



Citation: *TS v Canada Employment Insurance Commission*, 2023 SST 335

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: T. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 11, 2023
(GE-22-3094)

Tribunal member: Neil Nawaz

Decision date: March 23, 2023

File number: AD-23-109

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. S., was employed as an infection control officer for a regional hospital. On May 10, 2022, the Claimant's employer dismissed her after refusing to provide proof that she 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 her failure to comply with her 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 her 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. She argues that the General Division made the following errors:

- It ignored the fact that nothing in the law required her employer to establish and enforce a COVID-19 vaccination policy;
- It ignored the fact that her employment contract said nothing about a vaccine requirement;
- It failed to appreciate that, under Canadian common law, individuals have the right to control what happens to their bodies;
- It ignored the fact that she did not work with patients directly and was able and willing to do her administrative job from home;
- It ignored her willingness to work toward a mutually acceptable accommodation with her employer; and

- It ignored 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 her 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 that the Claimant lost her 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 she did nothing wrong by refusing to submit to testing or get vaccinated. She suggests that, by forcing her to do so under threat of dismissal,

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.

her employer infringed her rights. She argues that she should not have been disqualified from receiving EI benefits, because she was only trying to protect her health.

[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 get vaccinated or submit to testing within the reasonable timelines demanded by her employer; and
- The Claimant failed to satisfy her employer that she 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 her actions were deliberate, and they foreseeably led to her dismissal. The Claimant may have believed that her refusal to follow the policy was not doing her employer any harm but, from an EI standpoint, that was not her 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 says that nothing in the law required her employer to implement a mandatory vaccination policy. She maintains that getting tested or vaccinated were never conditions of her 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 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, 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 toward her employer and that there was a real possibility of being disciplined 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 her employment contract didn't require her to get the COVID-19 vaccination. However, case law says that is not the issue. What matters is

⁴ See General Division decision, paragraphs 26–27.

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 decisions about whether the Claimant has 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 what the Claimant did or failed to do is misconduct under the Act.⁵

[18] 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.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 though 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

⁵ See General Division decision, paragraph 29, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

⁷ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

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 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 her employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in her suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

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

[23] 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 mandatory COVID-19 vaccination policy.⁹ The Claimant appears to be suggesting that the General Division member who heard her case should have followed an analysis similar to the one in *A.L.*

[24] I can't agree.

[25] 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 her.

[26] Second, *A.L.*, like the Claimant's case, was decided by the General Division. Even if the member who heard the Claimant's case had considered *A.L.*, she would

⁸ See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

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 a few weeks before the General Division heard this appeal.

have been under no obligation to follow it. 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 peers.

[27] 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 would not have broad applicability.¹¹

Conclusion

[28] 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

¹¹ See *Cecchetto*, note 7, at paragraph 43.