Citation: *HR v Canada Employment Insurance Commission*, 2023 SST 1127

Social Security Tribunal of Canada
Appeal Division

Extension of Time Decision

Applicant:	H. R.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 28, 2023 (GE-22-3043)

Tribunal member:	Neil Nawaz
Decision date:	August 18, 2023
File number:	AD-23-575

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, H. R., is appealing a General Division decision to deny her Employment Insurance (EI) benefits.

[3] The Claimant worked as an IT specialist for a department of the federal government. On January 18, 2022, the Claimant'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 Claimant EI benefits because her noncompliance with her employer's vaccination policy amounted to misconduct.

[4] The General Division agreed with the Commission. 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 her suspension.

[5] The Claimant is now requesting leave, or permission, to appeal the General Division's decision. She maintains that he did not commit misconduct and argues that the General Division made the following errors:

- Its decision was not equitable or impartial—almost every single decision that the Social Security Tribunal has issued on COVID-19 vaccine mandates has gone against the claimant.
- It relied on cases with different fact situations—they involved claimants who, unlike her, lost their jobs because their conduct impacted the safety of themselves or others.
- It discounted cases that supported her position—the fact that they might be reversed in the future is no reason not to rely on them now.

- It disregarded indications that her employer breached her privacy—she is awaiting the results of an Access to Information and Privacy search of her human resources file.

Issues

[6] After reviewing the Claimant's application for permission to appeal, I had to decide the following related questions:

- Was the Claimant's application for leave to appeal filed late?
- Does the Claimant have a reasonable chance of success on appeal?

[7] I have concluded that, although the Claimant was late in submitting her application, she had a reasonable explanation for doing so. However, I am refusing the Claimant permission to proceed because her appeal does not have a reasonable chance of success.

Analysis

The Claimant's request for leave to appeal was late

[8] An application for leave to appeal must be made to the Appeal Division within 30 days after the day on which the decision was communicated to the applicant.[1] The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision was communicated to the applicant.

[9] In this case, the General Division issued its decision on February 28, 2023. That same day, the Tribunal sent the decision to the Claimant by email and regular mail. However, the Appeal Division did not receive the Claimant's application for leave to appeal until May 29, 2023—approximately two months past the filing deadline.

[10] I find that the Claimant's application for leave to appeal was late.

[1] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESDA).

The Claimant had reasonable explanation for the delay

[11] When an application for permission to appeal is submitted late, the Tribunal may grant the applicant an extension of time if they have a reasonable explanation for the delay.[2] In deciding whether to grant an extension, the interests of justice must be served.[3]

[12] In her application requesting permission to appeal, the Claimant said that she was a busy working mother who had limited time to do the kind of research necessary to make an appeal.

[13] Under the circumstances, I find this explanation reasonable. That's why I'm considering the Claimant's application even though it was late.

The Claimant's appeal does not have a reasonable chance of success

[14] 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.

[15] 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 exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[4]

[16] Before the Claimant can move ahead with her appeal, I have to decide whether it has a reasonable chance of success.[5] Having a reasonable chance of success is the

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[2] See section 27 of the *Social Security Tribunal Rules of Procedure*.
[3] See *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[4] See DESDA, section 58(1).
[5] See DESDA, section 58(2).

same thing as having an arguable case.[6] If the Claimant doesn't have an arguable case, this matter ends now.

There is no arguable case that the General Division lacked impartiality

[17] The Claimant suggests that, since the General Division rarely sides with EI claimants who refuse to comply with their employers' vaccine mandates, it is systematically biased against cases like hers.

[18] I don't see a case for this argument.

[19] 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. 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?"[7]

[20] An allegation of bias cannot rest on mere conjecture or insinuation, suspicions or impressions.[8] In this case, the Claimant's allegation is based on her belief that most of the people who are in her position do not end up receiving EI benefits. However, there is another, more plausible, explanation for this pattern—that the General Division has no choice but to apply a body of case law that reduces misconduct to only a few, easily provable, elements.

[21] Applying this case law, the General Division came to a conclusion that the Claimant didn't want, but that doesn't mean it was predisposed against her.

There is no case that the General Division misinterpreted the law

[22] 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

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[6] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[7] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[8] See *Arthur v Canada (Attorney General),* 2001 FCA 223.

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

[23] At the General Division, the Claimant argued that nothing in the law required her employer to implement a mandatory vaccination policy. She maintained that getting vaccinated was never a condition of her employment.

[24] I don't see a case that, in rejecting these arguments, the General Division got the law wrong.

[25] 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 wilful.
>
> The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.
>
> There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[9]

[26] 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 doesn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.

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[9] See General Division decision, paragraphs 35–37, 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.

– Employment contracts don't have to explicitly define misconduct

[27] At the General Division, the Claimant argued that her employer's mandatory vaccination policy violated her human rights. But was not the issue. What mattered was whether the employer had a policy and whether the Claimant 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 Appellant has other options under other laws. And it isn't 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 Appellant did or failed to do is misconduct under the Act.[10]

[28] Because the law forced it to focus on narrow questions, the General Division had no authority to assess the employer's behaviour. For that reason, the General Division could not decide whether the employer should have in some way accommodated the Claimant's concerns over disclosing her vaccination status. The General Division found that the Claimant disobeyed the policy, and that was all that was needed to establish misconduct under the EI Act.

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

[29] A recent 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.[11] 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

[10] See General Division decision, paragraph 24.
[11] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[12]

[30] 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 *Employment Insurance 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.

[31] 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 dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

– **The General Division didn't have to follow *A.L.***

[32] At the General Division, the Claimant cited a case called *A.L.*, in which an EI claimant was found to be entitled to benefits even though she disobeyed his employer's mandatory COVID-19 vaccination policy.[13] The Claimant suggests that the General Division should have followed this case because it involved a fact situation similar to her own.

[33] However, the General Division was under no obligation to follow *A.L.*, which was decided by another member of the same tribunal several months earlier. 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.

[34] As the General Division noted, *A.L.* was decided before *Cecchetto*, the recent case that provided guidance on employer vaccination mandates in an EI context. In

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[12] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[13] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

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.[14]

[35] In any event, *A.L.* has recently been overturned by the Appeal Division, which found that the General Division made several legal errors in arriving at its decision.[15]

– **The General Division relied on relevant case law**

[36] The Claimant argues that some of the cases cited by the General Division involve acts, such as illicit drug use,[16] that can't be compared to her refusal to disclose her vaccination status. I can see why she takes exception such comparisons, but the principles that emerge from these cases are nonetheless relevant to hers. They all stand for the idea that the EI system can't be used to litigate the fairness or legitimacy of employers' workplace policies. Since of all of them were all decided by the Federal Court of Appeal, they are binding on this Tribunal.

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

[37] At the General Division, the Claimant insisted that she did nothing wrong by refusing to disclose her vaccination status. She suggested that, by forcing her to do so under threat of dismissal, her employer infringed her rights. She argued that she posed no threat to co-workers because she, like many other employees, was working from home when the policy was introduced.

[38] 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.

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[14] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 43.
[15] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[16] See, for instance, *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.

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

- 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 was aware that failure to comply with the policy by a certain date would cause loss of employment;
- The Claimant intentionally refused to disclose whether she had been vaccinated within the timelines demanded by her employer; and
- The Claimant did not apply for one of the exemptions permitted under the policy.

[40] 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 her refusal to follow the policy was not doing her employer any harm but, from an EI standpoint, that was not her call to make.

There is no case that the General Division ignored the Claimant's privacy concerns

[41] The Claimant suggests that the General Division downplayed her employer's violation of her privacy. I can't agree.

[42] The General Division didn't ignore the Claimant's privacy concerns and in fact referred to them several times in the reasons for its decision.[17] The problem for the

[17] See General Division decision, paragraph 35 among others.

Claimant was that, as noted, the General Division was barred from considering her employer's actions, particularly the measures it took to implement its vaccination policy.

[43] If the Claimant believed that her employer was coercing her into disclosing her medical information, then she was free to seek a remedy, not through the EI claims process, but in a court or human rights tribunal.

Conclusion

[44] For the above reasons, I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This appeal will not proceed.

Neil Nawaz
Member, Appeal Division