Citation: *DB v Canada Employment Insurance Commission*, 2023 SST 985

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated April 11, 2023 (GE-22-2865)

Tribunal member:	Neil Nawaz
Decision date:	July 26, 2023
File number:	AD-23-444

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, D. B., is employed as a professor at a community college. On January 4, 2022, the college placed the Claimant on an unpaid leave of absence after he refused to get vaccinated for COVID-19. The Canada Employment Insurance Commission decided that it didn't have to pay the Claimant EI benefits because his non-compliance 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 loss of employment.

[4] The Claimant is now asking for permission to appeal the General Division's decision. He alleges that the General Division made the following errors:

- It ignored the fact that his employer attempted to impose a new condition of employment without his consent; and
- It relied on a Federal Court case called *Cecchetto*, even though the facts of that case differed significantly from his own.[1]

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;

[1] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.

- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.[3] Having a reasonable chance of success is the same thing as having an arguable case.[4] 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 was suspended 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 he is not guilty of misconduct because he did nothing wrong. He suggests that, by forcing him to get vaccinated under threat of dismissal, his employer infringed his rights. He maintains that his employer was attempting to force a potentially unsafe and ineffective vaccine on him against his will.

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

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

[12] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes — one 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 (careless or negligent) that it is almost wilful.
>
> […]
>
> There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties to the employer and that there was a real possibility of being suspended because of that.[5]

[13] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that it didn'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] At the General Division, the Claimant argued that the college's mandatory vaccination policy violated his human rights. But was not the issue. What mattered was whether the college had a policy and whether the Claimant deliberately disregarded it knowing there would be consequences. In its decision, the General Division put it this way:

> I have no authority to decide whether the employer breached the Appellant's collective agreement or any of his rights. Nor do I have authority to decide if he was wrongfully suspended, or if the employer's accommodation request process was proper, or whether the employer should have allowed him to rapid test or

[5] See General Division decision, paragraphs 22 and 24, 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.

> provided some form of accommodation. The Appellant's recourse for his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.[6]

[15] I don't see an arguable case that this passage misstates the law. Since the leading cases forced it to focus on two very narrow questions, the General Division came to the inescapable conclusion that the Claimant had committed misconduct, as the term is understood in the context of EI.

– **The General Division appropriately relied on *Cecchetto***

[16] As the General Division noted in its reasons, a recent case has considered misconduct in the specific context of COVID-19 vaccination mandates. In *Cecchetto*, the Federal Court confirmed that this Tribunal is not permitted by law to address certain questions:

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

[18] The Claimant argues that *Cecchetto* involved facts that were significantly different from his own. I don't agree. Of course, no two cases are identical, but the Claimant's situation was close enough to Mr. Cecchetto's to justify the General Division's use of his case. Like the Claimant, Mr. Cecchetto refused to comply with his

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[6] See General Division decision, paragraph 44.
[7] See *Cecchetto supra*, note 1, at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

employer's mandatory COVID-19 vaccination policy. Like the Claimant, Mr. Cecchetto argued that the policy was not part of his employment contract and violated his human rights. Like the Claimant, Mr. Cecchetto claimed that his employer unreasonably refused to accommodate him.

[19] Based on these similarities, I don't see how the General Division erred by invoking *Cecchetto*. As in that case, the only relevant questions were 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. Here, 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

[20] At the General Division, the Claimant noted that the College had exempted him from its mandatory vaccination policy throughout the fall of 2021. He noted that the college allowed him to submit to daily rapid testing and attend education sessions for four months. He claimed that the college suddenly and unreasonably refused to extend his exemption in January 2022, forcing him into an unpaid leave of absence.

[21] From what I can see, the General Division didn't ignore these points. It simply didn't give them as much weight as the Claimant thought they were worth. Given the law governing misconduct, I don't see how the General Division erred in assessing the available evidence.

[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 knew, or should have known, that failure to comply with the policy by the specified deadline would cause loss of employment;

- The Claimant intentionally refused to get vaccinated by the deadline;
- The Claimant never applied for religious or medical exemptions under the policy; and
- The employer was under no obligation to accept the Claimant's continued requests for accommodation.

[23] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. 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.[8] In this case, having reviewed emails, memos, and testimony, the General Division concluded that the Claimant knew about his employer's policy and understood that there was a good chance he'd be let go if he 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.[9]

Conclusion

[24] 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 *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[9] 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.