Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 574

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. S.
Representative:	A. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 27, 2023 (GE-22-3598)

Tribunal member:	Neil Nawaz
Decision date:	May 4, 2023
File number:	AD-23-230

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, D. S., worked as a project manager for a regional municipality. On January 3, 2022, the Appellant's employer placed him on an unpaid leave of absence after he refused to provide proof that he had been vaccinated for COVID-19.[1] 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" in the *Employment Insurance Act* (EI Act);
- It failed to exercise its jurisdiction by considering whether the employer's vaccination policy was legal;
- It ignored the fact that his employment contract said nothing about a vaccine requirement;
- It ignored the fact that his employer attempted to unilaterally impose a new condition of employment without his consent;

[1] The Claimant's employer terminated his employment altogether on February 14, 2022.

- It failed to appreciate that, under human rights and occupational health and safety legislation, he had the right to refuse unsafe working conditions;
- It ignored the fact that he was able and willing to work from home, where he posed no threat to clients or co-workers;
- It ignored the fact that he obtained a religious exemption from officials in his church;
- It ignored the Commission's attempt to mislead it by insisting that he had not received a religious exemption, even though he had evidence proving he did; and
- It disregarded an important precedent that allowed a claimant to collect EI, even though she 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.[2]

[6] Before the Appellant can proceed, I have to decide whether his 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 Appellant doesn't have an arguable case, this matter ends now.

[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.

[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.

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 notes that nothing in the law required his employer to implement a mandatory vaccination policy. He maintains that getting tested or vaccinated were never conditions 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 because of that.[5]

[13] 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

[14] The Appellant argues that nothing in his employment contract 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:

> The Tribunal does not have the authority to rule on those issues in a misconduct appeal The Claimant's remedies lie with the courts, not with the Tribunal.
>
> The courts have ruled that the performance of services under the employment contract is an essential condition of employment. They have also ruled that a deliberate violation of an employer's policy is considered to be misconduct.
>
> Based on the principles from these court decisions, the Appellant was in breach of his obligations to the employer. The Tribunal does not have the authority to rule on wrongful or unjust dismissal, or to rule on the legality of the Policy.[6]

[15] This passage echoes a case called *Lemire*, in which the Federal Court of Appeal had this to say:

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[5] See General Division decision, paragraphs 11–22, 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 30–32, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Canada (Attorney General) v Wasylka*, 2004 FCA 219; *Canada (Attorney General) v Lavallée*, 2003 FCA 255; *Canada (Attorney General)* v *Brissette*, A-1342-92; *Canada (Attorney General) v Bellavance,* 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

> 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.[7]

[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.

– 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.[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]

[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.

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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.

[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 ignore a binding precedent

[20] At the General Division, the Appellant cited a 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.[10] The Appellant argues that the General Division disregarded this case even though it was applicable to his own.

[21] However, the General Division was under no obligation to follow decisions from their own tribunal. 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.

[22] *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 his own employment contract.

[23] 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.[11]

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

[24] 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

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[10] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76.
[11] See *Cecchetto*, note 8, at paragraph 43.

his rights. He insists that he was exempt from having to get vaccinated on both medical and religious grounds.

[25] 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

[26] 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;
- 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 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.

[27] 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.

– The General Division did not ignore the Appellant's remote work

[28] The Appellant claims that the General Division disregarded his argument that, since he was working from home, he did not need to get vaccinated.

[29] I disagree. As seen in its decision, the General Division was well aware of the Appellant's working arrangements.[12] However, it didn't think those arrangements were relevant in determining whether the Claimant had breached his employer's policy. As we have seen, the law did not require the General Division to determine whether the employer's rules were reasonable or whether the employer had done enough to accommodate the Appellant's concerns about the vaccine's safety.

– The General Division didn't misconstrue the Claimant's efforts to get an exemption

[30] The Appellant alleges that the General Division ignored the fact that he obtained a religious exemption from officials in his church.

[31] I don't see a case for this allegation. As the General Division noted, the Appellant made an **attempt** to be exempted from the vaccine policy, but he did not **succeed** in getting such an exemption because his employer turned him down. Contrary to the Appellant's accusation, the Commission did not attempt to mislead the General Division into thinking that the Appellant never received a religious exemption. That's because, in reality, he never did.

[32] In its decision, the General Division described what happened:

> The Appellant also applied in mid-January 2022 for an exemption on religious grounds. He supported his request with a letter from the parish priest of his Catholic church. That letter stated that the Appellant was doing his best to follow his informed conscience in this matter, based on the Church's teachings. The Appellant also provided a letter from the Transformational Ministerial Fellowship, signed by the Appellant and by a Reverend Doctor. The letter sets out the Appellant's position based on the interpretation of numerous passages from the Bible. The employer did not approve the application, because it was based on personal preference and not specifically tied to a doctrine.[13]

[12] See General Division decision, paragraphs 4 and 15.
[13] See General Division decision, paragraph 24.

[33] This passage accurately reflects the available evidence. There is no doubt that the Appellant went to considerable lengths to support his application for a religious exemption. However, his employer rejected the application, as was its right under the rules governing EI. Whether that rejection was fair or reasonable was not for General Division to decide. If the Appellant wanted to challenge the rejection, he was free to take his employer to court or to a human rights tribunal. However, the EI claims process was not the appropriate way to litigate such a dispute.

Conclusion

[34] 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