Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 470

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	R. L.
Representative:	J. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 18, 2023 (GE-22-3083)

Tribunal member:	Neil Nawaz
Decision date:	April 20, 2023
File number:	AD-23-180

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. L., worked as an attendant for a regional assisted living service provider. On September 13, 2021, Claimant's employer placed her on an unpaid leave of absence after she refused to disclose whether she had received a COVID-19 vaccine.[1] 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 maintains that she is not guilty of misconduct and argues that the General Division made the following errors:

- It misinterpreted the meaning of "misconduct" as set out in the *Employment Insurance Act* (EI Act);
- It claimed to have no jurisdiction to decide whether her refusal to comply with her employer's vaccination policy was misconduct; and
- It ignored her employer's decision to amend her record of employment (ROE) to reflect the fact that she was suspended because of a shortage of work, not misconduct.

[1] The Claimant's employer later dismissed her altogether.

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.[2]

[6] Before the Claimant can proceed, I have to decide whether her appeal has a reasonable chance of success.[3] Having a reasonable chance of success is the same thing as having an arguable case.[4] 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 ignored or misunderstood the evidence

[9] 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.

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[2] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] See DESDA, section 58(2).
[4] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

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

– 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 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 timelines demanded by her employer; and
- The Claimant did not attempt to qualify for either the medical or religious exception 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 vaccination policy was not doing it any harm but, from an EI standpoint, that was not her call to make.

– The General Division didn't ignore the amended ROE

[13] The Claimant alleges that the General Division chose to disregard the fact that her employer amended her ROE in her favour. She notes that her employer repudiated

its previous declaration that she had been "dismissed" and replaced it with one saying that she was let go because of a "shortage of work."[5]

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

[15] The General Division did not disregard the Claimant's amended ROE and, in fact, squarely addressed it in its decision. It found that, whatever her employer said, **in substance**, the Claimant was suspended because she was unvaccinated, not because of lack of work:

> I realize the Claimant testified that her Record of Employment was amended to layoff. However, when the Claimant was initially placed on an unpaid leave of absence and then dismissed on October 14, 2021, the **reason** was because she didn't comply with the employer's vaccination policy. On this matter, I agree with the Commission that what transpired with the Claimant's union (and later resulted in an amendment of the Record of Employment) wasn't binding on me.[6]

[16] In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.[7] In this case, the General Division examined the circumstances around the Claimant's suspension and concluded that she was let go because of her noncompliance with the vaccine policy, and not for any other reason. In the absence of a significant factual error, I see no reason to second-guess this finding.[8]

There is no case that the General Division misinterpreted the law

[17] 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

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[5] See Claimant's ROEs at GD3-20 and GD3-30.
[6] See General Division decision, paragraph 13. See also paragraphs 22 and 23, in which the General division addresses this subject again.
[7] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.

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

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

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

[20] 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:

> To be misconduct under the law, 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.[9]

[21] 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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[9] See General Division decision, paragraphs 15–16, 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.

– Employment contracts don't have to explicitly define misconduct

[22] 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:

> [T]he Claimant argued that refusing to receive an experimental vaccine wasn't misconduct. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.[10]

[23] 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.[11]

[24] The court in *Lemire* went on to find that 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.

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

[25] 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.[12] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

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[10] See General Division decision, paragraph 25, citing *Morris v Canada (Attorney General)*, (A-291-98).
[11] See *Canada (Attorney General) v Lemire*, 2010 FCA.
[12] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> 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.[13]

[26] 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.

[27] 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.

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

[13] 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.