Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1102

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated May 17, 2023 (GE-22-3621)

Tribunal member:	Neil Nawaz
Decision date:	August 15, 2023
File number:	AD-23-570

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, J. B., was employed as a food inspector for an agency of the Government of Canada. On March 18, 2022, the agency 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 Employment Insurance (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 ignored evidence that the Commission misled him. He says that Service Canada staff specifically told him that he would be entitled to receive benefits if he enrolled in a retraining program. He says that, although he completed a program at Sheridan College pursuant to section 25 of the Employment Insurance Act (EI Act), he never received benefits.

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 his 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 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] 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:

> The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct. To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or

[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.

> intentional. And misconduct also includes conduct that is so reckless 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.[4]

[11] 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

[12] At the General Division, the Claimant argued that his employer's mandatory vaccination policy violated his human rights. But was not the issue. What mattered was whether his employer had a policy and whether the Claimant deliberately disregarded it. In its decision, the General Division put it this way:

> I have to focus on what the Appellant did or didn't do, and whether that conduct amounts to misconduct under the EI Act. I can't consider whether the employer's policy is reasonable, or whether suspension was a reasonable penalty.[5]

[13] 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*

[14] 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

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[4] 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.
[5] See General Division decision, paragraph 24.

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.[6]

[15] 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.

There is no case that the General Division ignored or misunderstood the evidence

[16] At the General Division, the Claimant submitted an affidavit from a minister in his church outlining his faith-based objections to the vaccine's development. He maintained that his employer should have given him an exemption from having to get vaccinated on religious grounds. He argued that, by forcing him to accept the vaccine under threat of losing his job, his employer violated his rights to religious freedom and bodily integrity.

[17] In the reasons for its decision, the General Division addressed these points, but found them less than compelling. Given the law governing misconduct, I don't see how the General Division made an error in assessing the available evidence.

[18] 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;

[6] 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.

- The Claimant's 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 failed to satisfy his employer that he qualified for a religious exemption under the policy; and
- The employer was under no obligation to accept the Claimant's request for an exemption.

[19] 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.[7] 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.[8]

There is no case that the General Division disregarded the Claimant's retraining

[20] The Claimant says that Commission staff assured him he would receive EI if he participated in a retraining program pursuant to section 25 of the EI Act. Although he successfully completed such a program in November 2022, the Commission still declared him ineligible for EI benefits. He is now criticizing the General Division for not acknowledging that he was given misleading advice.

[21] I don't see a case here.

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[7] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] 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.

[22] A judicial or quasi-judicial decision-maker is presumed to have considered all the material before it.[9] In its decision, the General Division may not have referred to the Claimant's submissions about retraining, but that doesn't mean it overlooked them. Decision-makers can't be expected to address a claimant's every submission, however insignificant it may be.

[23] Here, I can see why the General Division chose not to discuss the Claimant's decision to go back to school. That's because it wasn't relevant to the issue of whether the Claimant committed misconduct.

[24] Under section 25 of the EI Act, a claimant is deemed available for work if they are engaged in a retraining program to which the Commission, or an authority designated by the Commission, has referred the Claimant. From what I can see, the Claimant never produced evidence that the Commission or a designate referred him to the millwright program that he took at Sheridan College. Instead, the evidence shows that, after the Claimant was dismissed from his job, it was his decision, and his decision alone, to use his time to learn another skill.[10]

[25] The Claimant suggests that he was misled into believing that retraining by itself would entitle him EI benefits. However, that argument can't succeed. Even if the Commission provided the Claimant with misinformation (something that wasn't proven), that doesn't relieve him from the operation of the EI Act.[11] Claimants for EI benefits have an obligation to take reasonable steps to determine their rights and obligations under the law.[12]

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[9] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[10] The Claimant can be heard discussing his effort to get funding for retraining from 29:30 to 37:00 of the recording of the General Division hearing.
[11] See *Canada (Attorney General) v Shaw*, 2002 FCA 325.
[12] See *Canada (Attorney General) v Carry*, 2005 FCA 367.

Conclusion

[26] 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