Citation: *AT v Canada Employment Insurance Commission*, 2023 SST 667

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated March 3, 2023 (GE-22-3448)

Tribunal member:	Neil Nawaz
Decision date:	May 30, 2023
File number:	AD-23-295

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. T., worked as a language instructor for a community support agency. On April 26, 2022, her employer placed her on an unpaid leave of absence after she refused to disclose whether she had been 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 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 She alleges that the General Division to consider what happened when the federal government repealed the *Emergencies Act*. She says that, while the Commission might have had the power to find her guilty of misconduct during the emergency, her refusal to disclose her vaccination status should not have disqualified her from EI once it was over.

Issue

[5] There are four grounds of appeal to the Appeal Division. An 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.[1]

[6] Before the Claimant can proceed, I have to decide whether her 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.

There is no case that the General Division failed to exercise its jurisdiction

[9] According to the Claimant, General Division should have recognized that the easing of the pandemic meant that drastic measures were no longer needed. She claims that the government's decision to invoke the *Emergencies Act* in early 2022 forced employers to implement vaccine mandates. She argues that, once the government's emergency powers expired, her refusal to get vaccinated could no longer be construed as misconduct.

[10] I don't see a case for this argument.

[11] First, it is not at all clear that the employer's implementation of a vaccine policy had anything to do with the federal government's declaration of a national emergency. I

[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.

note that the first occurred on February 9, 2023, and the second occurred on February 14, 2023.

[12] In any event, it doesn't matter what led the Claimant's employer to implement such a policy. As we will see, what matters is that the policy existed, and that the Claimant intentionally refused to follow it knowing that disciplinary measure would follow.

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 has always maintained that she was not guilty of misconduct because she did nothing wrong. She suggests that, by forcing her to get vaccinated under threat of suspension or dismissal, her employer infringed her rights. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on her against her will.

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

[16] 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 (or careless or negligent) that it is almost wilful (or shows a wilful disregard for the effects of their actions on the performance of their job).

> The Appellant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be misconduct under the law.
>
> There is misconduct if the Appellant knew or ought to 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 suspended because of it.[4]

[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 her employer's mandatory vaccination policy violated her right to bodily integrity, but that is not the issue here. The issue is whether her employer had a policy and whether the Claimant deliberately disregarded it. In its decision, the General Division put it this way:

> [i]t is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accommodated the Appellant by allowing her to continue teaching on-line, or whether the penalty of being placed on an unpaid leave of absence on was too severe.[5]

[19] 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 her constitutional or human rights. Nor did the General Division have any authority to decide whether the employer could have in some way

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[4] See General Division decision, paragraphs 25–27, 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.
[5] See General Division decision, paragraph 32, citing *Fakhari v Canada (Attorney General)*, 197 N.R. 300 (FCA); *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.

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

[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.[6] 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.[7]

[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 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.

[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.

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

[23] At the General Division, the Claimant pointed to evidence that the vaccine was untried and untested. She insisted that she was exempt from having to get vaccinated

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[6] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

on religious grounds. She emphasized her willingness to accept alternative measures that would keep her co-workers safe.

[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 Claimant thought they were worth. Given the law surrounding misconduct, I don't see how the General Division erred in assessing the available evidence.

[25] 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;
- 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 her employer that her qualified for a religious exemption under the policy; and
- The employer was under no obligation to accept the Claimant's requests for accommodation.

[26] 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 refusal to follow the policy was deliberate, and it foreseeably led to her suspension. The Claimant may have believed that refusing to comply with the policy would do her employer no harm but, from an EI standpoint, that was not her 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