Citation: *GM v Canada Employment Insurance Commission*, 2023 SST 662

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	G. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 23, 2023 (GE-22-3133)

Tribunal member:	Neil Nawaz
Decision date:	May 30, 2023
File number:	AD-23-294

Decision

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

Overview

[2] The Claimant, G. M., worked as a marine tow operator. On November 2, 2021, his employer placed him on an unpaid leave of absence after he refused to get vaccinated for COVID-19. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant employment Insurance (EI) benefits because his failure to comply with his employer's vaccination policy amounted to misconduct.

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

[4] The Claimant is now asking for permission to appeal the General Division's decision. He alleges 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 his employment contract didn't say anything about forcing him to undergo medical treatment;
- It ignored the fact that his employer attempted to impose a new condition of employment without his consent;
- It disregarded evidence that his employer's mandatory vaccination policy violated his human rights;
- It ignored the fact that he offered to accommodate his employer by submitting to regular testing and self-isolating on his days off;

- It ignored evidence that his employer rejected his request for a religious exemption for no good reason; and
- It disregarded a recent case that awarded EI to a claimant who, like him, refused to submit to her employer's mandatory vaccine policy.

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 Claimant 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 Claimant 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 Claimant 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 Claimant 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 Claimant 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 Claimant argues that he is not guilty of misconduct because he did nothing wrong. He suggests that, by forcing him to get vaccinated under threat of suspension or dismissal, his employer infringed his rights. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on him against his will.

[11] I can understand the Claimant's frustration but, based on law as it exists, I don't see a case for his arguments.

[12] The General Division defined misconduct as follows:

> [T]o be misconduct under the law 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 doesn't 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.
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> 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.[4]

[13] 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

[4] See General Division decision, paragraphs 19–20, 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.

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 Claimant argues that his employer's mandatory vaccination policy violated his human rights, but that is not the issue here. 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] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether the employer's policy contradicted the Claimant's employment contract or violated his human or constitutional rights. Nor did the General Division have any authority to decide whether the employer could have in some way accommodated the Claimant's concerns or whether its exemption request process was fair.

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

[16] 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.[6] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

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[5] See General Division decision, paragraph 22, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107 and *Paradis v Canada (Attorney General),* 2016 FC 1282.
[6] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

> 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.[7]

[17] 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.

[18] That's also true in this case. Here, the only questions that mattered were whether the Claimant 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 didn't ignore a binding precedent

[19] The Claimant relies on a recent General Division case called *A.L.*, in which an EI claimant was found to be entitled to benefits even though she disobeyed her employer's mandatory COVID-19 vaccination policy. The Claimant appears to be suggesting that the General Division member who heard his case should have followed an analysis similar to the one in *A.L*.

[20] I can't agree.

[21] First, it does not appear that the Claimant raised *A.L*. before the General Division. The member who heard the Claimant's appeal therefore can't be blamed for failing to consider a case that wasn't presented to her.

[22] Second, *A.L.*, like the Claimant's case, was decided by the General Division. Even if the member who heard the Claimant's case had considered *A.L.*, she would

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[7] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

have been under no obligation to follow it. 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 peers.

[23] Finally, *A.L.* does not, as the Claimant 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 Claimant has never pointed to a comparable provision in his own employment contract. *Cecchetto*, the recent Federal Court case that considered employer vaccinate mandates, also considered *A.L.* and suggested that it would not have broad applicability.[8]

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

[24] At the General Division, the Claimant pointed to evidence that the vaccine was untried and untested. He insisted that he was exempt from having to get vaccinated on religious grounds. He emphasized his willingness to accept alternative measures that would keep his co-workers safe.

[25] From what I can see, the General Division didn't ignore these points. 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 assessing the available evidence.

[26] The General Division came to the following findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;
- The employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated by a specified deadline;

[8] See *Cecchetto*, note 7, at paragraph 43.

- The Claimant knew, or should have known, that failure to comply with the policy by the specified deadline would cause loss of employment;
- The Claimant intentionally refused to get vaccinated by the deadline;
- The Claimant failed to satisfy the employer that he qualified for a religious exemption under the policy; and
- The employer was under no obligation to accept the Claimant's requests for accommodation.

[27] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The General Division concluded that the Claimant was guilty of misconduct because his refusal to follow the policy was deliberate, and it foreseeably led to his suspension. The Claimant may have believed that refusing to comply with the policy would do his employer no harm but, from an EI standpoint, that was not his call to make.

Conclusion

[28] 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