Citation: *JS v Canada Employment Insurance Commission*, 2023 SST 469

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 19, 2022 (GE-22-2489)

Tribunal member:	Neil Nawaz
Decision date:	April 19, 2023
File number:	AD-23-175

Decision

[1] The Claimant's appeal was late, but I am granting her an extension of time. However, 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, J. S., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as a customer service representative for a medical logistics company. On December 18, 2021, the company suspended the Claimant after she refused to get vaccinated for COVID-19 by a specified deadline. 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.

[4] The General Division agreed with the Commission. 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 her suspension.

[5] The Claimant is now seeking leave or permission to appeal the General Division's decision. She maintains that she is not guilty of misconduct and argues that the General Division made the following errors:

- It proceeded unfairly by forwarding important documents to her attention only seven days before the hearing date;
- It misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act);
- 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; and
- It ignored the fact that her employer attempted to impose a new condition of employment without her consent.

Issues

[6] After reviewing the Claimant's application for leave to appeal, I had to decide the following related questions:

- Was the Claimant's application for leave to appeal filed late?
- If so, should I grant the Claimant an extension of time?
- Does the Claimant have a reasonable chance of success on appeal?

[7] I have concluded that, although the Claimant was late in submitting her application for leave to appeal, she had a reasonable explanation for doing so. However, I am refusing the Claimant permission to proceed, because her appeal does not have a reasonable chance of success.

Analysis

The Claimant's request for leave to appeal was late

[8] An application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the applicant.[1] The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[9] In this case, the General Division issued its decision on December 19, 2022. That same day, the Tribunal sent the decision to the Claimant by email and regular mail. However, the Appeal Division did not receive the Claimant's application for leave to

[1] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).

appeal until February 17, 2023 — approximately one month past the filing deadline. I find that the Claimant's application for leave to appeal was late.

The Claimant had reasonable explanation for the delay

[10] When an application for leave to appeal is submitted late, the Tribunal may grant the applicant an extension of time if they have a reasonable explanation for the delay.[2] In deciding whether to grant an extension, the interests of justice must be served.[3]

[11] Just before the appeal deadline, the Claimant contacted the Tribunal to say that she was trying to get her application ready but was unable to do so due to unforeseen circumstances.[4] She asked for another 30 days in which to request permission to appeal.

[12] When the application eventually came, the Claimant explained that it was late because she needed additional time to seek assistance in preparing her appeal.[5]

[13] Under the circumstances, I find this explanation reasonable. That's why I'm considering the Claimant's application even though it was late.

The Claimant's appeal has no reasonable chance of success

[14] 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 exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[6]

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[2] See section 27 of the *Social Security Tribunal Rules of Procedure*.
[3] See *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[4] See Claimant's email dated January 17, 2023.
[5] See Claimant's application for leave to appeal dated February 17, 2023, AD1.
[6] See DESDA, section 58(1).

[15] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[7] Having a reasonable chance of success is the same thing as having an arguable case.[8] If the Claimant doesn't have an arguable case, this matter ends now.

– **There is no case that the General Division proceeded unfairly**

[16] The Claimant alleges that the General Division failed to follow due process. She says that her hearing was scheduled for December 12, 2022, but her documents were not provided to her until December 5, 2022.

[17] I don't see an argument here.

[18] The Claimant filed her notice of appeal with the General Division on July 26, 2022. One week later, on August 3, 2022, the Tribunal forwarded the Commission's complete file to the Claimant's mailing address. On November 18, 2022, the Tribunal sent the Claimant a notice of hearing by email and registered mail. Later that day, the Claimant emailed the Tribunal asking for clarification.[9]

[19] On November 22, 2022, a navigator — a Tribunal staff member tasked with helping claimants through the appeals process — called the Claimant to answer her questions and to advise her what to expect at the hearing.[10] Later, one week before the hearing, the navigator left the Claimant two separate voicemails reminding her of the upcoming hearing and asking her to confirm that she had the entire appeal file (document packages labelled GD1 to GD7).[11]

[20] The Claimant replied by email the same day. She confirmed that she was aware of the hearing scheduled for December 12, 2022, but she denied ever receiving formal notice of hearing, even though it had been previously sent to her by email and

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[7] See DESDA, section 58(2).
[8] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[9] See Claimant's email dated November 18, 2022.
[10] See Tribunal telephone conversation log dated November 22, 2022.
[11] See two Tribunal telephone conversation logs dated December 5, 2022.

registered mail.[12] Three days later, the Claimant confirmed by email that she would be attending the hearing. She did not indicate that she was missing any documents.[13]

[21] Based on this record, I am satisfied the Claimant was given adequate notice of her hearing and received all documents relevant to her appeal. In my view, the Tribunal did everything reasonably possible to ensure that the Claimant was prepared for her hearing.

– **There is no case that the General Division misinterpreted the law**

[22] The Claimant argues that there was no misconduct because nothing in the law requires her to receive the COVID-19 vaccination. She suggests that, by forcing her to do so under threat of suspension or dismissal, her employer infringed her rights. She maintains that she should not have been disqualified from receiving EI benefits, because she did nothing illegal.

[23] I don't see a case for this argument.

[24] The General Division defined misconduct as follows:

> [T]o be misconduct, the conduct has to be wilful. 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.
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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.[14]

[12] See Claimant's email dated December 5, 2022.
[13] See Claimant's email dated December 8, 2022.
[14] See General Division decision, paragraphs 13 and 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.

[25] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it does not 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**

[26] The Claimant argues that nothing in her employment contract 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 only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other 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.[15]

[27] 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.[16]

[28] 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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[15] See General Division decision, paragraph 16, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Canada (Attorney General) v Lemire*, 2010 FCA.

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

[29] A recent decision has reaffirmed the General Division's approach in the 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.[17] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law. The Court agreed that by making a deliberate choice not to follow his employer's vaccination policy, the claimant had lost his job because of misconduct under the EI Act. The Court said that there were ways other than the EI claims process by which the claimant could advance his human rights or wrongful dismissal claims.

[30] 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 dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

– **There is no case that the General Division disregarded evidence**

[31] The Claimant argues that the General Division ignored or misrepresented important aspects of her evidence. She says the General Division got it wrong when it found that she had a choice not to follow her employer's vaccination policy. She accuses the General Division of ignoring the fact that she was punished for exercising her rights.

[32] Again, I don't see how these arguments can succeed given the law surrounding misconduct. When the General Division reviewed the available evidence, it came to these findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;

[17] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- The Claimant's employer adopted and communicated a clear mandatory vaccination policy requiring employees to provide proof that they had been 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 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.

[33] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. The General Division concluded that the Claimant was guilty of misconduct for EI purposes, because her actions were deliberate, and they foreseeably led to her dismissal. The Claimant may have believed that her refusal to get vaccinated was not doing her employer any harm, but that was not her call to make.

[34] 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 employment contract or their human rights, they can take their employer to court. However, the EI claims process is not the appropriate place to litigate such disputes.

Conclusion

[35] 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.

[36] For that reason, I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This appeal will not proceed.

Neil Nawaz
Member, Appeal Division