Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 99

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated August 28, 2022 (GE-22-1275)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	January 18, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	January 25, 2023
File number:	AD-22-672

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, K. M. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was suspended from his employment because of misconduct. In other words, it found that he did something that caused him to be suspended. The Claimant had not complied with his employer's mandatory vaccination policy (and his employer did not grant him a religious exemption).

[3] Having determined that there was misconduct, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made procedural, legal, and factual errors. In particular, he argues that the General Division failed to address whether he was entitled to Employment Insurance benefits in connection with other employment that he held. He also argues that the General Division failed to consider his human rights and religious rights. He also argues that the General Division failed to consider his collective agreement.

[5] The Claimant asks the Appeal Division to give the decision he says the General Division should have given. He says the General Division should have found that there was no misconduct and that he is entitled to receive Employment Insurance benefits.

[6] The Respondent, the Canada Employment Insurance Commission (Commission), argues that the General Division did not make any errors over the misconduct issue. The Commission asks the Appeal Division to dismiss the appeal.

Preliminary matter

[7] The Claimant filed a copy of parts of his collective agreement. The General Division did not have a copy of the collective agreement.

[8] Ordinarily, the Appeal Division does not accept new evidence if it was not part of the record before the General Division. However, the Commission does not object to letting the collective agreement become part of the evidence. The Commission says that the Claimant referred to his collective agreement during the General Division hearing.

[9] As the collective agreement represents background information that the Claimant referred to during the General Division hearing, I will accept it.

Issues

[10] The issues in this appeal are as follows:

a) Did the General Division fail to consider whether the Claimant was entitled to receive Employment Insurance benefits in connection with his second job?

b) Did the General Division fail to consider the Claimant's human rights and religious rights?

c) Did the General Division fail to consider the Claimant's collective agreement?

d) If the General Division made any errors, how should the error(s) be fixed?

Analysis

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

[12] For factual errors, the General Division had to have 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.

[1] Section 58(1) of the *Department of Employment and Social Development Act*.

Did the General Division fail to consider whether the Claimant was entitled to receive Employment Insurance benefits in connection with his second job?

[13] The Claimant argues that the General Division failed to consider whether he was entitled to receive Employment Insurance benefits in connection with a second job that he held. The Claimant worked for two different hospitals. He says that, if the General Division had considered this other employment, it would have accepted that he was entitled to receive Employment Insurance benefits.

[14] Although the Claimant raised this argument at the General Division, the General Division did not have any authority to decide whether the Claimant was entitled to benefits in connection with his second job. The General Division could only address issues that arose out of the Commission's reconsideration decision. The Commission only addressed the issue of misconduct in relation to Claimant's first job.

[15] The Commission needs to make a decision (and reconsideration decision) on a matter before the Claimant can appeal it to the General Division. Here, the Commission never made a decision about the Claimant's second job. So, the Claimant is unable to appeal a decision that does not exist.

[16] The Commission explains that, in this case, it remains open to the Claimant to ask the Commission to decide his eligibility for benefits in connection with this second employment.

[17] If the Claimant intends to pursue this issue, his option is to ask the Claimant to make a decision on the matter. To be clear, I am not making a decision, one way or the other, about the Claimant's eligibility to receive benefits in connection with his second employment.

Did the General Division fail to consider the Claimant's human rights and religious rights?

[18] The Claimant argues that the General Division failed to consider his human rights and religious rights. He argues that his employer's vaccination policy violated his rights,

so he says that misconduct could not have arisen if he did not comply with the policy. He argues that, if the General Division had considered his rights, it would have determined that there was no misconduct.

[19] Article 5 of the Claimant's collective agreement provides that there will be no discrimination against any employee by reason of race, creed, colour, age, sex, marital status, nationality, ancestry of place of origin, family status, handicap, sexual orientation, political affiliation or activity, or place of residence.[2]

[20] The General Division acknowledged the Claimant's argument that his employer and its vaccination policy violated his rights. The General Division determined that the Claimant's recourse was to pursue an action in court, or any other tribunal that might deal with his rights-based arguments. In other words, if he can establish that there was a breach of his rights, another tribunal could compensate him for that breach.

[21] In a case called *McNamara*,[3] the Federal Court of Appeal said the focus has to be on the behaviour of the employee. The Court of Appeal noted that section 30 of the *Employment Insurance Act* reads, "if the claimant lost any employment because of their misconduct."

[22] Mr. McNamara had argued that he had been wrongfully dismissed, but the Court of Appeal said that he had other remedies available to him to sanction the behaviour of his employer.

[23] The Federal Court reached a similar conclusion in *Paradis*. Mr. Paradis had been dismissed when he failed a drug test. He argued that his employer should have accommodated him because his drug dependency was protected under provincial human rights legislation and company policy. The Court found that, "The question of whether the employer should have provided reasonable accommodation to assist [Mr. Paradis] to deal with his drug dependency is a matter for another forum."[4]

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[2] See Article 5 of the Claimant's collective agreement, at AD 2-1.
[3] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[4] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[24] In the *Mishibinijima*[5] case, Mr. Mishibinijima argued that the *Canadian Human Rights Act* applied. He was often away or late for work because of his alcoholism. He argued that he had a disability that his employer should have accommodated. The Court of Appeal agreed with the Umpire (the predecessor to the Appeal Division) that the issue of Mr. Mishibinijima's rights or whether his employer should have accommodated him were irrelevant. The Court of Appeal determined that the focus was had to be on whether Mr. Mishibinijima lost his employment because of his misconduct.

[25] The General Division did not fail to consider the Claimant's human rights and religious rights when it examined whether there was misconduct. It is clear from the court cases that these are irrelevant considerations. The courts have said that the question and the focus must be on whether an employee's conduct amounts to misconduct within the meaning of the *Employment Insurance Act*.

Did the General Division fail to consider the Claimant's collective agreement?

[26] The Claimant argues that the General Division failed to consider the terms of his collective agreement. In particular, he says that (1) the collective agreement did not require vaccination against COVID-19 and (2) it also allowed employees to refuse vaccination and, when an employee refuses vaccination, the employer is required to reassign the employee to another position.

– The collective agreement did not require vaccination

[27] The Claimant argues that, as his collective agreement did not require vaccination against COVID-19, he did not have to get vaccinated even after his employer introduced a mandatory vaccination policy. So, he argues that there was no misconduct.

[28] The Commission readily acknowledges that the General Division did not consider this argument.

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[29] However, employers can unilaterally impose any rule or policy, even if the union does not agree to it. The employer can impose any rule or policy if it meets what is called the "KVP test." The test comes from Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[6] The Supreme Court of Canada has endorsed the *KVP* test[7] which means it is good law that should be applied.

[30] The *KVP* test has been applied in numerous labour arbitration awards, as well as in at least one recent court decision[8] in deciding whether an employer can unilaterally introduce a rule or policy.

[31] Under the *KVP* test, the rule or policy must satisfy the following requirements:

- It must not be inconsistent with the collective agreement.
- It must not be unreasonable.
- It must be clear and unequivocal.
- It must be brought to the attention of the employee before the company can act on it.
- The employee must be notified that a breach of such rule could result in discharge if the rule is used as a foundation for discharge.
- Such a rule should have been consistently enforced by the company from the time it was introduced.

[32] Here, the Claimant argues that the employer's vaccination policy is inconsistent with the collective agreement. He does not otherwise say that the vaccination policy was unclear, vague, or unreasonable, that his employer did not bring it to his attention before acting on it, or that it did not consistently enforce the policy. He also does not say

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[6] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1695), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (O.N.L.A.).
[7] See *Communications, Energy and Paperworkers' Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458.
[8] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

that he did not receive notice or that he was unaware of the consequences for not following the policy.

[33] The Claimant says that his employer's COVID-19 vaccination policy is inconsistent with the collective agreement because the agreement allows employees to refuse vaccination and requires an employer to reassign employees during outbreaks, whereas he says the COVID-19 vaccination policy does not do any of this.

[34] Article 21 of the collective agreement reads:

21.01 Influenza Vaccinations

> The parties agree that influenza vaccinations may be beneficial for patients and employees. Upon a recommendation pertaining to a facility or a specifically designated area(s) thereof from the Medical Officer of Health, or in compliance with applicable provincial legislation, the following rules will apply:
>
> (a) Hospitals recognize that employees have the right to refuse any recommended or required vaccination.
>
> (b) If an employee refuses to take the recommended or required vaccine required under this provision, she or he will be reassigned during the outbreak period, unless reassignment is not possible, in which case he or she will be placed on unpaid leave …

[35] Article 21.01 of the collective agreement specifically refers to influenza vaccinations. It does not apply in the Claimant's case because the employer's vaccination policy is for COVID-19 vaccinations.

[36] Even if Article 21.01 of the collective agreement was somehow broad enough or had been extended to cover COVID-19 vaccinations, the employer's COVID-19 vaccination policy was not inconsistent with or at odds with the collective agreement:

i. Under the COVID-19 vaccination policy, the Claimant could refuse vaccination too.

ii. During a COVID-19 outbreak, the Claimant continued to work. After the outbreak, when the employer determined that reassignment was not

possible, the Claimant was placed on a leave of absence.[9] This practice was consistent with the collective agreement too.

[37] As the employer's COVID-19 vaccination policy met the requirements of the *KVP* test, the Claimant's employer was allowed to introduce its vaccination policy.

[38] Indeed, the employer was required to bring in a vaccination policy under a provincial directive issued by the Chief Medical Officer of Health. It did not matter then that the collective agreement did not require vaccination for COVID-19. The employer introduced a vaccination policy, as required by the province, so employees were expected to comply with it.

[39] The collective agreement did not supersede the employer's vaccination policy. So, the General Division did not have to consider the collective agreement. The General Division did not fail to consider the collective agreement because it did not govern the Claimant's circumstances on vaccination for COVID-19.

– The Claimant says that the collective agreement let him refuse any vaccinations

[40] The Claimant argues that the collective agreement let him refuse any vaccinations. That being the case, he argues that misconduct did not arise when he refused vaccination.

[41] I have reproduced the relevant sections of Article 21.01 of the collective agreement above. The section specifically refers to influenza vaccinations.

[42] The parties to the collective agreement (presumably) signed the collective agreement before the COVID-19 pandemic started. Clearly, the parties intended that the section would apply to only influenza vaccinations. If the parties had contemplated other vaccinations, surely the parties would have said the section was not restricted or limited to influenza vaccinations only.

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[9] The Claimant confirmed that he continued to work when there was an outbreak of COVID-19 at his workplace. But after the outbreak, his employer placed unvaccinated employees on a leave of absence.

[43] Because the collective agreement (Article 21.01) did not apply, the General Division did not fail to consider it.

[44] Even if the collective agreement did not apply, the Claimant was allowed to refuse COVID-19 vaccinations. The Claimant still had the right to exercise his choice. He could refuse vaccination. But that did not mean that exercising his choice was without any consequences.

[45] In a case called *Parmar*,[10] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.[11]

[46] The Court in that case recognized that it was "extraordinary to enact a workplace policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic."[12] The Court went on to say:

> [154] . . . **[Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income** …
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> [155] I note that in *Maddock v British Columbia*, 2022 BCSC 1065, Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para 78, Hinkson C.J. wrote that such policies "[do] not compel or prohibit subjection to any form of medical treatment": para 78. **Rather, individuals remain free to make choices within the bounds of the policy. The MVP did not, in the words of *Maddock*, "[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment**": paras. 78–79. Ms. Parmar retained the choice to remain on unpaid leave.
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> (My emphasis)

[10] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[11] See *Parmar*, at para 65.
[12] See *Parmar*, at para 65.

[47] Although the collective agreement did not apply because it covered only influenza vaccinations, the Claimant still had a choice between getting vaccinated or remaining unvaccinated.

The Claimant's argument about other workers

[48] Finally, the Claimant argues that the conduct of other public service workers, such as transit workers, has not been considered misconduct. These workers were subject to a vaccination policy and were also placed on leave (or dismissed) after refusing to get vaccinated. Some of these workers have since returned to work because their employers have lifted vaccination policies.

[49] The Claimant argues that much like these other workers, his conduct should not be considered misconduct for the purposes of the *Employment Insurance Act,* because his employer will also be recalling him to work again at some point.

[50] Each case has to be assessed on its facts. Other workers' situation is speculative and may be different from the Claimant's own situation. As it is, reinstatement or recall may have no bearing on the conduct that led to being placed on a leave of absence in the first place. According to the Claimant, employers have reinstated workers because they have lifted vaccination policies. This says nothing about the workers' conduct that led to the leave of absence in the first place.

Conclusion

[51] For the reasons I have set out above, the General Division did not fail to consider the collective agreement, the Claimant's human rights and religious rights, or his second employment. The Claimant can enquire with the Commission about his second employment and whether he qualifies for benefits in relation to this employment.

[52] The appeal is dismissed.

Janet Lew

Member, Appeal Division