Citation: *BI v Canada Employment Insurance Commission*, 2023 SST 936

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	B. I.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 8, 2022 (GE-22-1754)

Tribunal member:	Neil Nawaz
Decision date:	July 17, 2023
File number:	AD-23-537

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, B. I., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] The Claimant worked as a videographer for a market research firm. On December 1, 2021, the Claimant's employer dismissed him after he failed 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 EI benefits because his failure to comply with his employer's vaccination policy amounted to misconduct.

[4] The General Division agreed with the Commission. 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 his dismissal.

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

- It misinterpreted the meaning of "misconduct" in the *Employment Insurance Act* (EI Act);
- It ignored the fact that nothing in the law required his employer to establish and enforce a COVID-19 vaccination policy;
- It failed to appreciate that, under the law, individuals have the right to refuse medication; and
- It ignored evidence that he was willing to work toward a mutually acceptable accommodation with his employer.

Issues

[6] After reviewing the Claimant's application for leave 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 his application for leave to appeal, he had a reasonable explanation for doing so. However, I am refusing the Claimant permission to proceed, because his 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 is communicated to the applicant.

[9] In this case, the General Division issued its decision on October 7, 2022. 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 18, 2023 — approximately six months past the filing deadline. 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

[10] When an application for leave 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]

[11] In his application requesting leave to appeal, the Claimant said that the loss of his job had taken a toll on his physical and mental health. He said that, without a means of supporting his family, he was anxious and overwhelmed by the thought of having to go through with another appeal.

[12] 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

[13] 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]

[14] Before the Claimant can move ahead with his appeal, I have to decide whether it has a reasonable chance of success.[5] Having a reasonable chance of success is the same thing as having an arguable case.[6] If the Claimant doesn't have an arguable case, this matter ends now.

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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).
[6] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[15] 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

[16] At the General Division, the Claimant insisted that he did nothing wrong by refusing to disclose his vaccination status. He suggested that, by forcing him to do so under threat of dismissal, his employer infringed his rights. He noted that he was willing to negotiate an accommodation that would satisfy his employer's health and safety concerns.

[17] 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.

[18] 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 he had been vaccinated within the timelines demanded by his employer;
- The Claimant failed to satisfy his employer that he qualified for one of the exemptions permitted under the policy; and

- The Claimant requested accommodation under the policy, but his employer was under no obligation to accept the request.

[19] 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 actions were deliberate, and they foreseeably led to his dismissal. The Claimant may have believed that his refusal to follow the policy was not doing his employer any harm but, from an EI standpoint, that was not his call to make.

There is no case that the General Division misinterpreted the law

– Misconduct is any action that is intentional and likely to result in loss of employment

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

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

[22] 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.[7]

[23] 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.

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

[24] The Claimant also alleges that the General Division ignored his willingness to explore ways in which his beliefs could be accommodated while ensuring the safety of his co-workers.

[25] However, the employer's refusal to accommodate the Claimant is not the issue. 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 acknowledge that the Claimant hoped he would not be dismissed after he submitted his accommodation form, but the employer ultimately decided to terminate him because he did not intend to comply with their policy, even at a future date.
>
> I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the COVID19 pandemic.[8]

[26] 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 his vaccination status. The General Division found

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[7] 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.
[8] See General Division decision, paragraphs 45–46.

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**

[27] 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.[9] 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.[10]

[28] 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.

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

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

Conclusion

[30] 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.

[31] For that reason, 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