Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 961

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 11, 2023 (GE-23-108)

Tribunal member:	Neil Nawaz
Decision date:	July 24, 2023
File number:	AD-23-382

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, M. S., was employed as a laser technician in a private medical clinic. On December 22, 2021, the clinic dismissed the Claimant after she refused to get vaccinated for COVID-19. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her 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 her 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 asking for permission to appeal the General Division's decision. She alleges that the General Division made the following errors:

- It referred to her employer's policy, but it failed to show what was in the policy;
- It ignored the fact that her employer attempted to impose a new condition of employment without her consent; and
- It disregarded evidence that her employer's mandatory vaccination policy violated her right to security of the person under the *Canadian Charter of Rights and Freedoms*.

Issue

[5] There are four grounds of appeal to the Appeal Division. An appellant 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]

[6] Before the Claimant can proceed, I have to decide whether her 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 answer this question: Is there an arguable case that the General Division erred when it found that the Claimant lost her 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 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] The Claimant argues that she is not guilty of misconduct because she did nothing wrong. She suggests that, by forcing her to get vaccinated under threat of dismissal, her

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

employer infringed her rights. She maintains that her employer was attempting to force a potentially unsafe and ineffective vaccine on her against her will.

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

[12] 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:

> 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.
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> There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[4]

[13] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it doesn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.

– Employment contracts don't have to explicitly define misconduct

[14] The Claimant argues that her employer's mandatory vaccination policy violated her human rights, but that is not the issue here. What matters is whether the employer has a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

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[4] See General Division decision, paragraphs 16–17, 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.

> 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 is not for me to decide whether her employer wrongfully dismissed 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.[5]

[15] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether the clinic's vaccine policy contradicted the Claimant's employment contract or violated her human or constitutional rights. Nor did the General Division have any authority to decide whether the clinic acted fairly in how it implemented its policy.

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

[16] 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.[6] 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.[7]

[17] 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

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[5] See General Division decision, paragraph 20, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.
[6] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

which Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

[18] That's also true in this case. Here, the only questions that mattered were whether the Claimant breached her employer's vaccine policy and, if so, whether that breach was deliberate and foreseeably likely to result in her 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

[19] At the General Division, the Claimant maintained that her employer never specified the penalty for failing to comply with the policy. She testified that she never imagined she would lose her job for not getting vaccinated.

[20] Given the law surrounding misconduct, I don't see how the General Division erred in assessing the evidence.

– The General Division considered all relevant factors

[21] From what I can see, the General Division didn't ignore or misunderstand the Claimant's testimony. It simply gave it less weight than the Claimant thought it was worth. Instead, it decided that other evidence was more credible.

[22] The General Division based its decision on the following findings:

- The Claimant's employer was free to establish and enforce a vaccination policy as it saw fit;
- The employer adopted and communicated a policy requiring employees to provide proof that they had been fully vaccinated by a specified deadline;
- The Claimant intentionally refused to get vaccinated by the specified deadline; and
- The Claimant knew, or should have known, that failure to comply with the policy by the specified deadline might cause loss of employment.

[23] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The General Division concluded that the Claimant had committed misconduct because her refusal to follow her employer's policy was deliberate, and it foreseeably led to her dismissal.

– The General Division is entitled to weigh all available evidence

[24] The Claimant criticizes the General Division for finding that she broke her employer's policy without ever having seen the actual policy.

[25] It's true that the file did not contain a formal document entitled "vaccine policy." However, the General Division had considerable evidence that (i) such a policy nevertheless existed and (ii) the policy contained a deadline by which employees were expected to be fully vaccinated or face consequences if they were not. In its decision, the General Division pointed to these facts:

- On September 26, 2021, the clinic sent the Claimant an email asking all employees to have their first vaccination by the end of October 2021, and the second vaccination within four to six weeks of the first vaccination. The email didn't say anything about what would happen if an employee failed to get the vaccine.[8]
- On October 26, 2021, the clinic sent the Claimant another email reminding employees of their obligation to get vaccinated. The email extended the final compliance deadline to November 30, 2021 and warned that failure to take the deadline seriously would force the clinic to "consider all options to best meet patients [sic] needs safely in the long term."[9]

[8] See General Division decision, paragraph 31, citing employer's email dated September 26, 2021, GD3-22.
[9] See General Division decision, paragraph 32, citing employer's email dated October 26, 2021, GD3-23.

- The Commission's telephone memos document the Claimant saying on separate occasions that she knew going against her employer's vaccine policy could result in her losing her job.[10]
- The Appellant testified that her employer told her in November 2021 that she would be dismissed from her job because she was unvaccinated.

[26] In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.[11] In this case, having reviewed emails, memos, and testimony, the General Division concluded that the Claimant knew about her employer's policy and understood that there was a good chance she'd be let go if she failed to comply with it by a certain deadline. In the absence of a significant factual error, I see no reason to second-guess this finding.[12]

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

[10] See General Division decision, paragraphs 34–35, referring to Service Canada Supplementary Records of Claim dated March 4, 2022 (GD3-20) and April 25, 2022 (GD3-28).
[11] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[12] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.