Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 588

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. M.
Representative:	H. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 23, 2023 (GE-22-3332)

Tribunal member:	Neil Nawaz
Decision date:	May 10, 2023
File number:	AD-23-271

Decision

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

Overview

[2] The Appellant, J. M., worked as a courier for X In January 2022, X placed the Appellant on an unpaid leave of absence after he refused to provide proof that he had been vaccinated for COVID-19. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Appellant EI benefits because his failure to comply with his 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. He maintains that he did nothing wrong 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 disregarded his rights to bodily autonomy and religious freedom;
- It ignored the fact that neither his employment contract nor collective bargaining agreement (CBA) said anything about a vaccine requirement;
- It ignored the fact that X attempted to unilaterally impose a new condition of employment without his consent;
- It ignored the fact that, since X's vaccine policy contained no progressive disciplinary measures, nothing in it would have led employees to believe that non-compliance would lead to immediate dismissal;

- It exceeded its jurisdiction by making a ruling in violation of the *Canada Labour Code* and the *Canadian Human Rights Code*; and
- It ignored the fact that, on his record of employment (ROE), X misrepresented its reason for placing him on leave.

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 his 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 when it found that the Appellant lost his 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.

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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 is no case that the General Division misinterpreted the law

[9] 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 strike the Appellant 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

[10] The Appellant argues that nothing in the law required his employer to implement a mandatory vaccination policy. He maintains that getting vaccinated was never a condition of his employment. He says that it can't be misconduct if an employee refuses to follow a policy that is illegal or contrary to contractual terms.

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

[12] 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, 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.
>
> There is misconduct if the Appellant 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 from his job because of that.[4]

[13] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, when

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[4] See General Division decision, paragraphs 13–14, 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.

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

[14] The Appellant argues that nothing in his employment contract or CBA 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 only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed 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]

[15] 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]

[16] The court in *Lemire* went on to rule 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.

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

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

[17] 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 an appellant'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]

[18] 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 Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

[19] Here, as in *Cecchetto*, the only questions that matter are whether the Appellant 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 exceed its jurisdiction

[20] The Appellant argues that the General Division had no right to issue a ruling that went against Canadian labour and human rights legislation. However, as I have tried to show, this argument turns the law around. If the General Division had done as the Appellant wished and found X's vaccination policy in breach of labour and human rights policy, **then** it would have been acting outside its authority.

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[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.

[21] 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 CBA or their human rights, they can file a grievance or take their employer to court or some other tribunal. However, the EI claims process is not the appropriate place to litigate such disputes.

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

[22] The Appellant says that he did nothing wrong by refusing to get vaccinated. He suggests that, by forcing him to do so under threat of dismissal, his employer infringed his rights. He insists that he was exempt from having to get vaccinated on both medical and religious grounds.

[23] The General Division didn't ignore these arguments. It simply didn't give them as much weight as the Claimant thought they were worth. Given the law surrounding misconduct, I don't see how the General Division erred in its assessment.

– The General Division considered all relevant factors

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

- X was free to establish and enforce vaccination and testing policies as it saw fit;
- X 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 reasonable timelines demanded by his employer; and
- The Appellant failed to satisfy his employer that he fell under either of the exceptions permitted under the policy.

[25] 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 his actions were deliberate, and they foreseeably led to his suspension. The Appellant may have believed that his refusal to follow the policy was not doing his employer any harm but, from an EI standpoint, that was not his call to make.

[26] The Appellant also insists that, since X's vaccination policy did not contain progressive disciplinary measures, he could not have been expected to understand that his failure to get the shot by a specified deadline would lead to suspension. However, the policy did make clear that any employee not vaccinated by January 10, 2022, would be "placed on an unpaid leave of absence."[9] In the General Division's view, that was enough to find that the Appellant knew or should have known that failure to comply with the policy could possibly lead to loss of employment. I see no reason to interfere with this finding.

– The General Division did not ignore any significant aspect of the ROE

[27] The Claimant alleges that the General Division chose to disregard the "dishonest" way in which X's ROE described its reason for letting the Appellant go. He suggests that his interests were prejudiced by X's use of code "M" (suspension or dismissal), rather than "N" (leave of absence), as recommended by the Government of Canada.[10]

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

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[9] See X COVID-19 Safer Workplaces Policy issued September 15, 2021 (GD12-22) and Q&A: COVID-19 vaccination policy and attestation requirement for all employees (GD12-38).
[10] See Appellant's ROE at GD3-17.

[29] It's true that the General Division's decision didn't specifically address the ROE, but a decision-maker can't be expected to address each and every aspect of the evidence in its written reasons.[11] In any event, the General Division had good reason not to examine X's coding. That's because the topic wasn't particularly relevant to the question of whether the Appellant engaged in misconduct for EI purposes. Whether the Claimant was suspended or placed on a leave of absence, the net result was the same: the Appellant was involuntarily removed from his job without pay.

[30] In any case, the General Division did make a finding about the circumstances in which the Appellant left his job. It wrote, "The Appellant's employer put him on an unpaid leave of absence from work. Since the employer initiated the Appellant's separation from employment, this is considered a suspension."[12] It later determined that the suspension came about because of misconduct.

[31] 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.[13] In this case, the General Division examined the circumstances around the Claimant's suspension and concluded that he was let go because of his 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.[14]

Conclusion

[32] 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.

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[11] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[12] See General Division decision, footnote1.
[13] See *Simpson*, note 12.
[14] 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.

Neil Nawaz
Member, Appeal Division