testing without necessarily committing to vaccination

later. He claims that his employer later went back on its word and fired him when he made it clear that he had no intention of getting the shot.

[14] I don't see a case for this argument. From what I can see, the General Division didn't ignore or misrepresent the available evidence. Rather, it decided that the evidence, taken as a whole, didn't correspond with the Claimant's version of events. In its role as finder of fact, that was its right.

[15] The General Division found that the Claimant's employer never intended rapid testing to be an alternative to getting fully vaccinated. The General Division found that it was an interim measure intended to give additional time to employees who had missed the first vaccination deadline to either get the shot or qualify for a medical or religious exemption.

[16] At the General Division, the Claimant argued that his employer acted duplicitously by (i) leading him to believe that he would be allowed to continue in his job if he agreed to regular testing and (ii) then telling him that he was still expected to get vaccinated.

[17] However, the General Division didn't see any duplicity, and neither do I. As the General Division noted, the Claimant's employer notified its employees that they had to be fully vaccinated by October 31, 2021.[4] Immediately after that deadline passed, the employer issued a protocol that imposed interim measures on "all employees not considered fully vaccinated as those with granted human rights accommodation."[5] The protocol contained the following provisions:

- Unvaccinated employees were required to work from home unless their presence in the workplace was critical to business operations;
- Employees who had to go to the workplace were required to complete rapid testing twice a week;

[4] See Bell COVID-19 Vaccination Policy dated September 1, 2021, GD3-102.
[5] See Bell COVID-19 Protocol for Not Fully Vaccinated Team Members dated November 1, 2021, GD3-33.

- Employees other than those granted a human rights accommodation were required to complete a vaccination education course; and
- Going against the protocol might result in disciplinary measures, up to and including termination of employment.

[18] The evidence shows that the Claimant refused to get vaccinated or tested. The file contains a series of disciplinary letters that the employer sent the Claimant. The first, from November 8, 2021, notified the Claimant of a one-day suspension for failing to undergo rapid testing. The second, from November 16, 2021, notified him of a three-day suspension for the same reason. A third letter, dated November 22, 2021, imposed a five-day suspension. On December 2, 2021, the employer sent the Claimant a letter terminating his employment because he had not complied with the terms of the protocol.

[19] Given this evidence, the General Division found that the Claimant intentionally breached the vaccination policy and then the testing protocol, knowing that disciplinary measures were likely to follow. I see no reason to second-guess those findings, which fulfilled the essential elements of misconduct.

There is no case that the General Division misinterpreted the law

[20] When it comes to assessing misconduct, this Tribunal cannot assess the merits of a dispute between an employee and their employer. This interpretation of the EI Act may strike the Claimant as unfair, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

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

[21] 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.

[22] I don’t see a case for these arguments.

[23] 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 usage. 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, 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.[6]

[24] 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.

[25] The Claimant argues that the General Division disregarded the implications of a case called *Astolfi*, which he says requires decision-makers to scrutinize the conduct employers as much as employees.[7] I can't agree. In its decision, the General Division addressed *Astolfi* but found that it didn't apply to the Claimant's circumstances:

> I give a lot of weight to the employer's statement to the Commission that the testing protocol was an interim measure intended to give time to employees to get vaccinated. Because of this, I don't find that requiring the Claimant to attest that he would comply with the vaccination policy was duplicitous or that the Claimant's conduct was a direct result of his employer's actions in the way it was in *Astolfi*. I find that the Claimant

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[6] See General Division decision, paragraphs 18–19, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and A*ttorney General of Canada v Secours*, A-352-94.
[7] See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

> chose not to get vaccinated and not to follow the employer's testing protocol for his own reasons.[8]

[26] In *Astolfi*, an employer's persistent harassment led its employee to stop coming to work. In that case, the employer's actions raised doubts about whether the employee's so-called "misconduct" was wilfull. No such doubts exist in this case — the Claimant voluntarily chose to disobey his employer's vaccination policy and testing protocol. For that reason, I don't see how that the General Division erred in distinguishing *Astolfi*'s facts from the Claimant's.

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

[27] The Claimant argues that nothing in his employment contract and collective agreement required 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:

> I can decide issues under the Act only. I can't make any decisions about whether the Claimant has options under other laws. And it is not for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[9]

[28] This passage echoes a case called *Lemire*, in which 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.[10]

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[8] See General Division decision, paragraph 68.
[9] See General Division decision, paragraph 19, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v Lemire*, 2010 FCA.

[29] 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.

[30] 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 their human rights or 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 such disputes.

– The General Division cited relevant cases

[31] The Claimant alleges that the General Division relied on two cases — *McNamara* and *Paradis* — that had no applicability to his own.[11] He notes that both cases involved EI claimants who knowingly breached terms of their respective employment contracts. He suggests that his case is different because his employment contract contained no vaccine requirement, so there was nothing for him to breach.

[32] I don't see a case for this argument. It is true that *McNamara and Paradis* flowed from distinct sets of facts, but that does not make them irrelevant to the Claimant's case. It is clear from its decision that the General Division cited these cases because they both say essentially the same thing — that this Tribunal cannot consider the merits of a dispute between employee and employer.

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[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 and *Paradis v Canada (Attorney General)*, 2016 FC 1282. The Claimant also alleged that the General Division inappropriately referred to *Canada (Attorney General) v Caul*, 2006 FCA 251, but I could find no reference to this case in its decision.

[33] This interpretation of the EI Act may seem unfair to the Claimant, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

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

[34] A recent Federal Court 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.[12] 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.[13]

[35] 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 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.

[36] 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**

[37] 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

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[12] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[13] 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.[14] The Claimant argues that the General Division dismissed this case even though it was applicable to his own.

[38] However, the General Division was under no obligation to follow decisions from their own 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.

[39] 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 her employer from forcing her to get vaccinated. According to my review of this file, the Claimant has never pointed to a comparable provision in his own employment contract or collective agreement.

[40] As well, *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 was based on a very particular set of facts.[15]

Conclusion

[41] 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

[14] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76.
[15] See *Cecchetto*, note 12, at paragraph 43.