



Citation: *GD v Canada Employment Insurance Commission*, 2022 SST 957

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** G. D.  
**Representative:** C. P.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

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**Decision under appeal:** General Division decision dated March 31, 2022  
(GE-22-122)

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**Tribunal member:** Pierre Lafontaine

**Type of hearing:** Teleconference

**Hearing date:** September 22, 2022

**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** September 29, 2022

**File number:** AD-22-308

## **Decision**

[1] The appeal is dismissed.

## **Overview**

[2] The Appellant (Claimant) worked as a Chartered Accountant and started working remotely when the COVID-19 pandemic started. The employer introduced a COVID-19 vaccination policy (“policy”) at work. The Claimant was suspended and later dismissed because she did not comply with the employer’s policy. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended and lost her job because of misconduct so it was not able to pay her benefits. After reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant refused to comply with the employer’s policy. It found that the policy applied to the Claimant and that she ought to have known that the employer was likely to dismiss her in these circumstances. The General Division found that her refusal was willful, conscious and deliberate. It concluded that the Claimant lost her job because of her misconduct.

[5] The Appeal Division granted the Claimant leave to appeal of the General Division’s decision to the Appeal Division. The Claimant submits that the General Division failed to observe a principle of natural justice, erred in law, and 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, when it concluded that she lost her job because of misconduct.

[6] I have to decide whether the General Division failed to observe a principle of natural justice and whether it made an error of fact or law, when it concluded that the Claimant lost her employment because of misconduct.

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

## Issues

[8] Did the General Division fail to observe a principle of natural justice by limiting the role of the Claimant's representative during the hearing?

[9] Did the General Division make an error in fact or in law when it concluded that the Claimant lost her job because of misconduct?

## Analysis

### Appeal Division's mandate

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.<sup>1</sup>

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.<sup>2</sup>

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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.

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

<sup>2</sup> *Idem*.

### **The General Division's role**

[13] Before the General Division, and during the Appeal Division hearing, the Claimant expressed dissatisfaction with the way the Commission handled her application for benefits.

[14] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto. The role of the Appeal Division is to review the evidence presented to the General Division and to determine whether the General Division committed an error that justifies its intervention.

[15] The General Division and the Appeal Division do not have jurisdiction to investigate the Commission's conduct in the treatment of the Claimant's application for benefits. Furthermore, the Tribunal does not have the required jurisdiction to order compensation for the damages the Claimant claims she has suffered following the Commission's refusal to grant her benefits.<sup>3</sup>

### **Did the General Division fail to observe a principle of natural justice by limiting the role of the Claimant's representative during the hearing?**

[16] The Claimant submits that the General Division did not respect a principle of natural justice by limiting the role of her representative during the hearing. She puts forward that the representative's role was limited to asking her questions and that he was not allowed to talk on her behalf.

[17] In view of this ground of appeal, I proceeded to listen to the General Division hearing.

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<sup>3</sup> *TT v Canada Employment Insurance Commission*, 2018 SST 43; *Canada (Attorney General) v Romero*, A-815-96; *Canada (Attorney General) v Tjong*, A-672-95.

[18] The General Division member explained to the representative that he could ask questions to the Claimant during the hearing in order to bring out the evidence. She also explained that the representative could make arguments at the end of the hearing. The General Division member clarified that since the Claimant had personal knowledge of the facts of the case, she is the one who had to testify as a witness, and not the representative.

[19] I find that the General Division did not fail to respect a principal of natural justice. The General Division member's explanations were clear and accurate. During the hearing, the Claimant had the opportunity to testify and the representative had the opportunity to ask questions. The representative also had the opportunity to present his closing arguments.

[20] I note that the representative did not raise any issues with the General Division regarding his role during the hearing. He also concluded the hearing by mentioning that he was satisfied with the hearing process.

[21] I therefore cannot find that the General Division hearing process was not fair in some way.

[22] For the above-mentioned reasons, this ground of appeal is dismissed.

**Did the General Division make an error in fact or in law when it concluded that the Claimant lost her job because of her misconduct?**

[23] The Claimant submits the following grounds of appeal:

- (a) The General Division made an error when it referred in its decision to the *Ontario Human Rights Commission* and ignored the Quebec laws applicable to her case;
- (b) The General division ignored the Quebec laws that indicate that the vaccination status is personal and confidential information that employees are not required divulging to their employer;
- (c) The General Division erred when it concluded that she could be forced by her employer to go through a medical procedure and that the employer could terminate her based on an assumption;

- (d) The General Division ignored that the employer discriminated against her by not applying the policy to all its employees;
- (e) The General Division ignored case law that supports her position that the policy was unreasonable within her workplace context;
- (f) The General Division ignored that she was working from home and had no contact with customers and working colleagues;
- (g) The General Division ignored that the employer never offered her any accommodations;
- (i) The General Division erred when it did not consider that the employer did not communicate the policy to her and the Commission. She therefore did not know or could not know that she would be suspended or fired.
- (j) The General Division made several errors when it concluded that she lost her job because of misconduct. Therefore, the decision should be overturned.

[24] The General Division had to decide whether the Claimant was dismissed because of her misconduct.

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

[26] The General Division's role is not to judge 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, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.<sup>4</sup>

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<sup>4</sup> *Canada (Attorney general) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[27] The Claimant worked as a Chartered Accountant for the employer for a period of 14 years. Prior to the pandemic, she worked at the office from Monday to Friday. She started working remotely when the COVID-19 pandemic started.

[28] On August 23, 2021, in an effort to help safeguard the health and safety of all its employees, the employer requested that all employees working out of the Toronto and Montreal offices be fully vaccinated against COVID-19 before reporting to the office on Monday September 13, 2021. Employees could seek accommodation for needs related to disability or religious reasons. All employees were required to attest that they had received both COVID-19 shots by September 10, 2021. Employees who did not submit proof of their vaccination status, and who did not have an approved accommodation in connection with the vaccine requirement, were not allowed to return to the office as of September 13, and would be subject to a **review of their employment status**.<sup>5</sup>

[29] The Claimant did not seek accommodation from the employer for needs related to disability or religious reasons.

[30] On September 13, 2021, the employer advised the Claimant that it had not received her COVID-19 proof of vaccination. The employer gave the Claimant one final opportunity to consider becoming fully vaccinated against COVID-19 in order to return to the office. The employer advised the Claimant that she would be contacted regarding her **employment status** should she fail to provide proof of her first COVID-19 vaccination dose by September 20, 2021.<sup>6</sup>

[31] On September 21, 2021, the employer contacted the Claimant by letter stating she was in violation of the employer's mandatory vaccination policy. Effective September 21, the employer suspended the Claimant without pay for failure to comply with the vaccination policy, as she has not received any of the COVID-19 vaccinations.<sup>7</sup>

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<sup>5</sup> See GD3-35.

<sup>6</sup> See GD3-36 and GD3-37.

<sup>7</sup> See GD3-38 and GD3-39.

[32] On October 15, 2021, the employer reminded the Claimant that she had until November 29, 2021, to begin the process of becoming fully vaccinated in order to return to active employment. She was reminded that the employer would **terminate her employment** after November 29, 2021, if she did not comply with the vaccination policy.<sup>8</sup>

[33] On November 30, 2021, the employer dismissed the Claimant for failure to comply with the company vaccination policy.<sup>9</sup>

[34] Based on this evidence, the General Division determined that the Claimant was dismissed because she refused to follow the employer's policy. She had been informed of the employer's policy and was given time to comply. The Claimant refused intentionally; this refusal was wilful. The General Division found that this was the direct cause of her dismissal. It found that the Claimant ought to have known that her refusal to comply with the policy could lead to her dismissal.

[35] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

[36] It is well-established case law that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act* (EI Act).<sup>10</sup>

[37] The Claimant argues that the employer never communicated the policy to her. She therefore did not know or could not know that she would be suspended or fired. She argues that the failure by the employer and the Commission to produce the policy in evidence supports her claim that the employer never communicated the policy to her.

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<sup>8</sup> See GD3-40.

<sup>9</sup> See GD3-41 to GD3-43.

<sup>10</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.



[38] I find that this argument is without merits. The fact that no written policy was produced in evidence before the General Division does not mean that there was no policy. The burden on the Commission is to prove misconduct on a balance of probabilities.

[39] As stated by the General Division, there was enough evidence in the file to support a conclusion that **it was more likely than not** the employer had a vaccination policy in place and that it was communicated to all employees. The preponderant evidence before the General Division also supports its conclusion that the Claimant made a personal decision not to comply with the policy, and that her persistent refusal to comply with the policy put her employment in jeopardy.<sup>11</sup>

[40] The Claimant argues that the employer failed to accommodate her considering that she was working from home during the pandemic. She puts forward that she did not create any specific problem, or significant risk related to an outbreak, infections or significant interference with customers and colleagues by working from home or in isolation. She argues that the employer's policy discriminated against her, went against her Human Rights, the Quebec Act respecting labour standards, and the Quebec Act respecting occupational health and safety.<sup>12</sup>

[41] As stated by the General Division, these questions are matters for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.<sup>13</sup>

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<sup>11</sup> See GD3-28.

<sup>12</sup> In support of her position, the Claimant refers to the arbitration decision: *Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 (ON LA).

<sup>13</sup> 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 found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, indicating that the employer's duty to accommodate is irrelevant in determining misconduct under the EI Act.

[42] The Claimant further argues that the employer's policy violated her constitutional rights.<sup>14</sup>

[43] I find that the General Division correctly determined that the *Canadian Charter of Rights and Freedoms* (Charter) applies to government action. The Charter does not apply to private interactions between individuals or private businesses.<sup>15</sup>

[44] I must reiterate that the question submitted to the General Division was not whether the employer was guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant was guilty of misconduct under the EI Act and whether this misconduct resulted in the Claimant losing her employment.

[45] The preponderant evidence before the General Division shows that the Claimant **made a personal and deliberate choice** not to follow the employer's policy in response to the exceptional circumstances created by the pandemic and this resulted in her being suspended and losing her job.

[46] I agree with the Claimant that the reference by the General Division in its decision to the *Ontario Human Rights Commission* was incorrect. I find that the reference was also not necessary for the General Division to dispose of the issue of misconduct. I am of the opinion that the General Division made no error that justifies my intervention because it nonetheless correctly decided the issue of misconduct within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.<sup>16</sup>

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<sup>14</sup> More precisely, sections 6(2) (b) and 15(1) of the *Canadian Charter of Rights and Freedoms*.

<sup>15</sup> See section 32(1) of the *Canadian Charter of Rights and Freedoms*.

<sup>16</sup> *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[47] I am fully aware that the Claimant may seek relief before another forum, if a violation is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was suspended and dismissed because of her misconduct.

[48] For these reasons, I have no choice but to dismiss the Claimant's appeal.

## **Conclusion**

[49] The appeal is dismissed.

Pierre Lafontaine  
Member, Appeal Division