



Citation: *KG v Canada Employment Insurance Commission*, 2022 SST 1305

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** K. G.

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

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**Decision under appeal:** General Division decision dated July 13, 2022  
(GE-22-961)

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** November 1, 2022

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

**Decision date:** November 14, 2022

**File number:** AD-22-435

## Decision

[1] The appeal is dismissed.

## Overview

[1] The Appellant, K. G. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was suspended and lost his employment because of misconduct. In other words, it found that he did something that caused him to lose his job.

[2] The Claimant had not complied with his employer's COVID-19 vaccination policy. The policy required him to inform the company of his vaccination status. If he chose not to disclose his vaccination status, or was not fully vaccinated, he had to undergo rapid testing. The employer provided accommodation for medical, religious, or other reasons based on protected grounds, but the Claimant did not seek any accommodation.

[3] Having determined that the Claimant had been dismissed due to misconduct, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made legal errors. He claims that his employer's policy was unlawful because it violated the *Genetic Non-Discrimination Act*. He argues that because the policy was unlawful, he did not have to comply with it. Therefore, he says that there was no misconduct on his part and no basis for his employer to dismiss him. He says the General Division failed to decide the legality of his employer's policy and wrongly concluded that there was misconduct. The Claimant asks the Appeal Division to allow his appeal.

[5] The Respondent, the Canada Employment Insurance Commission (Commission) denies that the General Division made any errors. The Commission asks the Appeal Division to dismiss the appeal.

## Issue

[6] Did the General Division misinterpret what misconduct means?

## Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal or certain types of factual errors.<sup>1</sup>

### **Did the General Division misinterpret what misconduct means?**

[8] The Claimant argues that the General Division misinterpreted what misconduct means. As a result, he argues that it mistakenly concluded that there was misconduct in his case.

[9] The General Division found that misconduct exists as long as an employee knowingly does not comply with their employer's policies, and is aware of the consequences that result from non-compliance.

[10] But, the Claimant argues that employees do not have to comply with unlawful policies. In this case, the Claimant argues that his employer violated the *Genetic Non-Discrimination Act* by requiring that he undergo rapid testing. Because he says he did not have to comply with an unlawful policy, he denies that there was any misconduct.

[11] The General Division acknowledged the Claimant's argument that his employer "crossed the line by imposing the policy" and that the policy was "against the law and unjust".<sup>2</sup> However, the General Division found that it did not have the authority to decide whether the employer's policy was lawful or just.<sup>3</sup> So, it did not address whether the employer's policy was lawful.

[12] The Claimant argues that the General Division failed to consider the legality of his employer's vaccination policy. He says that it then compounded its legal error by

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act*.

<sup>2</sup> See General Division decision, at para 36(d).

<sup>3</sup> See General Division decision, at para 38.

concluding that he had to comply with his employer's policy, irrespective of whether it was lawful.

[13] The Federal Court of Appeal has suggested that, as long as an employer's directive is lawful, an employee has to comply with that directive.<sup>4</sup> Failure to comply would be misconduct. It seems that what must flow from this is that if an employer's directive or policy is, on the other hand, unlawful, then an employee should not have to comply with it.

– **The *Genetic Non-Discrimination Act***

[14] The Claimant argues that the *Genetic Non-Discrimination Act* prohibits genetic testing and allows an employee not have to undergo a genetic test or disclose the results of such a test.

[15] The *Genetic Non-Discrimination Act* states:

**2** The following definitions apply in this Act.

**genetic test** means a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis.

**Prohibitions**

**Genetic test**

**3 (1)** It is prohibited for any person to require an individual to undergo a genetic tests as a condition of

...

**(b)** entering into or continuing a contract or agreement with that individual; ...

[16] The Claimant also refers to what has become subsection 247.98 of the *Canada Labour Code*. Relevant portions of that section read:

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<sup>4</sup> See *Bedell*, A-1716-83.

**Genetic test**

- (2) Every employee is entitled not to undergo or be required to undergo a genetic test.

**Disclosure of results**

- (3) Every employee is entitled not to disclose or be required to disclose the results of the genetic test.

**Disciplinary action**

- (4) No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Division, have worked, or take any disciplinary action against or threaten to take any such action against an employee
- (a) because the employee refused a request by the employer to undergo a genetic test;
  - (b) because the employee refused to disclose the results of a genetic test ...

[17] I note that the *Canada Labour Code* also allows an employee to make a complaint to the Head of Compliance and Enforcement for any violations under subsection 247.98(4). There is no indication that the Claimant made any complaint to the Head.

**– The employer's policy**

[18] The Claimant's employer implemented a COVID-19 North America Mitigation Measures Policy. Under the policy, any employees not fully vaccinated were required to undergo rapid COVID-19 testing.<sup>5</sup>

[19] The Claimant argues that the rapid COVID-19 testing required by his employer is a form of genetic testing, which he says the *Genetic Non-Discrimination Act* prohibits.

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<sup>5</sup> COVID-19 North America Mitigation Measures Policy, at GD3-34 to GD3-38. See section 4.4 of the Policy.

However, there was no evidence in the hearing file before the General Division that the rapid COVID-19 testing is a form of genetic testing.

[20] In my leave to appeal decision, I informed the Claimant that he would need to point to any evidence to show that his employer's vaccination policy violated the *Genetic Non-Discrimination Act*. I said that he would need this evidence to support his claims that the General Division made a legal error by failing to consider the legality of the employer's vaccination policy.

[21] The Claimant says it is common and widespread knowledge that PCR and rapid tests are genetic tests. He says he researched this. He went online and spoke to numerous doctors and nurses to confirm this information. He also claims that he brought the results of his research to his employer.

[22] However, despite the Claimant's assertions, I cannot necessarily conclude that the Claimant's employer required a genetic test of him or that the COVID-19 testing requirement violated the *Genetic Non-Discrimination Act*. There has to be an evidentiary basis to support this conclusion.

[23] For that reason, it is moot whether the General Division should have examined whether an employer's policy must be lawful if a claimant is to be found to have engaged in misconduct for not complying with that policy. Without a sufficient evidentiary foundation, it was merely hypothetical or speculative whether the employer's policy might have been unlawful.

[24] The Claimant argues that he has a right to choose whether or not to be vaccinated and/or tested. The Commission agrees. As the Commission notes, the Claimant exercised this choice not to be vaccinated or tested, despite knowing the consequences that would follow.

[25] As the Courts have consistently determined, a claimant's deliberate violation of an employer's policy amounts to misconduct under the *Employment Insurance Act*.<sup>6</sup>

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<sup>6</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

The Claimant's choice not to comply with his employer's policy represented a deliberate violation and it amounted to misconduct.

## **Conclusion**

[26] The appeal is dismissed.

[27] Given the facts of this case, the General Division did not make a legal error when it declined to consider the legality of the employer's vaccination policy. There was no factual basis for it to decide the question.

Janet Lew  
Member, Appeal Division