Citation: *IT v Canada Employment Insurance Commission*, 2023 SST 602

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 9, 2023 (GE-22-2343)

Tribunal member:	Neil Nawaz
Decision date:	May 18, 2023
File number:	AD-23-265

Decision

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

Overview

[2] The Applicant, I. T., worked for many years as a customer service agent for a national airline. On October 30, 2021, the Applicant's 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 Applicant EI benefits because her failure to comply with her employer's vaccination policy amounted to misconduct.

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

[4] The Applicant is now asking for permission to appeal the General Division's decision. She argues that the General Division made the following errors:

- It misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act);
- It displayed bias by dismissing her views about the meaning of misconduct;
- It misinterpreted or misunderstood relevant case law;
- It mischaracterized her employer's reasons for wanting to let her go;
- It ignored the fact that nothing in the law required her employer to establish and enforce a mandatory COVID-19 vaccination policy;
- It ignored the fact that neither her employment contract nor collective agreement said anything about a vaccine mandate;

- It ignored the fact that her employer attempted to impose a new condition of employment without her consent;
- It ignored the fact that her employer never accused her of, or disciplined her for, any wrongdoing;
- It refused to assess the reasonableness or fairness of her employer's mandatory vaccination policy;
- It disregarded evidence that her employer's mandatory vaccination policy violated her human rights; and
- It disregarded an important precedent that allowed a claimant to collect EI, even though she had been suspended for refusing the COVID-19 vaccine.

Issue

[5] There are four grounds of appeal to the Appeal Division. An applicant 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 Applicant 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 Applicant 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 Applicant lost her job because of misconduct?

---

[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.

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 Applicant does not have an arguable case.

There is no case that the General Division displayed bias

[9] The Applicant accuses the General Division of bias, but she offers no evidence other than the fact that her appeal was unsuccessful. 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.

[10] 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?"[4] An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[5]

[11] Contrary to the Applicant's allegations, the General Division did not ignore her views on the meaning of misconduct but engaged with them at length in its decision. The General Division did not draw the conclusions that the Applicant wanted, but that does not mean it was predisposed against her.

There is no case that the General Division misinterpreted the law

[12] 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 Applicant, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

---

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

– Misconduct is any action that is intentional and likely to result in loss of employment

[13] At the General Division, the Applicant 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 insisted that it couldn't be misconduct if she refused to follow a policy that was unreasonable, illegal, or contrary to contractual terms.

[14] I don't see how the General Division erred in dismissing these arguments.

[15] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't correspond to the word's everyday usage. Misconduct in this context refers to an employee intentionally breaking a rule knowing that consequences will follow, but it doesn't necessarily mean the employee has done something "bad" or "wrong."

[16] The General Division defined misconduct as follows:

> [T]o be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. 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.[6]

[17] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, when

---

[6] See General Division decision, paragraphs 18–19, 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.

determining EI entitlement, it doesn't 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 Applicant 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 decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it is not for me to decide whether her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[7]

[19] 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.[8]

[20] 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.

[21] The Applicant addressed *Lemire* in her written submissions. She attempted to draw a distinction between its fact situation and her own. She noted that Mr. Lemire was doing something plainly illegal, while she has never been accused of breaking a law. That is true, but it doesn't make the principle from *Lemire* any less relevant to her case.

---

[7] See General Division decision, paragraph 22, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[8] See *Canada (Attorney General) v Lemire*, 2010 FCA.

According to *Lemire*, there must be a causal link between the claimant's alleged misconduct and the claimant's employment, and the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment. In this case, the General Division accepted the employer's view that getting vaccinated became an implied condition of continued employment because it enabled employees to carry on their duties during the pandemic.[9]

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

[22] Late last year, the Federal Court considered 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.[10] The Federal Court confirmed that this Tribunal is prohibited by law to address the fairness of such policies:

> 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.[11]

[23] 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.

[24] The Applicant argues that her case differs from Mr. Cecchetto's. She notes that he declined, not only vaccination, but rapid antigen testing, an alternative that was never offered to her.

[25] Again, I don't see that anything turns on this distinction. Here, as in *Cecchetto*, the only questions that matter are whether the employer had a policy and whether the

---

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

employee deliberately breached it, knowing there would be consequences. The General Division had good reason to answer "yes" to both questions.

– The General Division cited relevant cases

[26] The Applicant alleges that the General Division relied on three cases — *Mishibinijima*, *Paradis* and *Secours* — that had no applicability to her own.[12] She notes that all three cases involved EI claimants who knowingly breached terms of their respective employment contracts. She argues that her case is different because her employment contract contained no vaccine requirement, so there was nothing for her to breach.

[27] I don't see a case for this argument. It is true that the cases in question flowed from distinct sets of facts, but that does not make them irrelevant to the Applicant's case. It is clear from its decision that the General Division cited these cases because they all say essentially the same thing — that this Tribunal cannot consider the merits of a dispute between employee and employer. Like it or not, this is where the law stands.

[28] The Applicant also cites a number of cases that, in her view, impose a high threshold for misconduct — for instance, "habitual neglect of duty, incompetence, or conduct incompatible with the duties, or prejudicial to the employer's business."[13] However, several of these cases involve labour arbitration or wrongful dismissal claims, and they therefore don't address the particular meaning of "misconduct" as it is understood in the EI context.

– The General Division did not ignore a relevant or binding precedent

[29] At the General Division, the Applicant cited a case called *A.L.*, in which an EI claimant was found to be entitled to benefits even though he disobeyed his employer's

---

[12] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; also see citations for *Mishibinijima* and *Secours* at note 6.
[13] See *R v Arthurs, Ex p. Port Arthur Shipbuilding Co.,* [1967] 2 O.R. 49 (C.A.) In this vein, the Applicant also cited *Metropolitan Hotel and H.E.R.E., Loc. 75 (Bellan) (Re*), 2002 CanLII 78919 (ON LA) and *McKinley v BC Tel,* 2001 SCC 38, among others.

mandatory COVID-19 vaccination policy.[14] The Applicant argues that the General Division dismissed this case even though it was applicable to her own.

[30] However, the General Division was under no obligation to follow one of its own decisions. 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 colleagues.

[31] Moreover, *A.L.* does not, as the Applicant 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 Applicant has never pointed to a comparable provision in her own employment contract or collective agreement.

[32] As well, *A.L.* was decided before *Cecchetto*, the recent case that provided clear guidance on employer vaccination mandates in an EI context. In *Cecchetto*, the Federal Court considered *A.L.* in passing and suggested that it would not have broad applicability because it was based on a very particular set of facts.[15]

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

[33] The Applicant argues that the General Division ignored important aspects of her evidence. She says that he did nothing wrong by refusing to disclose her vaccination status. She suggests that, by forcing her to do so under threat of dismissal, her employer infringed her rights.

[34] 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

[14] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, paragraphs 74–76.
[15] See *Cecchetto*, note 9, at paragraph 43.

law surrounding misconduct, I don't see how the General Division erred in its assessment.

– The General Division considered all relevant factors

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

- The Applicant's employer was free to establish and enforce vaccination and testing policies as it saw fit;
- The Applicant's employer adopted and communicated a clear policy requiring employees to get fully vaccinated by a certain date;
- The Applicant was aware that failure to comply with the policy by that date would cause loss of employment;
- The Applicant intentionally refused to confirm that she had been vaccinated within the timelines demanded by her employer; and
- The Applicant did not ask for a religious or medical exemption, as permitted by the policy.

[36] These findings appear to accurately reflect the documents on file, as well as the Applicant's testimony. The General Division concluded that the Applicant was guilty of misconduct because her actions were deliberate, and they foreseeably led to her dismissal. The Applicant may have believed that her refusal to follow her employer's policy was reasonable but, from an EI standpoint, that was not her call to make.

– The General Division did not mischaracterize the employer's reason for letting the Applicant go

[37] The Applicant takes issue with how the General Division described her employer's stated reasons for taking her off the job. She says that her employer submitted a record of employment (ROE) indicating that that a "leave of absence" was the reason for the separation. However, the General Division said in its decision that she had been "suspended."

[38] I don't see an argument here.

[39] That's because, in my view, this discrepancy isn't particularly relevant to the question of whether the Applicant engaged in misconduct for EI purposes. Whether the Applicant was placed on a leave of absence or suspended, the net result was the same: the Applicant was involuntarily removed from her job without pay.

[40] In any case, the General Division did make a finding about the circumstances in which the Applicant left her job. It wrote, "I don't agree that the Claimant's unpaid leave is a lay-off. I find that the Claimant's employer placed her on unpaid leave because she didn't do something it required her to do."[16] It later determined that the suspension came about because of misconduct.

[41] In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.[17] In this case, the General Division examined the circumstances around the Applicant's departure from her job and concluded that he was let go because of her noncompliance with the vaccine policy, and not for any other reason. In the absence of a significant factual error, I see no reason to second-guess this finding.[18]

– The General Division didn't ignore the Applicant's employment contract

[42] As we have seen, 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.

[43] The Applicant notes that the terms of her employment said nothing about mandatory vaccination. However, it was not for the Commission or the General Division

---

[16] See General Division decision, paragraph 14.
[17] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[18] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.

to decide whether the employer's new policy conflicted with a pre-existing contractual or collective agreement.

[44] 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

[45] 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