



Citation: *DF v Canada Employment Insurance Commission*, 2023 SST 669

**Social Security Tribunal of Canada  
Appeal Division**

**Leave to Appeal Decision**

**Applicant:** D. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 21, 2023  
(GE-22-2425)

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**Tribunal member:** Neil Nawaz

**Decision date:** May 31, 2023

**File number:** AD-23-291

## 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, D. F., worked as a signalman for a railway maintenance firm. On November 3, 2021, the Claimant's employer placed him on an unpaid leave of absence after he refused to get vaccinated for COVID-19.<sup>1</sup> 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 ignored the fact that his employer attempted to impose a new condition of employment without his consent;
- It disregarded evidence that his employer's mandatory vaccination policy violated his human rights;
- It ignored the grievance that his union filed to protest his employer's vaccination policy; and
- It ignored relevant provisions of the Criminal Code of Canada, the Nuremberg Code, the Ontario Human Rights Code, and the Canadian Charter of Rights and Freedoms.

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<sup>1</sup> The Claimant was later dismissed from his job altogether.

## 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.<sup>2</sup>

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.<sup>3</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>4</sup> 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 *Employment Insurance 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.

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<sup>2</sup> See *Department of Employment and Social Development Act* (DESDA), section 58(1).

<sup>3</sup> See DESDA, section 58(2).

<sup>4</sup> 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 is not guilty of misconduct because he did nothing wrong. He suggests that, by forcing him to get vaccinated under threat of suspension or dismissal, his employer infringed his rights. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on him against his will.

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

[12] 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 wilful.

The Appellant 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 misconduct under the law.

There is misconduct if the Appellant knew or ought to have known his conduct could get in the way of carrying out his duties toward the employer and there was a real possibility of being suspended and/or dismissed because of it.<sup>5</sup>

[13] 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**

[14] The Claimant argues that his employer's mandatory vaccination policy violated his human rights, as well as employment contract and collective agreement. However, that is not the issue here. What matters is whether the employer has a policy and

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<sup>5</sup> See General Division decision, paragraphs 30–32, 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.

whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

I have no authority to decide whether the employer breached the Appellant's collective agreement or whether he was wrongfully suspended. The Appellant's recourse for his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.<sup>6</sup>

[15] 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 collective agreement or violated his human or constitutional rights. Nor did the General Division have jurisdiction to decide whether the Claimant's employer could have in some way accommodated his concerns or whether its exemption request process was fair.

[16] The Claimant accuses the General Division of ignoring laws that he says protected him against forced treatment and unjust dismissal. However, the General Division did consider such laws — only to find that it had “no authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act.”<sup>7</sup> I don't see an arguable case that the General Division was wrong on this point. The courts have repeatedly said that the EI claims process is not the appropriate place to litigate disputes between employers and employees.

– **A recent 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 an appellant's refusal to follow his employer's COVID-19 vaccination policy. The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

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<sup>6</sup> See General Division decision, paragraph 54.

<sup>7</sup> See General Division decision, paragraph 42, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.<sup>8</sup>

[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 Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

[19] 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**

[20] At the General Division, the Claimant pointed to evidence that the vaccine was untried and untested. He said that he was worried about getting the vaccine because he has health issues and had previously experienced an adverse reaction to the flu shot. He noted that he posed no threat to clients or co-workers because he worked outdoors and communicated by cell phone. insisted that he.

[21] 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.

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

[22] The General Division made 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 did not attempt to apply for either a medical or religious exemption under the policy; and
- The employer was under no obligation to accept the Claimant's requests for accommodation.

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

## **Conclusion**

[24] 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