Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 563

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 9, 2023 (GE-22-2492)

Tribunal member:	Neil Nawaz
Decision date:	May 16, 2023
File number:	AD-23-262

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, S. C., worked as a carhouse operator 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 misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act);
- It ignored evidence that the vaccinated are just as susceptible to contracting and spreading the virus as the unvaccinated;
- It disregarded laws that protect Canadians' freedom of religion and bodily integrity; and
- It ignored the fact that his employer attempted to unilaterally impose a new condition of employment without his consent.

[1] The X terminated the Claimant's employment altogether on December 31, 2021. See X's letter of dismissal to the Claimant, GD2-59.

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 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.

[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.

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

[10] The Claimant argues that he can't be guilty of misconduct because he did nothing wrong by refusing to get vaccinated. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on him against his will. He insists that the X could have offered its employees alternative measures that would have protected everyone just as well.

[11] I don't see a case for 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 under the law, the conduct must 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).
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> The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law.
>
> There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended and dismissed because of it.[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 didn't have the authority to decide whether an employer's policies were reasonable, justifiable, or even legal.

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[5] See General Division decision, paragraphs 21–23, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *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 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:

> [I]t's not the Tribunal's role to decide if the employer's policy was reasonable or fair, or whether the employer should have accepted the Claimant's request for an exemption or accommodation, or whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed was too severe. The Tribunal must focus on the conduct that caused the Claimant to be suspended and terminated and decide if it constitutes misconduct under the EI Act.[6]

[15] 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

[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.[7] 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

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[6] See General Division decision, paragraphs 30–32, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Canada (Attorney General) v Wasylka*, 2004 FCA 219; *Canada (Attorney General) v Lavallée*, 2003 FCA 255; *Canada (Attorney General)* v *Brissette*, A-1342-92; *Canada (Attorney General) v Bellavance,* 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[7] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> 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.[8]

[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.

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

[19] At the General Division, the Claimant said that, by forcing him to get vaccinated under threat of dismissal, the X infringed his rights. He pointed to evidence that the vaccine was untried and untested. He insisted that he was exempt from having to get vaccinated on both medical and religious grounds.

[20] The General Division didn't ignore these points; it simply didn't find them compelling. Given the law surrounding misconduct, I don't see how the General Division erred in its assessment.

– The General Division considered all relevant factors

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

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

- The Claimant's employer was free to establish and enforce vaccination and testing policies 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 knew, or should have known, that failure to comply with the policy by a certain date would cause loss of employment;
- The Claimant intentionally refused to get vaccinated within the reasonable timelines demanded by his employer; and
- The Claimant failed to satisfy his employer that he fell under either of the exceptions permitted under the policy.

[22] 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 actions were deliberate, and they foreseeably led to his suspension. The Claimant may have believed that his refusal to follow the policy was not doing his employer any harm but, from an EI standpoint, that was not his call to make.

– The General Division couldn't consider alternatives to vaccination

[23] The Claimant argues that the General Division should have addressed the X's refusal to offer him alternatives to vaccination, such as social distancing, rapid testing, and personal protective equipment.

[24] I don't see a case for this argument. As the General Division correctly noted, it was prohibited under the law from judging what the Claimant's employer did or didn't do. If the Claimant wanted to challenge the X's refusal to negotiate accommodations, he was free to take his employer to court or to a human rights tribunal. However, the EI claims process was not the appropriate way to litigate such a dispute.

Conclusion

[25] 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