Citation: *RD v Canada Employment Insurance Commission*, 2023 SST 423

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 3, 2023 (GE-22-2954)

Tribunal member:	Neil Nawaz
Decision date:	April 11, 2023
File number:	AD-23-214

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, R. D., worked as a case worker for a community drop-in centre. On February 11, 2022, the Claimant's employer placed her on an unpaid leave of absence after she failed to confirm that she had received a COVID-19 vaccine or, alternatively, refused to submit to weekly rapid testing supervised by a third party. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant Employment Insurance (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 alleges that the General Division made the following errors:

- It ignored the fact that her employment contract said nothing about a vaccine requirement;
- It ignored the fact that her employer attempted to impose a new condition of employment without her consent;
- It failed to appreciate that, under Canadian common law, individuals have the right to control what happens to their bodies;
- It based its decision on principles from three cases whose fact situations significantly differed from her own;

- It disregarded the fact that her employer ignored her request for a religious exemption to the policy; 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 preliminary stage, I have to answer the following question: Is there an arguable case that the General Division erred in finding 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.

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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.

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 her evidence. She maintains that she is not guilty of misconduct because her employment contract didn't require her to get vaccinated. She maintains that her employer didn't take her request for a religious exemption seriously. She insists that she was willing to get tested regularly, but her employer unreasonably insisted that such testing be monitored by an independent third party.

[10] From what I can see, the General Division didn't ignore the above 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 or, in the alternative, to submit to regular testing;
- 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 she had been vaccinated within the timelines demanded by her employer;
- The Claimant refused to agree to regular testing monitored by the Red Cross, as 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 suspension. The Claimant may have believed that her refusal to follow her employer's policy was reasonable but, from an EI standpoint, that was not her call to make.

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

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

[14] I don't see a case for this argument. The General Division's decision didn't ignore the Claimant's attempt to secure a religious exemption. However, the General Division determined that it had no authority to decide whether the Claimant was entitled to such an exemption:

> In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. There is also the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.
>
> Despite the Claimant's argument, I am not allowed to consider whether an action taken by an employer violates a claimant's Charter rights. I am also not allowed to make rulings on the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant must go to a different tribunal or a court to address that.[4]

[15] Although the Claimant may find it unjust, even illogical, the General Division was barred from considering her employer's conduct. Instead, the General Division was required to focus on the Claimant and whether her behaviour amounted to misconduct, as defined by the *Employment Insurance Act* (EI Act) and related case law.

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[4] See General Division decision, paragraphs 38–39.

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

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

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

[18] 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. In its decision, the General Division defined misconduct as follows:

> Case law says that 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, 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 suspended or let go because of that.
>
> The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.[5]

[19] 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.

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[5] See General Division decision, paragraphs 16–18, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; *Attorney General of Canada v Secours*, A-352-94; and *Paradis v Canada (Attorney General)*, 2016 FC 1282.

– Employment contracts don't have to explicitly define misconduct

[20] 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 whether the employer has a policy and whether the employee deliberately disregarded it knowing there would be consequences. In its decision, the General Division put it this way:

> The [Federal Court of Appeal] also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[6]

[21] The Claimant argues that she can't be guilty of misconduct unless she breached an expressed or implied duty in her 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.[7]

[22] *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 the employee knew or should have known that the side business would lead to dismissal, even if his employer had no explicit policy against it.

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[6] See General Division decision, paragraph 23, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Canada (Attorney General) v Lemire*, 2010 FCA 314 at paragraph 15.

– The General Division cited relevant cases

[23] The Claimant alleges that the General Division relied on three cases — *McNamara, Mishibinijima,* and *Paradis* — that had no applicability to her own.[8] She notes that all three cases involved EI claimants who knowingly breached terms of their respective employment contracts. She argues that her case is different because her employment contract contained no vaccine requirement, so there was nothing for her to breach.

[24] I don't see a case for this argument. It is true that *McNamara, Mishibinijima,* and *Paradis* all 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 all say essentially the same thing — that this Tribunal cannot consider the merits of a dispute between employee and employer. Whether the dispute arises from an explicit or implicit contractual term is beside the point.

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

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

[26] 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.[9] The 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

[8] See case citations at notes 5 and 6.
[9] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[10]

[27] 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.

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

[29] 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.[11] The Claimant argues that the General Division dismissed this case even though it was applicable to her own.

[30] 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.

[31] 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 her own employment contract.

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[10] See *Cecchetto* note 9, at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[11] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76.

[32] 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.[12]

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 *Cecchetto*, note 9, at paragraph 43.