[TRANSLATION]

Citation: *RA v Canada Employment Insurance Commission*, 2022 SST 928

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated April 22, 2022 (GE-21-2584)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	September 6, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	September 21, 2022
File number:	AD-22-277

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) lost her job. Her employer said that she was let go because she refused to be vaccinated or tested for COVID-19, in compliance with Ministerial Order 2021-024.

[3] The Canada Employment Insurance Commission (Commission) told the Claimant that it was not able to pay her benefits, since she had lost her job because of her own misconduct. The Claimant asked the Commission to reconsider. It upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant lost her job because she refused to comply with Ministerial Order 2021-024, which was still in effect. It found that the Claimant knew that doing this would lead to her dismissal and that she was let go for this reason. The General Division decided that the Claimant lost her job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal the General Division decision. The Claimant argues that the General Division made its decision without regard for the material before it.

[6] I have to decide whether the General Division made its decision without regard for the material before it.

[7] I am dismissing the Claimant's appeal.

Issue

[8] Did the General Division make its decision without regard for the material before it?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[11] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make its decision without regard for the material before it?

[12] The Claimant argues that the General Division ignored two emails that the employer had sent to employees on May 27 and 31, 2021, indicating that they were now exempt from Ministerial Order 2021-024 on mandatory testing, and ignored the lack of a reasonable explanation from the employer.

[13] The Claimant says that the evidence before the General Division shows that, around late May 2021, two of her colleagues—one from her unit and the other a nurse from the same CIUSSS [integrated university health and social services centre]—received an email saying that they were now exempt from Ministerial Order 2021-024, which meant that they were no longer required to get tested.

[14] The Claimant argues that the General Division disregarded evidence that the Ministerial Order was no longer in effect at the time of her alleged acts, and it

[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

disregarded the fact that the employer had not provided any evidence that the Ministerial Order was still in effect in June 2021.

[15] When the Commission asked it about the emails, the employer said that the Ministerial Order was still in effect and that the employees in question had probably gotten vaccinated.[2]

[16] In support of its decision, the General Division accepted the employer's version of the facts, namely that the Ministerial Order was still in effect at the time and that the employees had received the emails because they were probably vaccinated.

[17] The General Division had to decide whether the Claimant had lost her job because of misconduct under the *Employment Insurance Act* (EI Act).

[18] The General Division's role is to consider the evidence presented by both parties in order to identify the relevant facts, that is, the facts relating to the issue it has to decide, and to explain in writing its decision based on those facts.

[19] The evidence before the General Division was clearly contradictory as to whether the Ministerial Order was in effect at the time of the Claimant's alleged acts.

[20] The General Division must justify its determinations. When faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or that it will be qualified as capricious.[3]

[21] In this case, the General Division ignored the Claimant's evidence. Without explaining why, the General Division preferred the employer's version of the facts and disregarded the Claimant's evidence. This is an error of law.

[22] Given this error, I am justified in intervening.

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[2] See GD3-38 and GD3-40.
[3] *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

Remedy

[23] Considering that both parties had the opportunity to present their case before the General Division, I will give the decision that the General Division should have given.[4]

[24] The notion of misconduct does not imply that the breach of conduct needs to be the result of wrongful intent; it is enough that the misconduct be conscious, deliberate, or intentional. In other words, to be misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that you could say the person wilfully disregarded the effects their actions would have on their performance.

[25] The Tribunal's role is not to rule on the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified. Its role is to determine whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[26] The Claimant submitted two emails that the employer had sent to employees on May 27 and 31, 2021, indicating that they were now exempt from Ministerial Order 2021-024 on mandatory testing. This meant that they were no longer required to get tested. They were two of the Claimant's colleagues, one from her unit and the other a nurse colleague from the same CIUSSS.

[27] Before the General Division, the Claimant testified that the two employees in question were unvaccinated when they received the emails.[5] The Claimant argues that this supports her position that Ministerial Order 2021-024 was no longer in effect in June 2021.

[28] The employer says that the Ministerial Order was in effect when the Claimant chose not to report for work to avoid complying with the Ministerial Order.

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[4] In accordance with the powers given to the Appeal Division under section 58(1) of the *Department of Employment and Social Development Act*.
[5] Since the recording of the General Division hearing is defective, I presume good faith on the Claimant's part concerning her testimony before the General Division.

[29] The evidence shows that Ministerial Order 2021-024 of the Minister of Health and Social Services came into effect on April 9, 2021, for the duration of the public health emergency. It applied to the Claimant, who worked as a support worker in a Quebec youth centre.[6]

[30] The Claimant admitted that, on June 11, 2021, just days before her return to work, her employer told her that the Ministerial Order was still in effect. She was also told that the emails her colleagues had received did not concern her.[7]

[31] Contrary to the Claimant's submission, I find that the employees' emails do not indicate that the Ministerial Order was no longer in effect. Rather, they informed the employees in question that **they were now exempt** from Ministerial Order 2021-024.

[32] I note from the evidence that the Claimant did not receive such an email from the employer.

[33] I have no choice but to find, on a balance of probabilities, that she was still subject to Ministerial Order 2021-024 at the time of the alleged acts.

[34] The employer let the Claimant go on August 17, 2021, for failing to report for work on June 14, 16, and 17, 2021, because she had chosen not to comply with Ministerial Order 2021-024.

[35] In my view, the evidence shows, on a balance of probabilities, that the Claimant was let go because she refused to be vaccinated or tested. She did not get any exemption from the employer. She was informed of the Ministerial Order that had been introduced to protect public health and make sure that the health and social services network had the human resources it needed. She had time to comply with it. She made a personal and deliberate choice not to follow the Ministerial Order. That is what led directly to her dismissal. She knew or should have known that her refusal to comply with the Ministerial Order could lead to her dismissal.

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[6] See GD3-52 to GD3-61.
[7] See GD3-32.

[36] The evidence shows, on a balance of probabilities, that the Claimant's refusal to be vaccinated or tested for COVID-19, in compliance with Ministerial Order 2021-024, was misconduct.

[37] It is well established that a deliberate violation of an employer's guidelines is considered misconduct under the EI Act.

[38] The question of whether the employer discriminated against the Claimant, failed to accommodate her, or violated her constitutional rights is for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[8]

[39] I have to decide the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[40] I am fully aware that the Claimant may seek relief in another forum, if a violation is established.[9] This does not change the fact that, under the EI Act, the Commission has proven, on a balance of probabilities, that the Claimant was let go because of misconduct.

Conclusion

[41] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

[8] In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court decided that that issue was for another forum. See also *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, concerning the employer's duty to accommodate when it comes to deciding a claimant's misconduct.
[9] I note that, in a recent decision, the Superior Court of Quebec found that provisions that imposed vaccination did not violate section 7 of the *Canadian Charter of Rights* [*sic*] despite infringing personal liberty and security. Even if a section 7 Charter violation were found, it would be justified as a reasonable limit under section 1 of the Charter—*United Steelworkers, Local 2008 c Attorney General of Canada*, 2022 QCCS 2455.