Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 631

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 18, 2023 (GE-22-2340)

Tribunal member:	Neil Nawaz
Decision date:	May 26, 2023
File number:	AD-23-250

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, A. B., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as a caretaker-clerk for a branch of the X (X). On November 2, 2021, X placed the Claimant on an unpaid leave of absence after she refused to disclose whether she had been vaccinated for COVID-19.[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.

[4] The General Division agreed with the Commission. In a decision dated January 15, 2023, 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 her suspension.

[5] On March 10, 2023, the Claimant requested leave or 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" in the *Employment Insurance Act* (EI Act);
- It ignored the fact that nothing in the law required X to establish and enforce a COVID-19 vaccination policy;

[1] X dismissed the Claimant altogether on January 2, 2022 after she continued to refuse to say whether she had been vaccinated.

- It ignored the fact that neither her employment contract nor collective agreement said anything about a vaccine requirement;
- It ignored the fact that her employer attempted to impose a new condition of employment without her consent;
- It ignored her evidence that she did not expect to be dismissed for misconduct, because she had requested accommodation under the policy; and
- It ignored her evidence that X never responded to her request for accommodation before suspending her.

Issues

[6] After reviewing the Claimant's application for leave to appeal, I had to decide the following questions:

- Was the Claimant's application for leave to appeal filed late?
- Does the Claimant have a reasonable chance of success on appeal?

[7] I have concluded that the Claimant's application for leave to appeal was not late. However, I am refusing the Claimant permission to proceed, because her appeal does not have a reasonable chance of success.

Analysis

The Claimant's request for leave to appeal was not late

[8] An application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the applicant.[2] However, the Appeal Division may allow further time to make an application for leave to appeal.

[2] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).

[9] In this case, the General Division issued its decision on January 15, 2023, and the Tribunal sent the decision to the Claimant by regular mail three days later. The Appeal Division did not receive the Claimant's application for leave to appeal until March 10, 2023 — approximately three weeks past the filing deadline.

[10] However, the Claimant says that she received the General Division's decision on February 13, 2023.[3] She did not explain why it took nearly a month for the decision to find its way into her hands, but I am willing to give her the benefit of the doubt on this point. For that reason, I find that the Claimant's application for leave to appeal was filed on time.

The Claimant's appeal does not have a reasonable chance of success

[11] 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 exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[4]

[12] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[5] Having a reasonable chance of success is the same thing as having an arguable case.[6] If the Claimant doesn't have an arguable case, this matter ends now.

[13] 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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[3] See Claimant's application for leave to appeal dated March 10, 2023 (AD1-2) and her email dated April 26, 2023 (AD1B-1).
[4] See DESDA, section 58(1).
[5] See DESDA, section 58(2).
[6] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

– **There is no case that the General Division misinterpreted the law**

[14] The Claimant argues that there was no misconduct because nothing in the law required her to disclose whether she had received a COVID-19 vaccination. She suggests that, by forcing her to do so under threat of suspension or dismissal, her employer infringed her rights. She maintains that she should not have been disqualified from receiving EI benefits, because she did nothing illegal.

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

[16] The General Division defined misconduct as follows:

> Case law says that, 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. They do not need to prove that there was deceit or a desire to cause the employer harm, just that the behaviour was done knowingly
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> […]
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> The case law also says that misconduct, in the context of the Act, means behaviour that could get in the way of an employee carrying out their duties toward their employer.[7]

[17] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it does not 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**

[18] The Claimant argues that nothing in her employment contract or collective agreement required her to get the COVID-19 vaccination or to disclose her vaccination status. However, case law says that is not the issue. What matters is whether the

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[7] See General Division decision, paragraphs 24 and 31, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and *Attorney General of Canada v Secours*, A-352-94.

employer has a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> The FCA [Federal Court of Appeal] also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them, including litigation, grievances and petitions to other tribunals. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[8]

[19] In a case called *Brisette*, the Federal Court of Appeal said that misconduct may manifest itself in a violation of the law, of a regulation or of an ethical rule, and may mean that an essential condition of the employment ceases to be met, resulting in dismissal. Such a condition may be express or implied and may relate to a concrete or more abstract requirement.[9]

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

[20] A recent decision has reaffirmed the General Division's approach in the 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.[10] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law. The Court agreed that, by making a deliberate choice not to follow his employer's vaccination policy, the claimant had lost his job because of misconduct under the EI Act. The Court said that there were ways other than the EI claims process by which the claimant could advance his human rights or wrongful dismissal claims.

[21] 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

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[8] See General Division decision, paragraph 54, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v Brissette*, A-1342-92.
[10] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

deliberate and foreseeably likely to result in dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

– **There is no case that the General Division disregarded evidence**

[22] The Claimant alleges that the General Division disregarded or misrepresented important aspects of her evidence. She says that X's vaccination policy was ambiguous. She insists that she could not have foreseen that she would be suspended or dismissed for failing to comply with it.

[23] Again, I don't see how these arguments can succeed given the law surrounding misconduct. When the General Division reviewed the available evidence, it came to these findings:

- X was free to establish and enforce a vaccination policy as it saw fit;
- X adopted and communicated a clear mandatory vaccination policy requiring employees to provide proof that they had been vaccinated;
- The policy was an important and necessary part of the Claimant's job;
- X warned the Claimant on multiple occasions that she would be suspended and/or dismissed if she did not comply with the policy;
- 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 ask for an exemption under the policy until December 23, 2021 — seven weeks after her suspension and 10 days before her dismissal.

[24] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. The General Division concluded that the Claimant was guilty of misconduct for EI purposes, because her actions were deliberate, and they foreseeably led to her dismissal. The Claimant may have believed that her refusal to

disclose her vaccination status was not doing her employer any harm, but that was not her call to make.

[25] The Claimant also alleges that the General Division ignored evidence that X

- failed to answer her questions about the safety and efficacy of the vaccine; and
- lost or ignored her request for accommodation.

[26] However, the General Division addressed these points in its decision. It found that, under the law, an employer's behaviour doesn't matter. How X implemented or enforced its vaccination policy was irrelevant to whether the Claimant committed misconduct. In this case, the General Division found that the Claimant disobeyed at least one part of the policy, and that was all that was needed to establish misconduct under the EI Act.

Conclusion

[27] 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.

[28] For that reason, I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This appeal will not proceed.

Neil Nawaz
Member, Appeal Division