



Citation: *CD v Canada Employment Insurance Commission*, 2023 SST 887

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: C. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 28, 2023
(GE-22-3908)

Tribunal member: Janet Lew

Decision date: July 6, 2023

File number: AD-23-435

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, C. D. (Claimant), a nurse, is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Claimant's employer had suspended and then dismissed her from her employment because of misconduct. The General Division found that the Claimant had not complied with her employer's mandatory vaccination policy.¹ As a result of the misconduct, the Claimant will not be receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made legal and factual errors. She denies that her employer even had a vaccination policy, as she says that it relied instead on a Provincial Health Order (PHO) that did not apply to her. Besides, her collective agreement did not require vaccination anyway. So, she argues that, as she did not have to undergo vaccination, there was no misconduct on her part.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.² If the appeal does not have a reasonable chance of success, this ends the matter.³

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

¹ At paragraph 10 of its decision, the General Division defined the employer's COVID-19 vaccination requirement as a policy.

² *Fancy v Canada (Attorney General)*, 2010 FCA 63.

³ Under section 58(2) of the *Department of Employment and Social Development (DESD) Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issue

[6] Is there an arguable case that the General Division made any legal or factual errors?

I am not giving the Claimant permission to appeal

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or certain type of factual error.⁴

[8] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Is there an arguable case that the General Division made any legal or factual errors?

[9] The Claimant argues the General Division made important mistakes about the facts.

– **The Claimant argues that her employer did not have a vaccination policy and that the PHO did not apply to her**

[10] The Claimant argues that the General Division overlooked the fact that her employer did not have its own formal vaccination policy and that it relied on a PHO. She claims that the PHO did not apply to her.⁵

[11] The Claimant argues that, if her employer did not have a vaccination policy or if the PHO did not apply to her, then it cannot be said that she failed to comply with a

⁴ See section 58(1) of the DESD Act.

⁵ See Claimant's Application to the Appeal Division - Employment Insurance, at AD1-5, AD1C-7 and AD-D1.

policy that did not exist or with a health order that did not apply. And, therefore, there could have been no misconduct.

[12] The evidence on file at the General Division includes the following:

- Memo dated September 24, 2021, from the Claimant's employer to all employees and medical staff. The memo said that "**individuals will need to have received their first dose of vaccine by Monday, Sept. 27, 2021** to allow for the required 28-day interval between the first and second dose."⁶
- Order of the Provincial Health Officer - Hospital and Community (Health Care and Other Services) COVID-19 Vaccination Status Information and Preventive Measures-October 21, 2021.⁷ The PHO required vaccination or an exemption to work. The PHO ordered employers not to let unvaccinated staff to work (unless they had an exemption and complied with the conditions of the exemption).

Memo dated October 15, 2021, from the Claimant's employer to all employees and medical staff. The employer extended the dates required for vaccination.

The memo stated that all employees, medical staff, and others who work were required to **have "received at least one dose of COVID-19 vaccine before Oct. 26, 2021 in order to continue working."**⁸ They would need to be fully vaccinated with two doses of the vaccine to be considered compliant with the PHO.

The memo also stated that employees who did not get a first vaccine dose by November 15 could expect that their employment and/or other contractual arrangements could be terminated.

⁶ Employer's memo dated September 24, 2021, at GD 3-29.

⁷ Provincial Health Order with enclosure, at GD 3-38 to GD 3-62.

⁸ Employer's memo dated October 15, 2021, at GD 3-30.

- Employer's termination letter dated November 17, 2021. The employer advised the Claimant that, as she had not been compliant with the PHO, it was terminating her employment.⁹
- Employer's AV3100 - COVID-19 IMMUNIZATION REQUIREMENT POLICY, approved on December 1, 2021.¹⁰ Under section 3.0 of the policy, all staff were required to be vaccinated for COVID-19 to work. Under section 4.0, unvaccinated staff were not allowed to enter an employer's facility or care location or provide services on behalf of the employer (with exceptions). The policy indicated that all unvaccinated staff would be placed on leave without pay and might be subject to discipline up to and including termination.

The policy set out the consequences of non-compliance. It stated that "any person found in violation of this Policy may be subject to removal from the facility or care location, remedial and/or disciplinary action up to and including termination of employment, cancellation of contract and/or revocation of privileges."¹¹

- Phone log notes of a telephone conference with Service Canada. The Claimant reportedly advised that her employer had adopted and communicated a clear mandatory vaccination policy and that she was aware that she had to be vaccinated by October 25, 2021 under the policy.¹²
- Phone log notes of a telephone conference with Service Canada. The Claimant's employer referred to its mandatory vaccine policy during this call.¹³

[13] As the Claimant states, her employer did not have its own formal vaccination policy when it dismissed her. It is unclear when the Claimant's employer formally introduced its Immunization Requirement Policy, as the bottom of the document has a

⁹ Termination letter dated November 17, 2021, at GD 3-28.

¹⁰ Employer's Immunization Requirement Policy, at GD 3-32 to GD 3-37.

¹¹ Section 4.3 of the employer's COVID-19 Immunization Requirement Policy.

¹² Supplementary Record of Claim dated March 9, 2022, at GD 3-24.

¹³ Supplementary Record of Claim dated March 7, 2022, at GD 3-25.

date approved of “2021.12.01.” This suggests that the Claimant’s employer may not have formally introduced its Immunization Requirement Policy until weeks after it had already dismissed the Claimant from her employment.

[14] However, it is clear that the Claimant’s employer did not rely on its Immunization Requirement Policy when it dismissed the Claimant from her employment on November 17, 2021. When the Claimant’s employer dismissed the Claimant from her employment, the employer explained that it was terminating her employment because she had not been compliant with the PHO.¹⁴

[15] The General Division recognized that the Claimant’s employer did not have a formal vaccination policy in place when it dismissed the Claimant from her employment. The General Division recognized that the Claimant’s employer was following the PHO when it required its employees to show proof of vaccination against COVID-19.¹⁵

[16] The General Division wrote:

I understand that the [Claimant] argues that the employer’s vaccination requirement wasn’t a real policy. [The Claimant] says the employer didn’t follow the collective agreement when it introduced the vaccination requirement. **But the evidence in the appeal file shows me that the employer was following a public health order when it required its employees to show proof of vaccination against COVID-19.** The employer notified employees of this expectation in writing, several times. The employer set a deadline for complying. The employer outlined the consequences for employees who didn’t show proof of vaccination by the deadline.

(My emphasis)

[17] As I noted above, the General Division referred to a vaccination policy. But the General Division explained that the vaccination policy was the employer’s vaccination requirements (which were essentially the PHO). The employer adopted the PHO and set out its requirements for and expectations of employees and all medical staff.

¹⁴ Termination letter dated November 17, 2021, at GD 3-28.

¹⁵ See para 11 of the General Division decision.

[18] As the Claimant notes, the PHO did not require the termination of unvaccinated employees. But the PHO clearly states that employers were not to permit unvaccinated staff to work (unless they had an exemption and followed certain conditions).

[19] The General Division found that there were letters and memos from the employer. They described the employer's requirements, set out deadlines and consequences for those who did not follow the employer's requirements.

[20] Even if the Claimant's employer had yet to formally approve its Immunization Requirement Policy, the General Division found that misconduct arose because the Claimant had not complied with the employer's vaccination requirements that it had communicated on September 24, 2021, and again on October 15, 2021. In other words, the General Division found that the employer had established rules and requirements with which the Claimant had not complied.

[21] Further, even if the employer had not approved the Immunization Requirement Policy before it dismissed the Claimant, she seems to have recognized that her employer had some sort of policy and vaccination requirements. When the Claimant spoke with Service Canada on March 9, 2022, she reportedly stated that her employer had a vaccination policy and that she was required to be vaccinated.¹⁶

[22] Given these considerations, I am not satisfied that the Claimant has an arguable case that the General Division made a factual error that the employer did not have any vaccination requirements.

[23] The Claimant's employer had not formally approved its Immunization Requirement Policy. But it is clear from the evidence that there was a PHO with which the employer expected employees and medical staff to comply. The employer also set out its own measures and consequences for those who did not comply with its vaccination requirements.

¹⁶ Supplementary Record of Claim dated March 9, 2022, at GD 3-24.

[24] The General Division was mindful of this evidence. As it found, the employer communicated these to employees and medical staff and the Claimant was aware of the employer's requirements.

– **The Claimant argues that her collective agreement did not require vaccination**

[25] The Claimant argues that, as her collective agreement did not require vaccination, she did not have to undergo vaccination. So, she says that there could have been no misconduct.

[26] The General Division noted the Claimant's arguments. The Claimant had argued that her employer did not have the right to require her to get vaccinated. She had argued that her employer did not follow the terms and conditions of the collective agreement and that its vaccination requirements were contrary to the terms of the collective agreement.

[27] The General Division found that it did not have any authority to decide whether the employer violated the terms of the Claimant's collective agreement. It found that the Claimant's options for relief lay elsewhere.¹⁷

[28] If the Claimant was going to rely on the collective agreement, properly she should have produced a copy of it at the General Division. Even so, I accept that the collective agreement likely did not require COVID-19 vaccination. The Claimant began her employment before the pandemic began and before vaccines became available.

[29] But the fact that the collective agreement may not have contained any provisions for vaccination did not preclude the employer from unilaterally imposing new conditions of employment.

[30] In a unionized setting, an employer can unilaterally impose any rule or policy, even if the union disagrees, as long as the new rule or policy is consistent with the

¹⁷ General Division decision, at paras 5, 11, 22, and 31 to 32.

collective agreement and is overall reasonable.¹⁸ This is what is called the “KVP test.”¹⁹ The courts have consistently endorsed this test.

[31] In a case called *Cecchetto v Canada (Attorney General)*, Mr. Cecchetto was an employee in a public healthcare setting. His employment agreement did not require vaccination. His employer adopted the provincial health directive that required vaccination or regular testing. The employer unilaterally adopted the policy, without Mr. Cecchetto’s consent.

[32] Mr. Cecchetto denied that there was any misconduct. He argued that it is not misconduct to refuse to abide by a vaccine policy unilaterally imposed by an employer.

[33] The Federal Court accepted that, even if vaccination did not form part of Mr. Cecchetto’s original employment agreement, his employer could later introduce a policy that required vaccination. The Court concluded that the General Division had reasonably determined that Mr. Cecchetto had committed misconduct based on his non-compliance with a policy that did not form part of his original employment agreement.

[34] The Federal Court addressed Mr. Cecchetto’s arguments stemming from *A.L. v Canada Employment Insurance Commission*.²⁰ In the *A.L.* case, the General Division found that A.L. had not committed misconduct. This was because the employer had introduced a new term of the employment agreement by requiring vaccination. The General Division also found that there was a specific provision in Mr. Cecchetto’s

¹⁸ See for instance *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.* 2013 SCC 34 at paras 25 to 26.

¹⁹ The “KVP test” emerged out of *Re Lumber & Sawmill Workers’ Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73. There are six conditions to the test, the primary one being that the new policy or rule has to be reasonable. Other conditions are the policy or rule (1) must not be inconsistent with the collective agreement, must be clear and unequivocal, must be brought to the attention of the affected employee before the company acts on it, (4) the employee must have been notified that a breach of the policy or rule could result in certain consequences, and (5) the company has to have consistently enforced the policy or rule.

²⁰ *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428. The case is currently under appeal at the Appeal Division.

employment agreement that specifically let employees refuse vaccination. The Court factually distinguished *A.L.* from Mr. Cecchetto's case.

[35] The *A.L.* decision was factually driven. The factual circumstances that existed in the *A.L.* case may not be present here, but it is difficult to know without a copy of the Claimant's collective agreement. Without the collective agreement, one cannot speculate that the agreement had any provisions that might have allowed the Claimant to continue working even if she did not comply with the employer's vaccination requirements.

[36] While the Claimant's collective agreement did not require vaccination, it is clear from the *Cecchetto* case that an employer may introduce a new policy or rule, even if an employee disagrees with it and does not consent to it. And it is also clear that, if an employee does not comply with that new policy or rule, that that will constitute misconduct.

Conclusion

[37] I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division