Citation: *SP v Canada Employment Insurance Commission*, 2023 SST 439

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 23, 2023 (GE-22-3457)

Tribunal member:	Neil Nawaz
Decision date:	April 13, 2023
File number:	AD-23-179

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, S. P., worked as a technician for the X (Department). On December 1, 2021, the X placed the Claimant on an unpaid leave of absence after she refused 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 asking for permission to appeal the General Division's decision. She argues that the General Division made the following errors:

- It displayed bias by finding that she was suspended from her job when, in fact, she was placed on unpaid leave without pay for administrative reasons;
- It misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act); and
- It disregarded important precedents that favoured her position.

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 this 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.

There is no case that the General Division displayed bias

[9] The Claimant accuses the General Division of bias, but she offers no evidence other than the fact that her appeal was unsuccessful. Bias suggests a closed mind that is predisposed to a particular result. The threshold for a finding of bias is high, and the burden of establishing it lies with the party alleging its existence.

[10] The Supreme Court of Canada has stated the test for bias as follows: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[4] An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[5]

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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.
[4] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[5] See *Arthur v Canada (Attorney General),* 2001 FCA 223.

[11] Contrary to the Claimant's allegations, the General Division did not ignore her evidence but engaged with it at some length in its decision. The General Division did not draw the conclusions that the Claimant wanted, but that does not mean it was predisposed against her.

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

[12] At the General Division, the Claimant insisted that she did nothing wrong by refusing to get vaccinated. She maintained that, by forcing her to do so under threat of dismissal, her employer infringed her rights.

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

[14] 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 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.

[15] 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 the Department's

vaccination policy was not doing it 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

[16] This Tribunal cannot consider the merits of a dispute between an employee and their employer. 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.

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

[17] At the General Division, the Claimant argued that the Department didn't have to implement a mandatory vaccination policy. She maintained that getting tested or vaccinated were never conditions of her employment.

[18] I don't see how the General Division erred in dismissing these arguments.

[19] 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.
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> 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 let go because of that.[6]

[6] See General Division decision, paragraphs 13–14, 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.

[20] 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

[21] The Claimant argued that nothing in her employment contract and collective agreement required 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. In its decision, the General Division put it this way:

> I have to focus on the Act only. I can't make any decisions about whether the Claimant has options under other laws. Issues about whether the Claimant was wrongfully dismissed 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.[7]

[22] 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.[8]

[23] 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.

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[7] See General Division decision, paragraph 16, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[8] See *Canada (Attorney General) v Lemire*, 2010 FCA.

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

[24] A recent Federal Court 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.[9] 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.[10]

[25] 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.

[26] 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 binding precedents

[27] At the General Division, the Claimant relied on two recent cases, *A.L. and T.C.*, in which EI claimants were found to be entitled to benefits even though they disobeyed their employers' mandatory COVID-19 vaccination policies.[11] The Claimant argues that

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[9] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[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 *T.C. v Canada Employment Insurance Commission*, 2022 SST 891 and *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

the General Division member who heard her case should have followed an analysis similar to those in *A.L*. and *T.C.*

[28] I can't agree.

[29] The General Division member who heard the Claimant's case was under no obligation to follow either *A.L.* or *T.C.* That's because the General Division also decided these cases, although they were presided over by other members. 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.

[30] *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.* 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.[12]

[31] As for *T.C*., it doesn't help the Claimant either. That's because, although it involved an EI claimant whose refusal to be vaccinated was found not to be misconduct, it contained circumstances that are not present here. *T.C*. turned on the fact that the claimant's employer game him a mere two days to comply with a vaccination policy that was not written down. Since the policy hadn't been adequately communicated to the Claimant, the General Division found that his refusal to get vaccinated was not wilful. In this case, by contrast, the Department had a written vaccination policy that was clearly communicated to the Claimant. As well, she was given ample warning to comply with the policy with a clear message of the consequences if she did not.

[12] See *Cecchetto*, note 9, at paragraph 43.

Conclusion

[32] 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