Citation: *EF v Canada Employment Insurance Commission*, 2023 SST 841

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 10, 2023 (GE-22-2948)

Tribunal member:	Neil Nawaz
Decision date:	June 23, 2023
File number:	AD-23-278

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, E. F., is a provincial civil servant. On November 30, 2021, the Claimant was placed on an unpaid leave of absence after he failed to show proof that he 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 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 suspension or dismissal.

[4] The Claimant is now seeking permission to appeal the General Division's decision. He argues that the General Division ignored evidence that he had a legitimate reason to be exempted from his employer's mandatory vaccination policy.

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.[1]

[1] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.[2] Having a reasonable chance of success is the same thing as having an arguable case.[3] If the Claimant doesn't have an arguable case, this matter ends now.

[7] At this preliminary stage, I have to decide whether there an arguable case that the General Division ignored the Claimant's grounds for exemption under his employer's vaccination policy.

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 ignored or misunderstood the evidence

[9] At the General Division, the Claimant argued that he was not guilty of misconduct because he did nothing wrong. He maintained that getting vaccinated was never a condition of his employment. He submitted a letter from his church outlining his faith-based objections to the vaccine's development.

[10] Given the law surrounding misconduct, these arguments could not succeed. 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 prove that they had been vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date would cause loss of employment;

[2] See section 58(1) of the *Department of Employment and Social Development Act*.
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- The Claimant intentionally refused to get vaccinated within the timeline demanded by his employer; and
- The Claimant failed to satisfy his employer that he qualified for a religious exemption under the policy.

[11] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. The General Division concluded that the Claimant was guilty of misconduct because his actions were deliberate, and they foreseeably led to his suspension. Under the law, that was all that was needed to prove misconduct.

There is no case that the General Division misinterpreted the law

[12] 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

[13] The Claimant argues that his employer's mandatory vaccination policy violated his human rights. He insists that nothing in the law required his employer to implement a mandatory vaccination policy. He alleges that the General Division failed to address evidence that he qualified for an exemption under the policy.

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

[15] As we have seen, the General Division **did** address the Claimant's evidence that he qualified for an exemption. However, it decided that whether the Claimant qualified for an exemption was strictly a matter between him and his employer.

[16] The General Division defined misconduct as follows:

> [T]o be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost willful. 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 his employer and that there was a real possibility of suspension because of that.[4]

[17] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, for the purpose of determining EI entitlement, it didn't have the authority to decide whether an employer's policies were reasonable, justifiable, or even legal.

– Employment contracts don't have to explicitly define misconduct

[18] At the General Division, the Claimant argued that there was nothing in his employment contract that required him to get the COVID-19 vaccination. However, case law says that was not the issue. What mattered was whether the employer had a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> And Federal Court of Appeal and Federal Court decisions consistently say that I can't look at the employer's actions when I am making a decision about misconduct. I can't look at whether the employer should have accommodated the Appellant or given him an exemption from the policy. I can't make a decision about whether the employer's policy was fair or justified. I can only look at the Appellant's own actions and decide if the reason for his suspension meets the test for misconduct.[5]

[19] The Claimant maintains that he has a deeply held religious objection to vaccination. He accuses the General Division of ignoring that objection, along with evidence that he qualified for an exemption under his employer's vaccination policy.

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[4] See General Division decision, paragraphs 18–19, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, among other cases.
[5] See General Division decision, paragraph 34, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[20] However, the General Division didn't ignore the Claimant's attempt to secure a religious exemption. In its decision, the General Division wrote:

> I understand that the Appellant argues that his employer should have granted his exemption request. He says his employer should have accommodated him. He argues that his employer doesn't consider his actions to be misconduct. He says his employer's policy is unfair.
>
> I am not persuaded by any of these arguments. The decision about whether the Appellant stopped working because of misconduct isn't up to the employer. This is because I have to look at the facts and the law and make my own decision about whether there was misconduct. Case law says I can't accept the employer's opinion about whether there was misconduct or not.[6]

[21] The Claimant may find it unfair, but the General Division was barred from considering what his employer did or didn't do. Instead, the General Division was required to focus on the Claimant's behaviour and whether that behaviour amounted to misconduct as defined by the EI Act and related case law.

[22] In a case called *Lemire*, the Federal Court of Appeal said:

> [It] is not a question of deciding whether or not the dismissal is justified under the meaning of labour 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.[7]

[23] The court in *Lemire* went on to find that an employer was justified in finding that it was misconduct when one of their food delivery employees set up a side business selling cigarettes to customers. The court found that this was so even if the employer didn't have an explicit policy against such conduct.

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

[24] A recent decision has reaffirmed the General Division's approach to misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto*

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[6] See General Division decision, paragraphs 29–30, citing *Crichlow v Canada (Attorney General)*, A-562-97.
[7] See *Canada (Attorney General) v Lemire*, 2010 FCA.

involved a claimant's refusal to follow his employer's COVID-19 vaccination policy.[8] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address such 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.[9]

[25] The Federal Court agreed that, by making a deliberate choice not to follow his 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 the claimant could have advanced his wrongful dismissal or human rights claims.

[26] Here, as in *Cecchetto*, the only questions that matter are 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.

Conclusion

[27] 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

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