Citation: *MR v Canada Employment Insurance Commission*, 2023 SST 1086

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. R.
Representative:	Nilanka Boteju
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 3, 2023 (GE-22-3591)

Tribunal member:	Neil Nawaz
Decision date:	August 14, 2023
File number:	AD-23-576

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. R., was employed as a dietary attendant for a mental health treatment centre. On October 18, 2021, the centre suspended the Claimant from work after she refused to get vaccinated for COVID-19.[1] 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. It also decided that the Claimant was disentitled from receiving EI benefits because she wasn't available for work.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken her employer's vaccination policy and that she knew or should have known that disregarding the policy would likely result in loss of employment. It also agreed with the Commission that the Claimant did not make herself available for work after being let go.

[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 considered irrelevant case law that addressed factual situations—involving EI claimants who failed drug tests—that were completely different from her own;
- It ignored the fact that, while the policy allowed for medical and religious exemptions in theory, her employer did not grant such exemptions in practice;

[1] The Claimant was dismissed from her job altogether on March 29, 2022.

- It ignored that fact that, although she was ready, willing and available to work, the pandemic made it difficult to find a job in late 2021;
- It ignored the fact that her employer offered to settle the wrongful termination grievance that her union filed on her behalf;
- It ignored the fact that the Commission rejected her EI claim, even though it never succeeded in contacting her employer; and
- It ignored the fact that she has contributed to EI for decades and is a member of a racialized and vulnerable community.

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.[2]

[6] Before the Claimant can proceed, I have to decide whether her 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 decide whether there is an arguable case that the General Division erred when it found that the Claimant (i) lost her job because of misconduct; and (ii) failed to make herself available for work.

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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.

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 made a legal error when it found the Claimant committed misconduct

[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] At the General Division, the Claimant argued that she did not commit misconduct because she did nothing wrong. She suggested that, by forcing her to get vaccinated under threat of dismissal, her employer infringed her rights.

[11] I can understand the Claimant's frustration, but I don't see how the General Division misinterpreted the relevant law.

[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.[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.

[14] The Claimant complains that some of the cases cited by the General Division involve illicit drug use,[6] which can't be compared to her refusal to accept a vaccination. I can see why she takes exception such comparisons, but the principles that emerge from these cases are nonetheless relevant to hers. All of them stand for the idea that the EI system can't be used to litigate the fairness of employers' workplace policies.

– Employment contracts don't have to explicitly define misconduct

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

> 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 isn't 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.[7]

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[5] See General Division decision, paragraphs 18–19, 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.
[6] See, for instance, *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.
[7] See General Division decision, paragraph 21, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.

[16] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether her employer's policy contradicted the Claimant's employment contract or violated her legal rights.

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

[17] 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.[8] 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.[9]

[18] 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.

[19] That's also true in this case. Here, the only questions that mattered were whether the Claimant breached her employer's vaccination 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.

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[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

There is no case that the General Division ignored the evidence

[20] 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.[10] In this case, having reviewed documents and heard 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. I see no reason to second-guess this finding.[11]

– The General Division considered all relevant factors

[21] At the General Division, the Claimant said that she refused to follow her employer's policy because she had concerns about the safety and efficacy of the vaccine. She also said that she didn't think she needed the vaccine because she had already been infected with COVID-19.

[22] The General Division gave these explanations little weight. Given the law surrounding misconduct, I don't see how the General Division erred in doing so.

[23] 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 clear policy requiring employees to provide proof that they had been fully vaccinated within specified timelines;
- The Claimant knew, or should have known, that failure to comply with the policy within the timelines would cause loss of employment; and
- The Claimant intentionally refused to get vaccinated within the specified timelines.

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[10] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[11] 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.

[24] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. The General Division concluded that the Claimant committed misconduct because her refusal to follow her employer's policy was deliberate, and it foreseeably led to her suspension. The Claimant may have believed that refusing to comply with the policy would not do her employer any harm but, from an EI standpoint, that was not her call to make.

– The General Division did not ignore the Claimant's attempt to get a religious exemption

[25] The Claimant says that the General Division ignored her deeply held religious objections to vaccination, along with evidence that she qualified for an exemption under her employer's vaccination policy.

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

> Either way, in my view, the Appellant didn't demonstrate any intention to comply with the vaccination policy, even if her exemption request was denied. She testified that she spoke to her union representative after submitting her exemption request, and filled out a grievance form, to be submitted if her request was denied. She testified that she spoke to the employer on the phone while she was suspended, and told it that she wouldn't be getting vaccinated.
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> I understand that the Appellant hoped that the employer wouldn't go through with dismissing her for not following its vaccination policy. But I find that she knew, or should have known, that not complying with the policy would very likely result in her losing her job.[12]

[27] The General Division was barred from considering what her 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.

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[12] See General Division decision, paragraphs 47–48.

There is no case that the General Division erred when it found the Claimant unavailable for work

[28] Under section 18(1)(a) of the EI Act, claimants are not entitled to benefits unless they are capable of and available for work. The Federal Court of Appeal says that this requires decision-makers to consider whether a claimant:

- wanted to return to work as soon as a suitable job was available;
- tried to do so by making efforts to find a suitable job; and
- set unreasonable conditions that limited their chances of finding a job.[13]

[29] I am satisfied that the General Division accurately summarized the law around availability.

– The General Division did not ignore or mischaracterize the evidence around the Claimant's attempt — or lack of thereof — to find another job

[30] The General Division reviewed the Claimant's written and oral submissions and, after applying the law to the available evidence, came to the following findings:

- Although the Claimant wanted to go back to work, she didn't make enough effort to find a suitable job from April 11, 2022;
- It wasn't enough to drop off two resumes, give her resume to her sister and a friend, and asking friends about possible jobs; and
- The Claimant unduly limited her chances of getting a job by (i) refusing to get vaccinated; (ii) restricting her job search to the Toronto food service sector (at a time when most employers in that sector required proof of vaccination).

[31] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. I see no reason to interfere with the General Division's conclusion that the Claimant was capable of work but unavailable for work.

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[13] See *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA).

– Claimants cannot succeed by rearguing their case

[32] The Claimant's argument at the Appeal Division mirrors the argument that she made at the General Division. She insists that he was available for work.

[33] However, the General Division heard this argument and, after applying the law to the evidence, decided that it had no merit.

[34] To succeed at the Appeal Division, claimants must do more than simply disagree with the General Division. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. A hearing at the Appeal Division is not meant to be a "redo" of the hearing at the General Division.

There is no case that the General Division ignored the Claimant's settlement offer

[35] The Claimant argues that the General Division ignored an offer that her employer made to settle a grievance filed by her union.[14]

[36] I don't see a case for this argument. Judicial and quasi-judicial decision-makers are presumed to have considered all the evidence before them. The General Division likely considered the offer but, for good reason, didn't think it was significant.

[37] There are some circumstances in which a settlement can rebut evidence of misconduct. However, such a settlement must contain a clear indication that the prior termination was wrong.[15] In this case, the file did not contain a signed or completed settlement but only the broad outline of an offer. The outline specifically says, "There is no admission of liability for wrongdoing from either party."

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[14] See email dated March 22, 2023 from unidentified Ontario Public Service Employees Union grievance officer, GD7-2.
[15] See *Canada (Attorney General) v Boulton* (1996), 208 N.R. 63 (FCA).

There is no case that the General Division ignored the Commission's failure to contact her employer

[38] The Claimant criticized the Commission for refusing her claim without having spoken to her employer. She accuses the General Division of ignoring what she considers a significant impropriety.

[39] I'm afraid I can't agree. It is not clear to me how the Claimant was prejudiced by the absence of input from an organization with which she was in conflict. In any event, there was nothing that the Commission could do to force the Claimant's former employer to provide information about her dismissal.

[40] Moreover, what the Commission did or didn't do is irrelevant in a General Division hearing. That's because the General Division is mandated to consider claims afresh. When a claimant comes to the General Division, the Commission's decision falls by the wayside, as does everything it did to arrive at that decision.

There is no case that the General Division improperly ignored the Claimant's contributions history

[41] As she did at the General Division, the Claimant argues that she is entitled to EI because she paid into it for many years. However, the General Division rightly rejected this argument, noting that EI isn't an automatic benefit: "Like any other insurance plan, you have to meet certain requirements to qualify to get benefits."[16]

[42] The Claimant also argues that the General Division disregarded her background as a racialized and vulnerable Canadian. I don't see a case for this argument either. First, it is not clear to me that this point was argued at the General Division, so the presiding member can't be blamed for failing to consider it. Second, the General Division must follow the letter of the law, and there is no provision in the EI Act that permits it to take a claimant's personal characteristics into account.

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[16] See General Division decision, paragraph 50.

Conclusion

[43] 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