Citation: *AG v Canada Employment Insurance Commission*, 2023 SST 513

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. G.
Representative:	M. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 6, 2023 (GE-22-2505)

Tribunal member:	Neil Nawaz
Decision date:	April 25, 2023
File number:	AD-23-242

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. G., worked as a delivery person for a courier company. On January 10, 2022, Claimant's employer placed her on an involuntary leave of absence after she refused to disclose whether she had been 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 employer imposed a new condition of employment without her consent; and
- It ignored evidence that, on her record of employment (ROE), her employer misrepresented its reasons for placing her on leave.

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

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.

– The Appeal Division can't consider new documents

[9] In support of her application requesting permission to appeal, the Claimant relied on several documents that had never been previously submitted to either the Commission or the General Division.[5]

---

[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.
[5] Among the Claimant's submissions were (i) internet printouts explaining the meaning of various codes used in ROEs (AD1B-3 and AD1B-5); (ii) extracts from law firm websites discussing workplace misconduct in an employment law context (AD1B-8 and AD1B-13); (iii) Letter of Understanding No. 17 between Purolator Inc. and the Canada Council of Teamsters (AD1C-02); (iv) an update letter from Teamsters Local Union No. 31 dated January 20, 2023 (AD1D-3); a request letter from Purolator to the

[10] The Claimant appears to be asking me to consider these documents and recognize her entitlement to EI. Unfortunately, that is not how the Appeal Division works. There is nothing in the law that allows me to consider new evidence, just as there is no way for me to reconsider evidence that the General Division has already considered. I don't see a reasonable chance of success on appeal for any argument that relies on the admission of fresh evidence.

[11] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division's decision. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. An appeal at the Appeal Division is not meant to be a "redo" of the General Division hearing. It is not enough to present the same evidence and arguments to the Appeal Division in the hope that it will decide your case differently.

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

[12] 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.

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

– The General Division considered all relevant factors

[14] 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 mandatory vaccination policy as it saw fit;

Claimant dated November 7, 2022 (AD1D-4); a letter of termination from Purolator to the Claimant dated November 25, 2022 (AD1D-5).

- The Claimant's employer adopted and communicated a clear policy requiring employees to provide proof that they had been fully vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date was likely to cause loss of employment;
- The Claimant intentionally refused to attest that she had been vaccinated within the timelines demanded by her employer; and
- The Claimant did not attempt to qualify for either the medical or religious exemptions permitted under the policy.

[15] 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 refusing to follow its vaccination policy was not doing her employer any harm but, from an EI standpoint, that was not her call to make.

– **The General Division didn't ignore why the Claimant was suspended**

[16] The Claimant alleges that the General Division didn't pay enough attention to the way in which her employment ended. The Claimant has always maintained that, because she did not give her consent, she was not placed on a "leave of absence," as her employer put it. She has also objected to her employer's decision to code the separation under "M," which is often used to indicate dismissal or suspension with cause.[6] At the General Division, the Claimant maintained that she did not deserve to be barred from doing the job she held for 29 years.

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

[18] From what I can see, the General Division didn't disregard the circumstances in which the Claimant left her job. Nor did it misrepresent how her employer described the separation. In its decision, the General Division found that, however her employer

[6] See Claimant's ROE at GD3-14.

described it, the Claimant's departure on January 10, 2022, was, in effect, a suspension.[7]

[19] 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.[8] In this case, the General Division examined the circumstances around the Claimant's suspension and concluded that she was let go because of her noncompliance with her employer's 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.[9]

There is no case that the General Division misinterpreted the law

[20] 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 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

[21] At the General Division, the Claimant argued that her employer didn't have to implement a mandatory vaccination policy. She maintained that getting tested or vaccinated were never conditions of her employment.

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

[23] 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 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 willful. The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be

[7] See General Division decision, paragraph 19.
[8] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[9] 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.

> 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.[10]

[24] 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 are reasonable, justifiable, or even legal.

– **Employment contracts don't have to explicitly define misconduct**

[25] The Claimant has argued that nothing in her employment contract and 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:

> In my opinion, thinking that an employer will not carry through with the consequences for not complying with a policy does not mean that the Claimant did not have knowledge of the consequences. The Claimant was clear in her evidence that she read all the policies and was aware of the possibility that she would not be able to work if she did not complete an attestation form. As a result, I find that the Claimant knew she could be suspended if she did not complete the vaccination attestation form.[11]

[26] This passage echoes a case called *Lemire*, in which the Federal Court of Appeal held that it is not a question of deciding whether or not the dismissal is justified under employment 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."[12]

---

[10] See General Division decision, paragraphs 36–37, 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.
[11] See General Division decision, paragraph 62.
[12] See *Canada (Attorney General) v Lemire*, 2010 FCA.

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

[27] 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.[13] 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.[14]

[28] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, Mr. Cecchetto 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.

[29] 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.

Conclusion

[30] 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

---

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