Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 551

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. B.
Representative:	L. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 13, 2023 (GE-22-3005)

Tribunal member:	Neil Nawaz
Decision date:	May 5, 2023
File number:	AD-23-220

Decision

[1] I am refusing the Appellant permission to appeal because she does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Appellant, M. B., worked as a quality assurance specialist for a large X hospital. On October 16, 2021, the Appellant's employer placed her on an unpaid leave of absence after she failed 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 Appellant Employment Insurance (EI) benefits because her failure to comply with her employer's vaccination policy amounted to misconduct.

[3] This Tribunal's General Division dismissed the Appellant's appeal. It found that the Appellant had deliberately broken his employer's vaccination policy. It found that the Appellant knew or should have known that disregarding the policy would likely result in loss of employment.

[4] The Appellant is now asking for permission to appeal the General Division's decision. She argues that the General Division made the following errors:

- It ignored the fact that her employer attempted to unilaterally impose a new condition of employment without her consent;
- It disregarded an earlier General Division decision that allowed a claimant to collect EI even though she too had been suspended for refusing the COVID-19 vaccine.

Issue

[5] There are four grounds of appeal to the Appeal Division. An appellant 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 Appellant 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 Appellant 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 Appellant 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 Appellant does not have an arguable case.

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

[9] The Appellant insists that she did nothing wrong by refusing to get vaccinated. She suggests that, by forcing her to do so under threat of dismissal, her employer infringed her rights and breached her employment contract.

[10] Given the law surrounding misconduct, I don't see how the General Division made a mistake in rejecting these arguments. When the General Division reviewed the available evidence, it came to the following findings:

- The Appellant's employer was free to establish and enforce vaccination and testing policies as it saw fit;

---

[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.

- The Appellant's employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated;
- The Appellant knew, or should have known, that failure to comply with the policy by a certain date would cause loss of employment;
- The Appellant intentionally refused to get vaccinated within the timelines demanded by her employer; and
- The Appellant did not attempt to apply for an exemption under the policy.

[11] These findings appear to accurately reflect the documents on file, as well as the Appellant's testimony. The General Division concluded that the Appellant was guilty of misconduct because her actions were deliberate, and they foreseeably led to her suspension. The Appellant 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 is no case that the General Division misinterpreted the law

[12] 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 Appellant, 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

[13] The Appellant argues that nothing in the law required her employer to implement a mandatory vaccination policy. She maintains that getting vaccinated was never a condition of her employment.

[14] I don't see a case for these arguments.

[15] 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 Appellant does not 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.
>
> There is misconduct if the Appellant 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.[4]

[16] 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

[17] The Appellant 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 Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.[5]

---

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

[18] 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.[6]

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

[20] 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.[7] 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.[8]

[21] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, the appellant lost his job because of misconduct under the EI Act. The Court said that there were other ways under the legal system in which Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

---

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

[22] Here, as in *Cecchetto*, the only questions that matter are whether the Appellant 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 did not ignore a binding precedent

[23] Finally, the Appellant alleges that the General Division disregarded a case that she says was directly applicable to her own. In *A.L.*, another member of the General Division found that an EI claimant was entitled to benefits even though she disobeyed her employer's mandatory COVID-19 vaccination policy.[9] The Appellant argues that the same logic should have been applied to her case.

[24] However, the General Division is under no obligation to follow its own decisions. 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 colleagues.

[25] Moreover, *A.L.* was decided before *Cecchetto*, the recent case that provided clear guidance on employer vaccination mandates in an EI context. In *Cecchetto*, the Federal Court considered *A.L.* in passing and suggested that it would not have broad applicability because it was based on a very particular set of facts.[10]

[26] Above all, *A.L.* does not, as the Appellant 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 her employer from forcing her to get vaccinated. According to my review of this file, the Appellant has never pointed to a comparable provision in her own employment contract.

---

[9] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76. In her written submission, the Claimant referred to this case by its file number, GD-22-1889.
[10] See *Cecchetto*, note 7, at paragraph 43.

Conclusion

[27] 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