Citation: *LF v Canada Employment Insurance Commission*, 2023 SST 651

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 7, 2023 (GE-22-3658)

Tribunal member:	Neil Nawaz
Decision date:	May 29, 2023
File number:	AD-23-299

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, L. F., worked as a bus driver for the X (X). On November 21, 2021, the X placed the Claimant on an unpaid leave of absence after he refused to get vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant 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 displayed bias by establishing a tone that suggested the hearing was a formality and that the decision had already been made;
- It disregarded evidence that he had been discriminated against because of his religion; and
- It ignored the fact that, since he had fulfilled every one of the X's requests, he could not be guilty of misconduct.

[1] The X terminated the Claimant's employment altogether on December 31, 2021. See X's letter of dismissal to the Claimant, GD2-55.

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 Claimant 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 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.

There is no case that the General Division displayed bias

[9] The Claimant accuses the General Division of bias, but he offers no evidence other than the fact that his appeal was unsuccessful.

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[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.

[10] Bias suggests a closed mind that is predisposed to a particular result. The threshold for a finding of bias is high, and the burden of establishing it lies with the party alleging its existence.

[11] The Supreme Court of Canada has stated the test for bias as follows: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[5] An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[6]

[12] I read the General Division's decision, and I listened to its hearing. I did not hear or see anything that made me believe the presiding member approached the Claimant's case with anything less than an open mind. As we will see, the law makes it difficult for EI claimants to rebut allegations of misconduct. The General Division did not draw the conclusion that the Claimant wanted, but that does not mean it was predisposed against him.

There is no case that the General Division misinterpreted the law

[13] 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

[14] The Claimant argues that there was no misconduct because nothing in the law required him to get vaccinated. He suggests that, by forcing him to do so under threat of suspension or dismissal, the X infringed his rights. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on him against his will.

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

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[5] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[6] See *Arthur v Canada (Attorney General),* 2001 FCA 223.

[16] The General Division defined misconduct as follows:

> To 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.
>
> 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.[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 the X'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:

> The issue is not whether the employer was guilty of misconduct by engaging in unjust dismissal; rather, the question is whether the applicant was guilty of misconduct… [T]heTribunal does not have the authority to rule on those issues in a misconduct appeal. Nor does the Tribunal have the authority to rule on claims of the vaccine being experimental, or on the vaccine's effectiveness or risks. The Appellant's remedies lie with the courts, not with the Tribunal.[8]

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[7] 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 *Attorney General of Canada v Secours*, A-352-94.

[8] See General Division decision, paragraphs 32, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.

[19] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether the X'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 X could have in some way accommodated the Claimant's concerns or whether its exemption request process was fair.

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

[20] 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.[9] 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.[10]

[21] 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 *Employment Insurance 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.

[22] 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.

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[9] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[10] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

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

[23] At the General Division, the Claimant maintained that he did not break any of his employer's rules. He pointed to evidence that the vaccine was untried and untested. He insisted that he was exempt from having to get vaccinated on religious grounds.

[24] From what I can see, the General Division didn't ignore these points. It simply didn't give them as much weight as the Applicant thought they were worth. Given the law surrounding misconduct, I don't see how the General Division erred in how it assessed the available evidence.

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

- The X was free to establish and enforce a vaccination policy as it saw fit;
- The X adopted and communicated a clear policy on September 7, 2021, requiring employees to provide proof that they had been fully vaccinated by October 20, 2021;
- The X extended its vaccination deadline twice — first to November 20, 2021, then to December 31, 2021;
- The Claimant knew, or should have known, that failure to comply with the X's policy by the specified deadlines would cause loss of employment;
- The Claimant intentionally refused to get vaccinated by the X's deadlines;
- The X was under no obligation to accommodate the Claimant's request for a further deadline extension to allow him addition time to get the Johnson & Johnson vaccine; and
- The Claimant failed to satisfy the X that he qualified for a religious exemption under the policy.

[26] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. In its role as fact finder, the General Division was within its authority to find that, despite his protests to the contrary, the Claimant did not fully

comply with the X's policy. With this in mind, the General Division concluded that the Claimant was guilty of misconduct because his non-compliance was deliberate, and it foreseeably led to his suspension. The Claimant may have believed that breaking the policy would not do his employer any harm but, from an EI standpoint, that was not his call to make.

Conclusion

[27] 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