Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 558

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 2, 2023 (GE-22-3241)

Tribunal member:	Neil Nawaz
Decision date:	May 12, 2023
File number:	AD-23-267

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, M. H., worked as an occupational therapist at an addiction treatment institution. On October 19, 2021, Claimant's employer placed her on an unpaid leave of absence after she 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 her failure to comply with her 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 her 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. 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" as set out in the *Employment Insurance Act* (EI Act);
- It ignored the fact that her employment contract said nothing about a vaccine requirement;
- It ignored the fact that her employer attempted to impose a new condition of employment without her consent; and

[1] The Claimant's employer later dismissed her altogether.

- It said that it couldn't assess the fairness of her employer's policy while, at the same time, finding that the policy was "justified."

Issue

[5] 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 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 her 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 in finding the Claimant lost her 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 misinterpreted the law

[9] 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

---

[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.

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] At the General Division, the Claimant argued that her employer didn't have to implement a mandatory vaccination policy. She maintained that getting vaccinated was never a condition of her employment. She said that she never refused to take the vaccine and was willing to discuss possible accommodations with her employer.

[11] I don't see how the General Division erred in dismissing 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 willful. This means that the conduct was conscious, deliberate, or intentional…
>
> The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.
>
> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her 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.

---

[5] See General Division decision, paragraphs 16–18, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *McKay-Eden v Her Majesty the Queen*, A-402-96; and A*ttorney General of Canada v Secours*, A-352-94.

– Employment contracts don't have to explicitly define misconduct

[14] The Claimant argued that nothing in her employment contract or collective agreement required her 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:

> I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.[6]

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

> 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 find that that it was misconduct for a food delivery employee to set up a side business selling cigarettes to customers. The court found that this was so even if the employer never had 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 a claimant's refusal to follow his employer's COVID-19 vaccination policy.[8] The

---

[6] See General Division decision, paragraph 20, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Canada (Attorney General) v Lemire*, 2010 FCA.
[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

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 the claimant could have advanced his wrongful dismissal or human rights claims.

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

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

[20] At the General Division, the Claimant insisted that she did nothing wrong by refusing to get vaccinated. She maintained that, by forcing her to do so under threat of dismissal, her employer infringed her rights. She said that she had no reason to believe her job was at risk because she had faith that her employer would recognize her religious objections to the vaccine.

[21] Given the law surrounding misconduct, I don't see how the General Division made a mistake in rejecting these arguments.

---

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

– The General Division considered all relevant factors

[22] When the General Division reviewed the available evidence, it came to the following findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;
- The Claimant's employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated;
- The Claimant had reason to believe that failure to comply with the policy by a certain date would jeopardize her employment;
- The Claimant intentionally refused to get vaccinated within the reasonable timelines demanded by her employer; and
- The Claimant failed to satisfy her employer that she fell under the religious exemption permitted under the policy.

[23] 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 her actions were deliberate, and they foreseeably led to her suspension. The Claimant may have believed that her refusal to follow her employer's vaccination policy was not doing it any harm but, from an EI standpoint, that was not her call to make.

– The General Division didn't contradict itself

[24] According to the law, misconduct is essentially whatever an employer says it is. If an employer has a policy, and if an employee disobeys it knowing their job may be put at risk, then the EI Act deems such disobedience "misconduct" and disqualifies them from benefits.

[25] The Claimant doesn't understand why her collective agreement, which contains a clause allowing employees to refuse vaccination, doesn't supersede the employer's

mandatory COVID-19 policy.[10] She sees a contradiction between what she sees as the General Division's apparent endorsement of the employer's policy and its repeated declarations that it couldn't consider whether the policy is the reasonable or justified.[11]

[26] However, I don't see a contradiction. The General Division did not endorse the employer's COVID-19 policy; it merely said that the employer had the right to establish such a policy as required by changing circumstances. But whether that policy conflicted with a pre-existing contractual agreement was not for the Commission or the General Division to decide.

[27] Employees often voluntarily subordinate their rights when they take a job. For example, an employee might agree to submit to regular drug testing. Or an employee might knowingly give up an aspect of their right to free speech — such as their right to publicly criticize their employer. During the term of employment, the employer may try to impose policies that encroach on their employees' rights, but employees are free to quit their jobs if they want to fully exercise those rights. If they believe that a new policy violates their collective agreement or their human rights, they can file a grievance or take their employer to court or some other tribunal. However, the EI claims process is not the appropriate place to litigate such disputes.

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

---

[10] While the Claimant's collective agreement recognizes the right of employees "to refuse any required vaccination," it also says that exercising that right will come at a cost: "If an employee refuses to take the vaccine required under this provision, she or he **may be placed on an unpaid leave of absence** during any influenza outbreak in the hospital until such time as the employee is cleared to return to work [emphasis added]" See GD6-20.
[11] See General Division decision, paragraphs 41–44.