Citation: *DA v Canada Employment Insurance Commission*, 2023 SST 482

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Tiffany Glover

Decision under appeal:	General Division decision dated November 14, 2022 (GE-22-2218)

Tribunal member:	Neil Nawaz
Type of hearing:	In person
Hearing date:	March 30, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	April 20, 2023
File number:	AD-22-952

Decision

[1] The appeal is dismissed. The General Division's decision stands.

Overview

[2] The Claimant, D. A., worked as a materials management supervisor for the X (X). On November 20, 2021, the X placed the Claimant on an unpaid leave of absence after he refused to confirm that he had been vaccinated for COVID-19. 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 denies that he did anything wrong and alleges 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 the X 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 Canadian tradition of protecting an individual's right to bodily integrity — and thus the right to refuse medical treatment; and
- It ignored a recent precedent that awarded EI to a claimant who refused to submit to his employer's mandatory vaccine policy.

[5] In January, one of my colleagues on the Appeal Division granted permission to appeal because he thought the Claimant had raised an arguable case. Last month, I held an in-person hearing to discuss the Claimant's allegations in full.

[6] Now that I've heard submissions from both parties, I have concluded that the General Division did not make any errors.

Issue

[7] 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]

[8] In this appeal, I had to decide whether any of the Claimant's allegations fell under one or more of the above grounds of appeal and, if so, whether they had merit.

Analysis

[9] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. In my view, the decision must stand.

The General Division did not ignore or misunderstand evidence

[10] The Claimant argues that the General Division ignored important aspects of his evidence. He maintains that he did nothing wrong by refusing to get vaccinated and was instead simply exercising his right not to accept medical treatment.

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

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[1] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

[12] When the General Division reviewed the available evidence, it came to the following findings:

- The X was free to establish and enforce vaccination and testing policies as it saw fit;
- The X 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 failed to satisfy his employer that he fell under one of the exceptions permitted under the policy;

[13] 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 misinterpret the law

[14] 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

[15] The Claimant maintains that nothing in the law required his employer to implement a mandatory vaccination policy. He argues that getting vaccinated was never

a condition of his employment. He claims that, by forcing him to do so under threat of dismissal, his employer infringed his rights.

[16] I don't find these arguments persuasive.

[17] 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.[2]

[18] 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**

[19] 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 have to focus on the Act only. I cannot make any decisions about whether the Claimant has other options. Issues about whether the Claimant was wrongfully dismissed or whether the

[2] See General Division decision, paragraphs 17–18, 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.

> employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[3]

[20] 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.[4]

[21] The court in *Lemire* went on to find that it was misconduct for a food delivery employee to 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.

[22] 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 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.

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

[23] 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

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[3] See General Division decision, paragraph 20, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[4] See *Canada (Attorney General) v Lemire*, 2010 FCA.

vaccination policy.[5] 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.[6]

[24] 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.

[25] 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 binding precedent**

[26] 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.[7] The Claimant appears to be suggesting that the General Division member who heard his case should have followed an analysis similar to the one in *A.L.*

[27] I can't agree.

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[5] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[6] See *Cecchetto*, note 5, at paragraph 48, which cites *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[7] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76. In his submissions, the Claimant referred to this case by its file number, GE-22-1889.

[28] First, *A.L*. was issued five weeks after the General Division heard the Claimant's appeal.[8] The member who heard the Claimant's appeal can't be blamed for failing to consider a decision that didn't yet exist.

[29] Second, *A.L.,* like the Claimant's case, was decided by the General Division. Even if the member who heard the Claimant's appeal had considered *A.L*., she would have been under no obligation to follow it. Members of the General Division are bound by decisions of the Federal Court and Federal Court of Appeal, but they are not bound by decisions of their peers.

[30] 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 his own employment contract or collective agreement. *Cecchetto*, the recent Federal Court case that considered employer vaccinate mandates, also considered *A.L.* and found that it did not have broad applicability because it was based on a very particular set of facts.[9]

Conclusion

[31] I am dismissing this appeal. The General Division did not make an error when found that the Claimant's refusal to disclose his vaccination status amounted to misconduct under the law. For that reason, the Claimant is not entitled to EI benefits.

Neil Nawaz
Member, Appeal Division

[8] *A.L.* was issued on December 14, 2022; the General Division heard the Claimant's appeal by videoconference on November 8, 2022.
[9] See *Cecchetto*, note 5, at paragraph 43.