



Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 780

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** C. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 24, 2023  
(GE-22-3044)

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**Tribunal member:** Neil Nawaz

**Decision date:** June 14, 2023

**File number:** AD-23-276

## 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, C. L., worked as a regulatory compliance officer for the X (X). On March 4, 2022, X placed the Claimant on an unpaid leave of absence after he refused to disclose whether he 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 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 applying for permission to appeal the General Division's decision. He alleges that the General Division made the following errors:

- It found that he asked to be exempted from disclosing his vaccination status when, in fact, he asked to be accommodated on national and ethnic grounds;
- It failed to realize that X's demand that he disclose his vaccination status was discriminatory; and
- It ignored the fact that, even though he never disclosed his vaccination status, X apparently still knew he hadn't received the shot — or else why would they ask him to get vaccinated?

## 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.<sup>1</sup>

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.<sup>2</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>3</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* (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**

[10] At the General Division, the Claimant maintained that he was not guilty of misconduct because he did nothing wrong. He suggested that, by forcing him to disclose his vaccination status under threat of suspension or dismissal, his employer

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

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

<sup>3</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

infringed his rights. He argued that his employer's policy was discriminatory because, as a Canadian who was born in a totalitarian state, he placed the utmost importance on privacy.

[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:

Case law says that to be misconduct, 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 doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.

There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward the employer, and that there was a real possibility of being suspended from his job because of that.<sup>4</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 did not have the authority to decide whether an employer's policies were reasonable, justifiable, or even legal.

**– The employer's refusal to accommodate is irrelevant**

[14] The Claimant maintains that he didn't violate X's vaccination policy. He says that, instead of disclosing his status or submitting to vaccination, he offered to work from home, which had become standard practice in any event. He alleges that the General Division ignored the fact that his employer unreasonably refused his offer.

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<sup>4</sup> See General Division decision, paragraphs 15–16, 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.

[15] However, X's refusal to accommodate the Claimant is not the issue here. What matters is that it had a policy and the Claimant deliberately disregarded it. In its decision, the General Division put it this way:

I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether the employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.<sup>5</sup>

[16] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether his employer's policy violated the Claimant's human rights. Nor did the General Division have jurisdiction to decide whether X should have in some way accommodated the Claimant's concerns over disclosing his vaccination status.

– **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.<sup>6</sup>

[18] 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.<sup>7</sup>

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<sup>5</sup> See General Division decision, paragraph 18, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107

<sup>6</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>7</sup> See *Cecchetto, ibid.*, paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

[19] 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.

[20] 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**

[21] At the General Division, the Claimant argued that he had good reason to not want to disclose his private medical information. He noted that X's policy required him to either attest to his vaccination status or request an accommodation by a specified deadline. He said that he interpreted this to mean that employees unwilling to disclose their vaccination status could be accommodated. He alleged that his employer didn't properly consider his request for accommodation.

[22] From what I can see, the General Division didn't ignore or misrepresent 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 its assessment.

#### **– The General Division considered all relevant factors**

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

- X was free to establish and enforce a vaccination policy as it saw fit;
- X adopted and communicated a clear policy requiring employees, among other things, to disclose whether they had been fully vaccinated by a specified deadline;

- The Claimant intentionally refused to disclose whether he had been vaccinated by the deadline;
- The Claimant knew, or should have known, that failure to comply with the policy by the deadline would cause loss of employment; and
- The Claimant requested accommodation under the policy, but his employer was under no obligation to accept the request.

[24] 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 disclose his vaccination status was deliberate, and it foreseeably led to his suspension. The Claimant may have believed that refusing to comply with X's policy would not do his employer any harm but, from an EI standpoint, that was not his call to make.

– **The General Division didn't ignore the Claimant's interpretation of the policy**

[25] The Claimant insists that, by choosing to request accommodation, he did not violate his employer's policy. He suggests that the General Division ignored the fact that he never refused to get vaccinated; he only refused to disclose whether he had been vaccinated.

[26] I don't see a case for this argument. The General Division didn't ignore the Claimant's interpretation of his employer's policy. In fact, it squarely addressed it in its decision:

He says that by choosing to request an accommodation, he was in compliance with the policy. I disagree. As explained by the employer in its February 8, 2022 letter, the policy said the employer would consider accommodation for employees who were unable to be vaccinated, not for employees who were unwilling to disclose their vaccination status.<sup>8</sup>

[27] Here, the General Division found that, even if the Claimant hadn't actually ruled out vaccination, it remained a fact that he intentionally refused to disclose his

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<sup>8</sup> See General Division decision, paragraph 37.

vaccination status by the specified deadline. According to the General Division, such disclosure was a prerequisite to (i) requesting accommodation or (ii) applying for an exemption on medical or religious grounds.

[28] As the General Division correctly noted, it was prohibited from judging X's conduct, in particular whether its implementation and enforcement of its policy was reasonable. If the Claimant wanted to challenge his employer's refusal to negotiate accommodations, he was free to take X to court or to a human rights tribunal. However, the EI claims process was not the appropriate way to litigate such a dispute.

## **Conclusion**

[29] 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