Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 1147

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. B.
Representative:	Philip Cornish
Respondent:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts
Added Party:	Toronto Transit Commission

Decision under appeal:	General Division decision dated January 31, 2023 (GE-22-3080)

Tribunal member:	Neil Nawaz
Type of hearing:	In person
Hearing date:	July 27, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	August 22, 2023
File number:	AD-23-221

Decision

[1] The appeal is dismissed. The General Division made an error of law in coming its decision. My own review of the evidence convinces me that the Claimant is not entitled to Employment Insurance (EI) benefits.

Overview

[2] The Claimant, M. B., is an operator with the Toronto Transit Commission (TTC). On November 21, 2021, the TTC placed him on an involuntary leave of absence after he 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 his failure to comply 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 asked the Appeal Division for permission to appeal the General Division's decision. He maintained that he was not guilty of misconduct and argued that the General Division made the following errors:

- It failed to consider whether the vaccination policy was an implied or express term of employment, as required by a Federal Court of Appeal case called *Lemire*;[1]
- It failed to consider evidence that the TTC later repudiated its misconduct allegation and reinstated the Claimant;

[1] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

- It ignored information
  - that the TTC's vaccination policy did not expressly provide for any penalty; and
  - that the TTC did not adequately notify him that his job would be at risk if he failed to comply with the policy;
- It disregarded a General Division case called *A.L.*, even though it involved a factual situation much like his own;[2] and
- It based its findings on employer records that were not tested by cross-examination.

[5] In May, I granted the Claimant permission to appeal because I saw an arguable case on at least one issue. Last month, I held a hearing to discuss his allegations in full.

Issue

[6] There are four grounds of appeal to the Appeal Division. A claimant 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.[3]

[7] My job is to determine whether any of the Claimant's allegations fall into the permitted grounds of appeal and, if so, whether they have any merit.

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[2] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[3] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

Analysis

[8] I am satisfied that the General Division erred in law by failing to consider a key aspect of the test for misconduct. Because the General Division's decision falls for this reason alone, I see no need to address the Claimant's remaining allegations.

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

[9] 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. An employee may be disqualified from receiving EI because of misconduct, but it doesn't necessarily mean that they have done something "wrong" or "bad." The *Employment Insurance Act* (EI Act) says that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct…"[4] Misconduct is not defined by the EI Act, but the term has been interpreted by the courts.

[10] The Federal Court of Appeal has held that, to be misconduct, an employee's conduct must be wilful. This means that the conduct was conscious, deliberate, or intentional.[5] Misconduct also includes conduct that is so reckless that it is almost wilful. There is misconduct if a claimant can reasonably foresee that their conduct will get in the way of carrying out their employment duties and that there is a real possibility of being let go because of it.

– Foreseeability implies a causal link between the claimant's alleged misconduct and their ability to carry out their employment duties

[11] The General Division found that the Claimant was guilty of misconduct because (i) he intentionally refused to get vaccinated and (ii) he knew or should have known that his refusal would lead to disciplinary measures.[6]

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[4] See EI Act, section 30.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v Secours*, [1995] FCJ No 210.
[6] See General Division decision, paragraph 27.

[12] However, the Claimant points to *Lemire*, which requires decision-makers to make sure that an employee's alleged misconduct actually impacts their job:

> To determine whether the misconduct could result in dismissal, there must be a **causal link** between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment [emphasis added].[7]

[13] This passage tells us that any alleged misconduct must be relevant to a claimant's ability to carry out their employment duties. In other words, an employee's "misconduct" can't be just whatever that the employer deems to be unacceptable behaviour. I emphasize that *Lemire* requires the causal link to be between the employee's misconduct and their **employment**. It does **not** say that the causal link must be between the misconduct and the **dismissal**.

[14] If a claimant is expected to foresee that their conduct is likely to result in suspension or dismissal, then it should be possible for them, or any reasonable person, to understand why. To hold otherwise would be to subject employees to the mercy of employers who may be tempted to let employees go for capricious reasons that have nothing to do with the essential terms of their employment.

[15] In this case, the General Division found that the Claimant's conduct was intentional and that it would foreseeably result in suspension or dismissal. However, the General Division didn't explain why it believed there was a causal link between the Claimant's refusal to get vaccinated and his ability to perform his job: "I realize the Claimant argued he had the freedom to choose not to be vaccinated and his actions weren't misconduct. However, I must apply the legal test for misconduct as established in the case law."[8]

[16] But it wasn't enough to find that the Claimant's mere failure to comply with the policy caused his dismissal. The General Division had to go further. It also had to satisfy

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[7] See *Lemire* at paragraph 14.
[8] See General Division decision at paragraph 27.

itself that the Claimant's non-compliance would render him unable to fulfill the terms of his employment.

[17] The General Division didn't address that question. It didn't ask how the Claimant's refusal to get vaccinated impaired his ability to perform his job. It failed to establish a rational connection between his alleged misconduct and his employment. That was an error of law.

Remedy

There are two ways to fix the General Division's error

[18] When the General Division makes an error, the Appeal Division can address it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.[9]

[19] As it conducts its proceedings, the Tribunal must balance simplicity, fairness, and quickness.[10] In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing applications for benefits to conclusion. It is now nearly two years since the Claimant submitted his EI application. If this matter goes back to the General Division, it will needlessly prolong a final resolution.

The record is complete enough to decide this case on its merits

[20] I am satisfied that the record before me is complete. The Claimant filed a large volume of written evidence with the Tribunal, including his collective agreement, his employer's vaccination policy, and letters and emails that document the circumstances that led to his dismissal. I also had access to the recording of the General Division hearing, in which the Claimant discussed his job, what he knew about the policy and when he knew it. I doubt that the Claimant's evidence would be materially different if this matter were reheard.

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[9] See DESDA, section 59(1).
[10] See *Social Security Tribunal Rules of Procedure*, section 8(1).

[21] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, if it hadn't erred. In my view, even if the General Division had properly followed the law, it would have come to the same result. My own review of the record satisfies me that the Claimant's refusal to get vaccinated amounted to misconduct.

The Claimant's refusal to get vaccinated was misconduct

[22] 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 I am bound to follow.

– Misconduct involves four essential elements

[23] The law says that you can't get EI benefits if you lose your job because of misconduct. As noted, the EI Act doesn't say what misconduct means, but the courts have established what is essentially a four-part test. For there to be misconduct:

- An employer must have a policy;
- An employee must be aware of the policy;
- The employee must deliberately refuse to comply with the policy; and
- The employee must be able to foresee that refusing to comply with the policy would lead to loss of employment.

[24] As we have seen, the element of foreseeability requires a causal link between the misconduct and the employment. An employee must be able to see how failing to comply with their employer's policy would interfere with their ability to do their job.

– The evidence shows that the Claimant committed misconduct

[25] The evidence in this case established the following facts:

- On September 1, 2021, the TTC issued a mandatory COVID-19 vaccination policy;[11]
- The policy required all employees to confirm their vaccination status by September 20, 2021;[12]
- Employees who had not been vaccinated by that date had until September 30, 2021, to get a first dose and until October 30, 2021, to get a second;[13]
- The policy explicitly stated that compliance was a condition of employment;[14]
- the TTC communicated the policy to all its employees by an organization-wide email, followed by memos outlining expectations and consequences, including loss of employment;[15]
- The TTC refused the Claimant's request for a religious exemption under the policy;[16] and
- On November 21, 2021, the TTC placed the Claimant on unpaid leave after he failed to confirm that he had been fully vaccinated.[17]

[26] Given the above evidence, I am satisfied that the Claimant lost his job because of misconduct. He was aware of his employer's policy and of potential disciplinary

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[11] See the TTC's Mandatory COVID-19 Vaccination Policy dated September 1, 2021 (GD3A-23), accompanied by letter from Richard Leary, TTC Chief Executive Officer, (GD3A-22). Some
[12] See TTC policy, article 5, GD3A-25. These deadlines were subsequently extended in response to changing circumstances – see TTC emails dated September 29, 2021 (GD3A-31) and October 15, 2021 (GD3A-40), among others.
[13] See TTC policy, article 5, GD3A-25.
[14] See TTC policy, article 9, GD3A-27.
[15] See organization-wide email from Richard Leary, TTC Chief Executive Officer, dated September 1, 2021, GD3A-21. See also emails dated September 7, 2021 (GD3A-28) and September 28, 2021 (GD3A-30).
[16] See TTC Creed Accommodation Request Form completed by Claimant on October 27, 2021, GD3A-61. See also Claimant's statement dated November 30, 2022, GD7-11.
[17] See Service Canada Supplementary Record of Claim dated December 21, 2021 documenting a telephone conversation with a TTC representative, GD3A-18.

measures if he did not follow it. He received repeated reminders to comply with the policy. He intentionally breached the policy by not getting vaccinated within the timelines demanded by his employer. He knew or should have known that refusing to do so within those timelines could lead to suspension.

[27] This outcome was foreseeable because (i) the Claimant was explicitly told that he would be suspended if he didn't comply with the policy; and (ii) his employer made it clear that failing to get vaccinated would impair his ability to carry out his work duties. As the TTC's policy stated in its preamble:

> Given the continuing spread of COVID-19, including the delta variant within Ontario, and the potential for other unknown and future variants, the compelling data demonstrating a higher incidence of COVID-19 among the unvaccinated population and the increasing levels of contact between individuals as businesses, services, and activities have reopened, it is important for TTC employees to be fully vaccinated in order to protect themselves against serious illness from COVID-19 as well as to provide indirect protection to others, including colleagues and customers.[18]

[28] The circumstances outlined above established a causal link, as required by *Lemire*, between the Claimant's alleged misconduct and his loss of employment. The Claimant may have believed that his refusal to follow his employer's policy would not interfere with his job performance but, from an EI standpoint, that was not his call to make.

– The employer's conduct is irrelevant

[29] The Claimant has always insisted that he did nothing wrong by refusing to get vaccinated. He has accused the TTC of attempting to impose a new condition of employment without his consent. He has argued that the TTC acted unfairly by making him choose between his job and what he saw as his right to refuse untested and potentially unsafe medical treatment.

[18] See the TTC vaccination policy, GD3A-24.

[30] Unfortunately for the Claimant, none of these arguments can succeed. As we have seen, the law has evolved to exclude any consideration of an employer's conduct in establishing, implementing, and enforcing its workplace policies. In this case, the TTC had a policy, and the Claimant deliberately refused to follow it, knowing that consequences would follow. That is all that matters.

[31] I have no authority to determine whether the TTC's vaccination policy was reasonable or fair. Nor do I have any authority to decide whether policy violated the Claimant's employment contract or collective agreement. That's because disputes between employee and employer are ultimately the domain of labour and employment law.

[32] Employees often voluntarily subordinate their rights when they take a job. For example, an employee might agree to submit to regular drug testing. Or an employee might knowingly give up an aspect of their right to free speech—such as their right to publicly criticize their employer. During the term of employment, the employer may try to impose policies that encroach on their employees' rights, but employees are free to quit their jobs if they want to fully exercise those rights.

[33] If they believe that a new policy violates their collective agreement or their human rights, they can file a grievance or take their employer to court or some other tribunal. However, the EI claims process is not the appropriate place to litigate such disputes.

[34] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."[19]

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

[35] A recent decision has reaffirmed this approach to misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved an EI claimant's refusal to follow his employer's COVID-19 vaccination policy.[20] The Federal

[19] See *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[20] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

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.[21]

[36] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, the claimant 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 the claimant could have advanced his wrongful dismissal or human rights claims.

[37] Here, as in *Cecchetto*, the questions that matter are whether the Claimant breached his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in his dismissal. In this case, there are good reasons to answer "yes" to both questions.

– Several precedents cited by the Claimant have little or no bearing on his case

[38] I will conclude by briefly commenting on some of the cases that the Claimant relied on to support his claim for benefits:

- The Claimant cited a case called *KVP*, which he says prevents an employer from unilaterally imposing any rule or policy unless it was reasonable, consistent with the collective agreement, and agreed to by the union.[22] Because this legal test was developed in the context of employment and labour law, I didn't find it helpful in interpreting the EI Act.

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[21] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[22] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA).

- The Claimant cited a case called *A.L.*, which allowed a claimant to collect EI benefits, even though she too had been suspended for refusing the COVID-19 vaccine. Because this case was decided by the General Division, I didn't have to follow it. In any event, it was recently overturned by the Appeal Division.[23]

- The Claimant cited a case called *Astolfi*, which he argues allows decision-makers to consider an employer's conduct when deciding whether an EI claimant wilfully broke workplace rules.[24] However, that case involves a particular set of facts that limit its wide applicability. In *Astolfi*, the employer targeted a single employee; in the Claimant's case, the TTC's vaccination policy applied to all its employees.

- The Claimant cited a case called *Boulton*, which says that a subsequent settlement between employee and employer can rebut evidence of misconduct.[25] However, *Boulton* also says that such a settlement must contain a clear indication that the prior finding of misconduct was wrong. In this case, the TTC has reinstated the Claimant,[26] and he argues that the reinstatement showed he wasn't guilty of misconduct. However, the TTC's reinstatement offer explicitly says that acceptance "is **without prejudice** to the ongoing policy grievance challenging the implementation of the COVID-19 Mandatory Vaccination [emphasis added]." In my view, this doesn't meet the test in *Boulton*.

[39] Finally, the Claimant argued that, since misconduct is not defined by the EI Act, it should be given a "fair, large and liberal construction" in accordance with the Supreme Court of Canada's instruction in a leading case called *Rizzo Shoes*.[27] I agree that, as remedial legislation, the EI Act must be interpreted generously where possible, but it is important to remember that *Rizzo Shoes* is predominantly a case about the principles of

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[23] See *Canada Employment Insurance Commission v A.L.,* 2023 SST 1032.
[24] See citing *Astolfi v Canada* 2020 FC 30.
[25] See *Canada (Attorney General) v Boulton* (1996), 208 N.R. 63 (FCA).
[26] See TTC's letter of reinstatement dated January 4, 2023, GD14-9.
[27] See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

statutory interpretation. Although the EI Act itself is silent about what misconduct means, the Courts have filled the void by setting out a detailed, multipronged test for the concept. As a member of an administrative tribunal, I am obliged to apply that test.

Conclusion

[40] I am dismissing this appeal. The General Division erred in law by failing to consider whether there was a causal link between the Claimant's alleged misconduct and his employment. However, I think the General Division would have come to the same decision even if it had not made that error. Having conducted my own review of the record, I have concluded that, for the purpose of determining EI entitlement, the Claimant's refusal to get vaccinated amounted to misconduct.

Neil Nawaz
Member, Appeal Division