Citation: *DB v Canada Employment Insurance Commission*, 2023 SST 538

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 13, 2023 (GE-22-3007)

Tribunal member:	Neil Nawaz
Decision date:	April 29, 2023
File number:	AD-23-239

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, D. B., worked as a clerk with British Columbia's public service. On November 23, 2021, the Claimant's employer placed her on an unpaid leave of absence after she refused to provide proof that she 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 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 says she did nothing wrong and argues that the General Division made the following errors:

- It failed to recognize that she was disadvantaged because she lacked legal representation;
- It ignored the fact that her employment contract said nothing about a vaccine requirement;
- It ignored the fact that her employer attempted to unilaterally impose a new condition of employment without her consent;
- It ignored evidence that she has a longstanding skin condition that makes vaccinations harmful to her health;

- It misled her by saying it had limited authority to consider arguments based on the *Canadian Charter of Rights and Freedoms* (Charter);
- It discouraged her from making a Charter argument that might have fallen within the Tribunal's jurisdiction; and
- It disregarded two 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 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's no case that the General Division treated the Claimant unfairly

[9] The Claimant alleges that the EI claims process and the Tribunal, in particular, discriminates against people who don't have legal representation.

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

[11] It is true that EI Act, and the case law around it, are complex. That is probably inevitable in any system designed to distribute limited resources among hundreds of thousands of claimants.

[12] However, the complexity of the EI system does not absolve claimants from taking reasonable steps to familiarize themselves with the law.

[13] Although I recognize that lawyers or paralegals cost money, the Claimant was free to hire a professional to help her with her submissions. The Claimant implies that unrepresented claimants don't stand a chance at the Tribunal, but that is contradicted by the fact that people like herself often succeed without legal assistance.

[14] In any event, even if she didn't have counsel, the Claimant benefitted from the Tribunal navigation service, which is designed to guide unrepresented claimants through the appeals process. As well, I have listened to the recording of the General Division hearing. From what I heard, the member who heard the appeal made a genuine effort to explain to Claimant key points of law.

[15] It's not easy to appeal an EI denial, but the process is not inherently biased against unrepresented claimants.

There's no case that the General Division ignored the evidence

[16] 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.

[17] 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**

[18] 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 knew, or should have known, 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 did not apply for one of the exceptions permitted under the policy.

[19] 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 policy was not doing her employer any harm but, from an EI standpoint, that was not her call to make.

– **There was no evidence that the Claimant qualified for a medical exemption**

[20] The Claimant says that she can't get vaccinated without putting her health at risk. She notes that she has never received a smallpox vaccine because of a childhood skin condition.

[21] I see no indication that the General Division disregarded evidence of a medical exemption.

[22] The file contained no mention of any exemption. In fact, the Claimant told the Commission that, although her employer allowed employees to apply for medical or

religious exemptions, “she did not have any of these concerns” and, as a result, “she did not request an exemption.”[4] As well, in my review of the Claimant testimony before the General Division, I didn’t hear anything about medical complications that might arise if the Claimant were vaccinated.

[23] The General Division can’t be faulted for failing to consider evidence that was never presented to it. The Claimant did not say anything about a potential medical exemption until she came to the Appeal Division. In a proceeding that is supposed to be about the General Division’s conduct, it’s too late to bring up such evidence now.

There’s no case that the General Division misinterpreted the law

[24] When it comes to assessing misconduct, 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

[25] The Claimant argues that nothing in the law required her employer to implement a mandatory vaccination policy. She maintains that getting tested or vaccinated were never conditions of her employment.

[26] I don’t see a case for these arguments.

[27] 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 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

[4] See Service Canada supplementary record of claim dated May 20, 2022, GD3-29.

> 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 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 because of that.[5]

[28] 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**

[29] 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 have to focus on the EI 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 EI Act.[6]

[30] 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

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[5] See General Division decision, paragraphs 16–17, 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.
[6] See General Division decision, paragraphs 24–25, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.

> normally foresee that it would be likely to result in his or her dismissal.[7]

[31] The court in *Lemire* went on to find that an employer was justified in finding misconduct when one of its 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.

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

[32] 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.[8] 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.[9]

[33] 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 he could have advanced his wrongful dismissal or human rights claims.

[34] 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.

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[7] See *Canada (Attorney General) v Lemire*, 2010 FCA.
[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[9] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

– The General Division gave the Claimant an opportunity to make a Charter argument

[35] The Claimant alleges that the General Division misled her by telling her that it had limited authority to consider Charter arguments. She claims that it discouraged her from making a Charter argument within the Tribunal's jurisdiction.

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

[37] In her notice of appeal to the General Division, the Claimant argued that her employer had violated her rights to privacy and security of the person. At the hearing, the presiding member cautioned the Claimant that his authority to decide Charter issues was limited. He explained that, while he could consider whether provisions of the EI Act breached the Charter, he could not do the same for other laws.[10]

[38] The General Division was not wrong. The Claimant's real dispute was with her employer and the directives that prompted it to establish a mandatory vaccination policy. But her submissions said nothing about how the EI Act itself violated the Charter.

[39] The General Division went on to tell the Claimant that she was free to make a Charter argument about the EI Act, but it warned her that such an argument would be subject to the formal process set out in the *Social Security Tribunal Regulations*. Asked whether she still wanted to rely on the Charter, the Claimant replied, "No."[11]

[40] The General Division did not deny the Claimant an opportunity to make a Charter argument. It simply described some of the challenges that she would face if she attempted to do so. Those challenges were real, and they presumably informed the Claimant's decision to focus her submissions on other issues.

– The General Division didn't ignore binding precedents

[41] 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

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[10] Refer to the recording of the General Division hearing at 24:50.
[11] Refer to hearing recording at 28:45.

mandatory COVID-19 vaccination policy.[12] The Claimant appears to be suggesting that the General Division member who heard her appeal should have followed an analysis similar to the one in *A.L*.

[42] I don't see a reasonable chance of success for this argument.

[43] First, it does not appear that the Claimant raised *A.L*. before the General Division.[13] The member who heard the Claimant's appeal therefore can't be blamed for failing to consider a precedent that wasn't presented to him.

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

[45] 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.* 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. *Cecchetto*, the recent Federal Court case that considered employer vaccinate mandates, also considered *A.L.* and found that it did not have broad applicability.[14]

[46] The Claimant also argues that the General Division ignored a case called *T.C*.[15] Again, that case does not help the Claimant because it is another non-binding General Division decision. And although *T.C*. involved an EI claimant whose refusal to be vaccinated was found not to be misconduct, that case contained circumstances that are not present here. *T.C.* turned on the fact that the claimant's employer gave him a mere two days to comply with a vaccination policy that hadn't been written down. Since the

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[12] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, in particular paragraphs 74–76.
[13] This may be because *A.L.* was issued on November 15, 2022 — not long before the General Division heard this appeal.
[14] See *Cecchetto*, note 8, at paragraph 43.
[15] See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891.

policy hadn’t been adequately communicated, the General Division found the claimant’s failure to get vaccinated was not wilful. By contrast, the Claimant in this case received clear written notice of her employer’s vaccination policy. As well, she received ample warning to comply with the policy, and she understood the consequences if she did not.

Conclusion

[47] 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