Citation: *AC v Canada Employment Insurance Commission*, 2023 SST 414

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | A. C. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | General Division decision dated January 9, 2023 (GE-22-3048) |

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| **Tribunal member:** | Janet Lew |
| **Decision date:** | April 12, 2023 |
| **File number:** | AD-23-137 |

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant, A. C. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission, had proven that the Claimant lost his job because of misconduct. In other words, it found that he did something that caused him to be dismissed. The Claimant had not complied with his employer's COVID-19 vaccination policy. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made both legal and factual errors. He says that there are several factual errors in the General Division decision. He also says that the terms of his collective agreement governed his employment relationship. He says that his behaviour was exemplary and that he remained well within the terms of his employment agreement. So, he says that choosing not to comply with his employer's vaccination policy does not constitute misconduct. He also says that his employer's vaccination policy violated his religious beliefs.

[4] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with his appeal.

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[1] Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

# Issues

[6] The issues are:

a) Is there an arguable case that the General Division made factual errors?

b) Is there an arguable case that the General Division failed to consider whether there could be misconduct if the Claimant honoured the terms of his collective agreement?

# I am not giving the Claimant permission to appeal

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.[3]

[8] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

## Is there an arguable case that the General Division made factual errors?

[9] The Claimant argues that the General Division made several important factual errors, at paragraphs 10, 15, 34, 35, 36, 48, and 64. However, the Claimant did not identify any specific errors.

- **Paragraph 10**

[10] The Claimant argues that paragraph 10 contains errors of fact. He did not identify any specific errors. Paragraph 10 reads:

[3] See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

> I find that the Claimant was suspended form his job because he did not follow his employer's mandatory vaccination policy. The Claimant says that he was not suspended but rather put on an unpaid leave of absence because he made a personal choice not to get vaccinated. The Claimant does not feel it is misconduct for not following the policy. The Claimant feels that the employer's policy was unfair and should have given more options for compliance like testing. The Claimant feels he should be entitled to benefits.

[11] It seems that the Claimant is challenging the General Division's finding that his employer suspended him from his employment. The Claimant denies that he was suspended. He maintains that his employer placed him on an unpaid leave of absence. Indeed, the Record of Employment states that there was a leave of absence.[4]

[12] The General Division explained why it found that the Claimant's employer had suspended him, despite what the Record of Employment stated. The General Division explained that it was not bound by the employer's characterization.

[13] The General Division determined that when an employer initiates the separation, then for the purposes of the *Employment Insurance Act*, it must be a suspension. After all, as the General Division noted, the *Employment Insurance Act* does not use the expression "leave of absence." Rather, it refers to suspensions. In other words, the *Employment Insurance Act* treats an involuntary departure as a suspension.

[14] Ultimately, the General Division examined whether the Claimant's separation from his employment was involuntary and, if so, whether it was due to his conduct. And, if it was due to his conduct, the General Division examined whether the reason for his separation from his employment could amount to misconduct.

[15] I am not satisfied that there is an arguable case that the General Division made a factual error on this point.

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[4] See Record of Employment dated December 22, 2021, at GD 3-18.

- **Paragraph 15**

[16] The Claimant suggests that the General Division made factual errors at paragraph 15. The General Division wrote:

> [15] If the Claimant had a choice to stay or leave his job, then he voluntarily left. [citation omitted] There is no dispute on this issue. the Claimant agrees that he did not have the choice to stay. The claimant agrees that his employer put his [*sic*] on an unwanted unpaid leave of absence. I find that the Claimant did not voluntarily leave his job.

[17] The Claimant did not identify the factual error that he says the General Division made. I find that the General Division's findings are consistent with the evidence that was before it. It is clear that the Claimant's employer placed him on an unpaid leave of absence and that the Claimant did not voluntarily leave his job.

[18] I am not satisfied that there is an arguable case that the General Division made a factual error at paragraph 15.

- **Paragraphs 34 and 35**

[19] The Claimant argues that the General Division made factual errors at paragraphs 34 and 35. The General Division wrote:

> [34] The Claimant testified that he first had an awareness that his employer would be making a policy about COVID-19 in April 2021. Employees were sent an email asking for the number of staff that had received vaccinations. [citation omitted] There was no obligation, at that time, to disclose one's vaccination status. The Claimant says he was concerned about the email. At that time, he wrote to his union about his concern but they said since there was no mandatory vaccination policy there was no issue.
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> [35] On October 20, 2021, the Claimant's employer released its COVID-19 vaccination policy. [citation omitted] The Claimant felt that this policy was a radical departure from what he had been informed about back in April 2021. The Claimant testified that he felt that the policy violated his religious beliefs, his rights under the *Canadian Charter of Rights and Freedoms*, and Canadian human rights legislation. The Claimant says that there was nothing in the collective agreement that permitted the employer to make this kind of policy.

[20] The Claimant did not identify the factual errors that he says the General Division made at paragraphs 34 and 35.

[21] I find that the General Division's findings are generally consistent with the evidence that was before it. It is indisputable that the Claimant's employer introduced a COVID-19 vaccination policy, and that the Claimant did not agree with it. It is clear also from the Claimant's arguments in his application to the Appeal Division that he is of the view that his collective agreement did not let his employer impose a vaccination policy.

[22] I am not satisfied that there is an arguable case that the General Division made any factual errors at paragraph 34 or 35.

- **Paragraph 36**

[23] The Claimant argues that the General Division made factual errors at paragraph 36. There, the General Division wrote that the Claimant testified about his religious beliefs about vaccinations. The General Division wrote that it accepted that the Claimant refused vaccination because of his religious beliefs.

[24] The Claimant did not identify any specific errors. Even so, I find that the General Division's findings are consistent with the evidence before it. The evidence clearly shows that the Claimant did not comply with his employer's vaccination policy. For instance, in one email, the Claimant wrote, "The following is a copy of the justification that I sent to my employer in regards to not following the newly implemented COVID Vaccination policy due to my sincerely held religious beliefs."[5]

[25] More importantly, I find that the General Division did not base its findings that there was misconduct on why the Claimant refused vaccination. So, even if the General Division had made a mistake about why the Claimant refused vaccination, it would not be a reason for the Appeal Division to intervene in the General Division decision and to provide a remedy.

[5] See Claimant's email with attachment, dated April 26, 2022, at GD 3-21 to GD 3-22.

[26] The Appeal Division does not intervene and provide remedies for every factual error. The *Department of Employment and Social Development Act* says that the Appeal Division may intervene and provide possible remedies for only certain types of factual errors.

[27] The only time the Appeal Division may intervene when there are factual errors is when the General Division based its decision on that error, **and** if it made that error in a perverse or capricious manner, or without regard for the evidence before it.

[28] The General Division did not base its decision on why the Claimant did not comply with his employer's vaccination policy. What mattered was whether the Claimant did or did not comply with the vaccination policy.

[29] I am not satisfied that the Claimant has an arguable case on this point.

- **Paragraph 48**

[30] The Claimant argues that the General Division made factual errors at paragraph 48. There, the General Division wrote that the Claimant felt that his employer's vaccination policy violated several laws, including the *Canadian Charter of Rights and Freedoms* and human rights legislation. The General Division also wrote that he felt his employer was constructively dismissing him.

[31] While the Claimant did not identify any specific errors, I find that the General Division's findings are generally consistent with the evidence before it. But, even so, the General Division did not base its decision on the Claimant's views of his employer's vaccination policy. The General Division appropriately found that it could not consider the Claimant's concerns about the policy because it fell outside its scope of review.[6]

[32] I am not satisfied that the Claimant has an arguable case on this point.

[6] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- **Paragraph 64**

[33] The Claimant argues that the General Division made factual errors at paragraph 64. The General Division wrote:

> [64] There is no dispute that the employer had a vaccination policy. The claimant knew about the vaccination policy. I find that the Claimant made his own choice not to get vaccinated. The Claimant also made his own choice not to disclose his vaccination status to his employer. This means that the Claimant's choice not to get vaccinated (or disclose his status) was conscious, deliberate and intentional.

[34] I do not see where the General Division might have made any factual errors in this paragraph. The evidence supports the General Division's findings. For instance, the Claimant wrote to his employer, acknowledging that he was aware of the vaccination policy. He explained why he was unable to follow the policy.[7] The evidence also shows that the Claimant did not disclose his vaccination status.[8]

[35] The evidence also shows that the Claimant knowingly and willingly chose not to comply with his employer's vaccination policy. Therefore, there was an evidentiary basis to support the General Division's findings that the Claimant's choice was conscious, deliberate, and intentional.

[36] I am not satisfied that the Claimant has an arguable case on this point.

## Is there an arguable case that the General Division failed to consider whether there could be misconduct if the Claimant honoured the terms of his collective agreement?

[37] The Claimant argues that the terms of his collective agreement governed the employment relationship. He says that, as long as he complied with the terms of his collective agreement, then there was no misconduct. The Claimant notes that his employment agreement had not been modified to include the vaccination policy, so says

[7] See Claimant's letter that he emailed to his employer on November 15, 2021, at GD 3-26 to GD 3-27.
[8] See Supplementary Record of Claim, dated August 30, 2022, at GD 3-30.

that he did not have to comply with it. He says that he had been an exemplary employee.

[38] The Claimant argues that the General Division should have followed the decision of *A.L. v Canada Employment Insurance Commission*,[9] a decision of the General Division. In *AL*, the General Division member found that neither party to a collective agreement could unilaterally impose new conditions to the agreement without consultation with and acceptance by the other party. The member found the only exception was where legislation demanded a specific action.

[39] The General Division distinguished *AL* on its facts. The General Division also found *AL* contrary to other court decisions. For these reasons, it did not follow *AL.*

[40] The Claimant argues that the General Division made a mistake by not examining whether he "remained within the boundaries and spirit of the employment contract."[10] He says as long as he remained within his contract's boundaries, there was no misconduct.

[41] In a case called *Cecchetto*,[11] the applicant also relied on *AL*. Mr. Cecchetto argued that it was not misconduct to refuse to abide by a vaccine policy that an employer unilaterally imposed outside the terms of a collective agreement.

[42] It is clear from the evidence in the *Cecchetto* case that the applicant's employment agreement did not require vaccination. The applicant began his employment in 2017—well before the pandemic began and well before there were any COVID-19 vaccines.

[43] After the COVID-19 pandemic started and vaccines became available, Mr. Cecchetto's employer adopted the provincial health directive that required

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[9] *AL v Canada Employment Insurance Commission*, 2022 SST 1428. The Claimant provided a copy of this decision after the General Division hearing. A copy can be found at GD 10-2 to GD 10-18.
[10] See Claimant's Application to the Appeal Divisoin – Employment Insurance, at AD 1-7 and AD 1-8.
[11] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

vaccination or regular testing. The employer adopted the policy unilaterally, without the consent of either the union or Mr. Cecchetto.

[44] The Federal Court noted this evidence. It was aware when Mr. Cecchetto started working and was aware that his employer adopted the provincial health directive. Mr. Cecchetto opposed the policy.

[45] The Court accepted that, even if vaccination did not form part of Mr. Cecchetto's original employment agreement, his employer could later introduce a policy that required vaccination, even if the employee or union disagreed with and did not consent to it.

[46] The Court found that the General Division had reasonably determined that Mr. Cecchetto had committed misconduct based on his non-compliance with a policy that did not form part of his original employment agreement.

[47] Despite the Claimant's exemplary behaviour and the fact that his employment agreement did not require vaccination, it is clear from *Cecchetto* that an employer may unilaterally introduce a vaccination policy without an employee's consent. It is also clear from *Cecchetto* that misconduct may arise in circumstances when an employee does not comply with that policy.

[48] Given Cecchetto, a decision that I am required to follow, I am not satisfied that the Claimant has an arguable case that misconduct could not have arisen in the circumstances when there is a new policy that did not form part of the original employment agreement.

## Conclusion

[49] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division