Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 1007

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated March 27, 2023 (GE-22-3487)

Tribunal member:	Neil Nawaz
Decision date:	July 30, 2023
File number:	AD-23-376

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 was employed as a medical technologist for X, a regional network of hospitals. On February 17, 2022, X dismissed her 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 numerous errors in coming to its decision.

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 jurisdiction or refused to exercise it;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

[1] See *Department of Employment and Social Development Act* (DESDA), section 58(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?

The Claimant's Reasons for Appealing

[8] The Claimant alleges that the General Division erred in the following ways:

Fairness:

- It didn't tell her that the Commission would not be appearing until the weekend before the hearing;
- It used Zoom to record the hearing, rather than a device, contrary to what Tribunal staff had led her to believe;
- It barred her from making a Charter argument at the hearing;

Jurisdiction:

- It defined misconduct to include her refusal of medical treatment — a decision that she made before her employer introduced its vaccine policy;

Law:

- It misinterpreted the meaning of "misconduct" as set out in the *Employment Insurance Act* (EI Act);
- It ignored the fact that nothing in the law required her employer to establish and enforce a COVID-19 vaccination policy;

[2] See DESDA, section 58(2).
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

- It ignored the fact that her employer attempted to impose a new condition of employment without her consent;
- It found, contrary to the evidence, that she knew or should have known that there was a real possibility she'd be fired; and

Facts:

- It got numerous important details wrong about the nature of her employment, the contents of her employer's vaccine policy, and the circumstances in which the policy was communicated to her.

Analysis

[9] 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.

– The Commission didn't have to appear at the hearing

[10] There is nothing that requires any party to a proceeding before this Tribunal to attend a scheduled hearing. In this case, the Commission filed written submissions but chose not to participate in the General Division's teleconference last March, and I don't see an arguable case that the Claimant's interests were prejudiced by that absence. Nor do I see how the Claimant was harmed by her learning of the Commission's non-attendance on relatively short notice.

– It makes no difference how the hearing was recorded

[11] The Claimant criticizes the Tribunal for lack of transparency for allegedly misrepresenting the means by which the General Division recorded the hearing. Again, I don't see how it matters whether the hearing was captured by Zoom's built-in recording feature or by a separate recording device. The main thing is that the hearing was, in fact, recorded and documented.

– The Tribunal is not obliged to give parties advance notice of what can or can't be argued

[12] The Claimant complains that, during the hearing, the General Division barred her from making arguments based on the *Canadian Charter of Rights and Freedoms*, leaving her unprepared. She says that this information should have been communicated to her earlier.

[13] However, it is up to EI claimants to familiarize themselves with the law, the Tribunal's jurisdiction, and its rules of procedure. In preparing her submissions, the Claimant should have known that the General Division could only consider how the specific provisions of the EI Act, and not any other government law or policy, might violate the Charter. The Claimant should have also known that a claimant wishing to raise a Charter argument before the General Division must first follow a preliminary procedure set out in section 1 of the *Social Security Tribunal Regulations*.

– Employers can impose new terms of employment

[14] The Claimant argues that the General Division didn't have the authority to make finding of misconduct for a decision that she made before her employer introduced its vaccine policy. Misconduct is not just about breaching the terms and conditions of employment as they existed when a claimant was hired; it can also arise from breaching new terms or conditions that an employer may subsequently impose in response to changing circumstances.[4] In this case, EI law recognizes that X was free to unilaterally introduce a new term of employment and impose disciplinary measures, including suspension, on those of its employees who refuse to comply with it.

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

[15] 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

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

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

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

[17] 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.

– The employer's conduct is not relevant

[18] 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 had a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Appellant did or

[5] See General Division decision, paragraphs 14–15, 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.

> failed to do and whether that amounts to misconduct under the Act.
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> I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer 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.[6]

[19] Because the law forced it to focus on narrow questions, the General Division had no authority to decide whether X's vaccination 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 X acted fairly in how it implemented its policy.

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

[20] A recent Federal Court decision has reaffirmed the General Division's 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.[7] 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.[8]

[21] 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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[6] See General Division decision, paragraphs 18–19, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Paradis v Canada (Attorney General),* 2016 FC 1282.
[7] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[8] See *Cecchetto*, *supra* note 4, 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.

[22] 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.

– The General Division considered all relevant factors

[23] 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.

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

- X was free to establish and enforce a vaccination policy as it saw fit;
- X 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;
- The Claimant knew, or should have known, that failure to comply with the policy by the specified deadline might cause loss of employment; and
- The Claimant failed to satisfy X that she qualified for a medical exemption under the policy; and
- X was under no obligation to accept the Claimant's requests for accommodation.

[25] 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.

– There was evidence that the Claimant knew she'd be dismissed

[26] The Claimant maintains that she never imagined she would lose her job for not getting vaccinated. However, the record contained documents indicating otherwise, and the General Division was within its rights to give such evidence weight. X issued a written policy on September 7, 2021, which stated that employees had to show proof of full vaccination by October 20, 2021.[9] In telephone conversations with Commission representatives, the Claimant acknowledged that she had received the policy and knew about the deadline.[10] It appears that X extended the deadline pending review of the Claimant's application for an exemption.[11]

[27] Given this evidence, I don't see a case that the General Division made a factual error, significant or otherwise. 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.[12] 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.[13]

– The General Division did not mischaracterize X's vaccination policy

[28] The Claimant devotes a large part of her written submissions to a point-by-point rebuttal of the General Division's decision. Nearly all her counterpoints come back to the same thing: her belief that she was not subject to X's mandatory vaccination policy because such a policy did not exist in the first place.[14]

[29] This argument has no reasonable chance of success. As noted, the policy did exist and, what's more, the Claimant referred to it several times in her discussion with the Commission's representatives, going so far as to apply for a medical exemption

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[9] See Trillium Health Partners' COVID-19 Immunization Policy dated September 7, 2021, GD3-38.
[10] See Supplementary Records of Claim dated May 31, 2022 (GD3-29) and September 1, 2022 (GD3-48).
[11] See Supplementary Record of Claim dated September 1, 2022, GD3-48.
[12] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[13] 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.
[14] See, for instance, paragraph 7 of the Claimant's leave to appeal submissions, AD1-13.

under its terms. The Claimant's argument seems to be based, in part, on the fact that the title of X's policy contained the word "immunization," not "vaccination." It seems to me that this is a distinction without a difference.

[30] The Claimant also seems to be suggesting that the vaccination policy did not apply to her because she was hired years before its introduction. As explained above, this argument cannot succeed. An employer can impose a new term of employment without an employee's consent, and failing to comply with the new term is still misconduct, even if it wasn't part of an EI claimant's original employment contract.

Conclusion

[31] 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