Citation: *MW v Canada Employment Insurance Commission*, 2023 SST 128

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated August 26, 2022 (GE-22-1124)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	January 3, 2023
Hearing participants:	Appellant
Decision date:	February 5, 2023
File number:	AD-22-683

Decision

[1] The appeal is dismissed.

[2] Although I have found that the General Division made an error of law, I agree with the conclusion the General Division reached. The Claimant was suspended due to his misconduct.

Overview

[3] M. W. is the Claimant. He works as a technician in the Works department of a Regional Municipality. The Claimant's employer placed him on an 8-week unpaid leave because he did not comply with the employer's Covid-19 vaccination policy.

[4] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) disentitled the Claimant from benefits for reason he voluntarily took a leave without just cause.

[5] The Claimant appealed to the Tribunal's General Division who dismissed his appeal. The General Division decided the Claimant did not voluntarily take a leave of absence but instead was suspended due to misconduct. The Claimant is now appealing that decision to the Tribunal's Appeal Division.

[6] The Claimant argues that the General Division misinterpreted what "misconduct" means. He also says the General Division made an error of law by failing to consider that his employer had revised its policy to remove the disciplinary consequences from his leave. Further, he asserts the General Division was politically motivated. He also says that the General Division failed to consider his rights under the *Canadian Charter of Rights and Freedoms* (Charter) when it decided that he was suspended due to misconduct.

[7] The General Division made an error of law by failing to meaningfully analyze evidence that the Claimant's employer had changed the Claimant's leave to an unpaid administrative leave with no disciplinary consequences.

[8] I have substituted my decision for the General Division, but I reach the same result. The Claimant was suspended due to his own misconduct.

I won't consider the Claimant's new evidence

[9] The Claimant provided various hyperlinks with his submissions to the Appeal Division. These provided information about the approval process for vaccines in Canada and information about the safety of vaccines.[1]

[10] As part of his submissions to the Appeal Division, the Claimant also submitted a letter from the Justice Centre for Constitutional Freedoms and a briefing note from that agency. The letter also contained various hyperlinks to information about the approval and safety of vaccines.[2]

[11] The Claimant also asked to submit his collective agreement as new evidence as he said he mistakenly provided an incorrect collective agreement to the General Division.[3]

[12] Since none of the hyperlink information or the collective agreement was before the General Division, it is new evidence.

[13] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[14] There are a few limited exceptions to this rule.[4] However, since the Claimant's new evidence doesn't meet any of the allowed exceptions, I decided at the hearing I would not accept it.

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[1] AD2-1 to AD2-6.
[2] AD2-7 to AD2-8.
[3] GD5.
[4] Generally, new evidence will only be accepted if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted

I won't consider the Claimant's Charter argument

[15] The Claimant argued in his Application to the Appeal Division that discretionary administrative and government decisions must conform to the Charter.[5] He refers in his submissions to sections 2(a), 7, 8, 12 and 15 of the Charter.[6]

[16] The Supreme Court of Canada has said that, for discretionary decisions that engage Charter protections, the decision maker is required to proportionately balance the relevant Charter protections against the applicable statutory objectives, to ensure the Charter protections are limited no more than necessary.[7]

[17] I understand the Claimant to be arguing that the General Division made an error of law by not undertaking such an analysis when it decided he was suspended due to misconduct.

[18] I have reviewed the documentary record and listened to the recording of the General Division hearing. I see no evidence that the Claimant raised this argument before the General Division. The Claimant confirmed at his hearing before the Appeal Division that he had not made this argument to the General Division.

[19] Charter-based arguments cannot normally be raised for the first time on appeal. The Appeal Division has consistently refused to exercise its discretion to consider arguments based on the Charter where those arguments are not first raised at the General Division.[8]

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unfairly. See *Sharma v Canada (Attorney General),* 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[5] AD1-4. The Claimant refers in support of this argument to the case of *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44 at paragraph 117.

[6] AD2-4 to AD2-6.

[7] This analysis was described by the Supreme Court of Canada in *Doré v Barreau du Quebec, 2012 SCC 12* (CanLII), [2012] 1 S.C.R. 395 and in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 (CanLII).

[8] See, for example, *CM v Minister of Employment and Social Development*, 2022 SST 382 and *CF v Minister of Employment and Social Development*, 2016 SSTADIS 86; See also *Canada Employment Insurance Commission v CG*, 2022 SST 301 and *DF v Canada Employment Insurance Commission*, 2019 SST 194.

[20] There are some exceptional cases where the courts have allowed a Charter argument to be raised for the first time on appeal. However, one of the requirements is that there is sufficient evidentiary record that would allow the court to decide the case.[9] That principle applies to tribunals as well.

[21] I recognize that the Claimant is not challenging the constitutionality of the legislation. However, the Supreme Court of Canada has pointed out that this type of analysis, which involves the balancing of Charter protections against statutory objectives is a highly contextual exercise.[10] Since the Claimant did not raise this argument before the General Division, neither party had the opportunity to provide evidence or submissions specific to this argument.

[22] There is, therefore, an incomplete evidentiary record and no findings of fact dealing with this argument. The Commission might have wanted to raise some evidence in response to this argument so the Commission would be prejudiced if I were to consider this argument now on the existing record. The Appeal Division cannot accept new evidence to resolve this problem.[11]

[23] The General Division's role is to hear the parties' evidence on all issues, weigh that evidence and make a decision based on the facts and the law. The Appeal Division's role is to decide whether the General Division made a reviewable error when it made its decision. The Appeal Division cannot decide whether the General Division made an error concerning an issue that was not presented to it.[12]

[24] For these reasons, I decline to consider the Claimant's Charter-based argument.

Issues

[25] The issues in this appeal are:

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[9] See *Guindon v Canada* [2015] 3 S.C.R. 3.
[10] See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 (CanLII) at paragraph 41.
[11] See *Sharma v Canada (Attorney General),* 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157 which explain the rule against new evidence and the limited exceptions to it.
[12] See *Andrade v Canada (Attorney General),* 2014 FCA 93 at paragraph 10.

a) Did the General Division breach procedural fairness by being biased?

b) Did the General Division misinterpret what “misconduct” means under the *Employment Insurance Act* (EI Act)*?*

c) Did the General Division make an error of fact about the length of the suspension?

d) Did the General Division make an error of law by failing to meaningfully analyze the evidence that the Claimant’s employer had converted his suspension from a disciplinary leave to an unpaid administrative leave?

Analysis

[26] The Claimant argues the General Division breached procedural fairness, made an error of fact and errors of law.

[27] If established, any of these types of errors would allow me to intervene in the General Division decision.[13]

The General Division did not breach procedural fairness

[28] The Claimant submits that denying EI benefits to employees fired for being unvaccinated is being used to advance a political agenda.[14] In his oral submissions to the Appeal Division, he explained he believed this because the Tribunal is part of the government.

[29] I understand the Claimant to be arguing that the General Division acted with bias when it decided his case.

[30] The Commission submits that there is no evidence that suggests the General Division breached procedural fairness.

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[13] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[14] AD1-4.

[31] The General Division is an independent decision-making body and adjudicators are presumed to be impartial.

[32] An allegation of bias is a serious allegation. The law says such an allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[15]

[33] Bias is concerned with a decision maker who does not approach the decision-making with an open mind but is already predisposed to a particular conclusion. The threshold for a finding of bias is high, and the burden of proof lies with the party alleging that it exists.

[34] To establish bias, the party alleging bias must show that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the decision maker, whether consciously or unconsciously, would not decide the case in a fair manner.[16]

[35] The Claimant did not point to anything specific about the General Division hearing to suggest the member was motivated by a political agenda.

[36] I have listened to the audio recording of the General Division hearing. The recording reveals the member was engaged in the process and gave the Claimant full opportunity to present his case. The member carefully listened to the Claimant's evidence and asked many clarifying questions. The Claimant was given the opportunity to provide any further information that he wanted to, after the General Division member had completed her questions. The Claimant did not raise any concerns of political motivation at the hearing.

[37] I see no evidence that the member had prejudged the case or did not approach the decision-making with an open mind. An informed person, viewing the matter reasonably and practically and having thought the matter through would not conclude

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[15] See *Arthur v Canada (A.G.),* 2001 FCA 223.
[16] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).

that it was more likely than not that the General Division would not decide the case in a fair manner.

[38] The Claimant's allegation appears to amount to no more than a disagreement with the result. However, a disagreement with the result is insufficient to show bias.

[39] The Claimant has not pointed to any other type of procedural unfairness, and I see no evidence of any.

The General Division did not misinterpret what "misconduct" means

[40] The Claimant worked in a unionized environment. His employer implemented a policy requiring him to disclose his vaccination status and prove proof of vaccination. The Claimant refused to disclose his vaccination status and so was placed on an unpaid leave. He then applied for EI regular benefits.

[41] The Commission disqualified the Claimant from benefits because it decided he had voluntarily taken a leave of absence from his employment without just cause.

[42] The Claimant appealed that decision to the Tribunal's General Division. He said that he had not voluntarily taken a leave of absence. He said his employer had placed him on an unpaid leave because he had not complied with their Covid-19 policy.

[43] The General Division decided that the reason the Claimant was not working was not a voluntary leave of absence, but rather a suspension by the employer for failing to comply with its Covid-19 policy.

[44] So, the General Division decided that meant that it had to decide whether the Claimant was suspended for reasons of misconduct.[17]

[17] Section 31 of the *Employment Insurance Act* provides for a disentitlement from benefits where a claimant has been suspended for misconduct.

[45] The Claimant has not objected to the General Division's decision to consider the issue before it to be one of misconduct as opposed to whether he voluntarily took a leave of absence without just cause.

[46] The Claimant's main objection is with how the General Division interpreted the term, "misconduct." He says that the General Division misinterpreted misconduct because:

- The General Division did not consider that his conduct in refusing the vaccine was not illegal or that the employer's Covid-19 policy was never a term of his employment contract or collective agreement.
- The General Division's interpretation of misconduct is inconsistent with the jurisprudence concerning what that term means.
- The General Division's interpretation of misconduct is inconsistent with the objective of the EI Act.

[47] The Commission submits that the General Division stated the proper legal test for "misconduct" and applied that legal test to the facts of this case.

[48] The term "misconduct" is not defined in the EI Act. However, the Federal Court of Appeal has provided a settled definition for this term.

[49] The Federal Court of Appeal defines "misconduct" to be conduct that is wilful which means that the conduct was conscious, deliberate, or intentional.[18] Misconduct also includes conduct that is so reckless that it is almost wilful.[19]

[50] A claimant doesn't have to have wrongful intent (in other words, the claimant doesn't have to mean to be doing something wrong) for the claimant's actions to be misconduct under the law.[20]

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[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *McKay-Eden v Her Majesty the Queen,* A-402-96.
[20] See *Attorney General of Canada v Secours*, A-352-94.

[51] The Federal Court of Appeal has also said that another way to describe this test is that there is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and there was a real possibility of risk to their employment because of that.[21]

[52] The burden is on the Commission to show the Claimant was suspended due to misconduct.

[53] The General Division did not misinterpret what misconduct means. The General Division stated the proper legal test. [22] It also applied that legal test to the facts.

[54] The essential facts were not in dispute. The Claimant's employer implemented a Covid-19 requiring vaccination by a certain deadline. The policy provided that if an employee did not produce proof of vaccination by the deadline, the employee would be placed on an unpaid leave of absence until the required documentation was provided.[23]

[55] The General Division found that the Claimant was made aware of the policy by email. He was also made aware on November 26, 2021, the employer required all employees to be vaccinated or they would be placed on leave.[24]

[56] The General Division found that the Claimant knew what was expected based on a number of letters given to the Claimant from the employer setting out his obligations and the consequences for not complying with them.[25]

[57] The General Division noted the Claimant's testimony that he made several efforts to avoid complying with the employer's requirements. He consulted the policy and read the materials online before deciding not to disclose his status. He brought it up with the union and signed a grievance form. He submitted a religious exemption request that was refused. He gave his employer a Notice of Liability contesting the policy.

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[21] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[22] See paragraphs 25 to 27 of the General Division decision.
[23] See paragraph 21 of the General Division decision.
[24] See paragraph 31 of the General Division decision.
[25] See paragraphs 32 and 33 of the General Division decision.

[58] The General Division found the evidence supported a conclusion that the Claimant's conduct in failing to comply with the employer's vaccination policy was conscious, deliberate, and intentional. The General Division decided that the Claimant did not disclose his vaccination status and he knew that if he did not do so, he would be placed on unpaid leave.

[59] The General Division concluded the Claimant's conduct was wilful as he knew or ought to have known that he could be suspended and ultimately dismissed from his job if he did not comply with the employer's policy. The General Division decided, therefore, that the Claimant's actions in refusing to comply with the policy amounted to misconduct for EI purposes.

[60] The General Division did not make an error of law in how it interpreted or applied the test for misconduct. The General Division applied the legal test for misconduct, as described by the Federal Court of Appeal.[26]

– Conduct does not have to be illegal to be misconduct

[61] The Claimant argues his conduct in refusing vaccination was not misconduct because it was not illegal. [27]

[62] I understand that the Claimant does not believe refusing to disclose his vaccination status or refusing vaccination to be the type of behaviour that would be considered misconduct.

[63] However, the law does not require that conduct be illegal to amount to misconduct.[28]As noted above, it wasn't necessary for the Claimant to have wrongful intent or be doing something wrong for his behaviour to be misconduct under the law.[29]

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[26] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[27] AD1-4.
[28] See *Canada (Attorney General) v Lemire*, 2010 FCA 314 (CanLII).
[29] See *Attorney General of Canada v Secours*, A-352-94.

[64] The law says that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[30] A deliberate violation of the employer's policy is considered to be misconduct.[31]

[65] The General Division acknowledged the Claimant's argument that the Covid-19 policy was not part of the Claimant's employment agreement or collective agreement but pointed out that the conduct of the employer is not relevant to the test for misconduct.[32] The General Division explained that disputes under the collective agreement had to go through the arbitration procedure.

[66] However, the General Division also noted that the employer had explained to the Claimant in each letter describing the policy requirements that the employer was obligated, pursuant to the *Ontario Occupational Health and Safety Act* to take every reasonable precaution to ensure a safe workplace and protect its workers.

[67] Duties owed to employers go beyond just performing work tasks. They include following safety policies.[33]

[68] The evidence was that the employer's Covid-19 policy had been implemented pursuant to the employer's obligations under the *Occupational Health and Safety Act*. So, the General Division was entitled to conclude, on that evidence, that complying with the Covid-19 policy was a duty the Claimant owed to his employer.

[69] There was no evidence to suggest otherwise. The Claimant did not file his collective agreement or employment agreement or provide any testimony about specific provisions in those agreements or how the Covid-19 policy might be inconsistent with those provisions.

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[30] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA 314.
[31] See *Attorney General of Canada v Secours*, A-352-94; See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87; See also *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[32] The General Division relied on *Paradis v Canada (Attorney General),* 2016 FC 1282.
[33] See, for example, CUB 80774 and CUB 71744.

[70] There was also no evidence or submissions from the Claimant to suggest that the employer's policy did not meet the requirements found in labour arbitration law for an employer to unilaterally introduce a new policy or rule.[34]

[71] There was no evidence that the policy had been deemed to be unlawful or unreasonable in any manner through labour arbitration.

[72] The General Division's conclusion that the Claimant's conduct in deliberately violating a safety policy, knowing he was at risk of an unpaid suspension in doing so was misconduct, is consistent with the legal test for misconduct under the EI Act and the evidence that was before the General Division.

– The General Division's interpretation of misconduct was not inconsistent with the caselaw

[73] The Claimant submits that the General Division's interpretation of misconduct was not in accordance with the jurisprudence.[35]

[74] The Claimant refers to the case of *Canada (Attorney General) v Tucker*, which he states that misconduct must be a "wilful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."[36]

[75] The legal test for misconduct as described by the Federal Court of Appeal in the *Canada (Attorney General) v Tucker* case is consistent with the legal test the General Division applied for misconduct.

[76] The Claimant submits that not every incident of misconduct constitutes "cause" for dismissal. He maintains the conduct must be so serious as to constitute a breach of

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[34] These requirements are set out in a case called *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* 1965 CanLII 1009 (ON LA).
[35] AD1-4.
[36] AD2-3; See *Canada (Attorney General) v Tucker*, [1986] 2 F.C. 329 at paragraph 4.

the employment agreement. The Claimant refers to the case of *Metropolitan Hotel and H.E.R.E., Loc 75 (Bellan) (Re)*.[37]

[77] The Claimant also argues that misconduct requires that an employee be "guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties." He refers to the case *of R. v Arthurs, Ex p. Port Arthur Shipbuilding Co*. in that regard.[38]

[78] The Claimant also maintains that the Supreme Court of Canada has determined that conduct must be "such as to undermine or seriously impair the trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship." The Claimant refers to the case of *McKinley v BC Tel*.[39]

[79] I acknowledge the Claimant's cases, but they do not point to an error of interpretation on the part of the General Division. These cases relate to the issue of wrongful termination under a collective agreement, not the issue of misconduct under the EI Act. So, they do not inform how misconduct should be interpreted under the EI Act. Indeed, the *Metropolitan Hotel* case the Claimant relies on makes this very point, noting that the test for misconduct under the EI Act is not the same question as whether a dismissal was justified under a collective agreement.[40]

[80] The question of wrongful or unjust suspension or dismissal is not something the General Division has the authority to consider.[41]

[81] The Claimant also cites the case of *Dowling v Ontario (Workplace Safety and Insurance Board)* for the proposition that when an employer unilaterally adds a new

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[37] AD1-4; See *Metropolitan Hotel and H.E.R.E., Loc 75 (Bellan) (Re)*, 2002 CanLII 78919 (ON LA).
[38] AD1-4; The Claimant cites R. *v Arthurs, Ex p. Port Arthur Shipbuilding Co*., 1967 CanLII 30 (ON CA). The Claimant cites the decision from the Ontario Court of Appeal. Although not relevant to my decision in this case, I note that the Ontario Court of Appeal decision was in fact overturned by the Supreme Court of Canada *in Port Arthur Shipbuilding Co. v Arthurs et al*., 1968 CanLII 29 (SCC), [1969] SCR 85.
[39] AD2-3; See *McKinley v. BC Tel*., 2001 SCC 38 at paragraph 20.
[40] See *Metropolitan Hotel and H.E.R.E., Loc 75 (Bellan) (Re),* 2002 CanLII 78919C (ON LA) at pages 280 to 281.
[41] See *Canada (Attorney General) v Marion*, 2002 FCA 185 (CanLII).

term to the employment contract midway, lack of compliance is unlikely to strike at the heart of the employment relationship and therefore cannot constitute misconduct.[42]

[82] The *Dowling* case also was a wrongful dismissal case. So, the legal test for misconduct described in that case is not relevant to the question of misconduct under the EI Act.

– The General Division's interpretation of misconduct is not inconsistent with the objective of the EI Act

[83] The Claimant submits that the General Division's decision that his actions in refusing to get a Covid-19 vaccination is misconduct is inconsistent with the purpose of the EI Act which is to enable someone who involuntarily loses their employment to receive benefits.

[84] In support of that argument, the Claimant cites the case of *Hudson's Bay Company ULC v. Ontario (Attorney General).*[43]

[85] The *Hudson's Bay Company* case is also not relevant to the interpretation of misconduct under the EI Act. This case deals with the requirement that a regulation made under a statute be interpreted in a manner consistent with the objective of the statute. In the Claimant's situation, the General Division was not interpreting a regulation made under the EI Act. Rather, it was deciding whether the Claimant's actions amounted to "misconduct" under section 31 of the EI Act.

[86] Even so, the General Division's interpretation of misconduct was not inconsistent with the objective of the EI Act. As the Claimant points out, the object of the EI Act is to compensate persons whose loss of employment is involuntary.[44]

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[42] AD2-3; See *Dowling v Ontario (Workplace Safety and Insurance Board),* [2004] O.J. No. 4812 (C.A.) at paragraph 49.
[43] See *Hudson's Bay Company ULC v Ontario (Attorney General),* 2020 ONSC 8046 (CanLII).
[44] See *Canada (Canada Employment and Immigration Commission) v Gagnon*, 1988 CanLII 48 (SCC) at paragraph 13; See also *Canada (Attorney General) v Lemire*, 2010 FCA 314 (CanLII).

[87] The General Division found the Claimant's actions were not involuntary. The General Division found the Claimant deliberately breached his employer's policy, knowing this action could result in his suspension.

The General Division did not make an error of fact about the length of the suspension

[88] I raised a possible error of fact about the finding of fact the General Division had made about the length of the suspension when I gave the Claimant permission to appeal to the Appeal Division.

[89] The Claimant was placed on an eight-week unpaid leave. The General Division decided that the Claimant's disentitlement was to last for the entire period of his unpaid leave.[45]

[90] The employer's documentation suggests only two weeks of that period was a suspension. The first six weeks was an administrative unpaid leave.

[91] Specifically, a letter from the Claimant's employer of January 6, 2022, states that the Claimant had been placed on an unpaid administrative leave for six weeks, to be followed by a two-week disciplinary suspension.[46]

[92] The Appeal Division can intervene only in certain kinds of errors of fact. The law says I can intervene only if the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[47]

[93] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[48]

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[45] See paragraph 46 of the General Division decision.
[46] See GD6-8.
[47] See section 58(1)(c) of the DESD Act.
[48] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).

[94] Factual findings being made without regard to the evidence would include circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings.[49]

[95] The General Division did not make an error of fact about the period of suspension.

[96] The General Division explained that the employer's policy said that if an employee did not produce proof of vaccination by the deadline in the policy, they would be placed on an unpaid leave of absence until the required documentation was provided. The Claimant did not comply with the policy by the deadline and was told he was being put on an administrative leave of absence.[50]

[97] The General Division referred to evidence that the employer told the Claimant in a letter dated January 6, 2022, that he had failed to comply with the mandatory vaccination policy. The letter provided that effective January 10, 2022, the Claimant would be placed on an unpaid leave of absence for 6 weeks. If he continued to be non-compliant, as of February 2, 2022, he would be subject to 2 weeks of disciplinary suspension without pay and then termination with cause thereafter for continued non-compliance.[51]

[98] The employer's characterization of the leave is not determinative.[52] Even though the employer called the initial six weeks an unpaid administrative leave and the final two weeks to be a disciplinary suspension, the employer's letter of January 6, 2022, makes clear that the entire eight weeks' unpaid leave resulted from the Claimant's failure to follow the employer's policy.[53] There was no evidence suggesting any part of the unpaid leave was for any other reason than the Claimant's non-compliance with the policy.

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[49] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII) at paragraph 41.
[50] See paragraph 21 for the General Division decision.
[51] See paragraph 22 for the General Division decision.
[52] See *Canada (Attorney General) v Boulton*, A-45-96.
[53] GD6-8.

[99] So, the General Division's finding of fact that the Claimant was suspended for the entire eight-week period due to misconduct was consistent with the evidence.

The General Division did not meaningfully analyze the evidence of the employer's revision of the entire leave to an unpaid administrative leave

[100] The parties agree and I accept that the General Division made an error of law by failing to meaningfully analyze evidence that the employer had revised the Claimant's entire leave to be an unpaid administrative leave with no disciplinary consequences.[54]

[101] On March 3, 2022, the Claimant was advised by letter that the employer had agreed to amend its policy to remove any disciplinary consequence for non-compliance. The employer advised the Claimant that the entire period of his disciplinary suspension would be converted back to an unpaid administrative leave. The letter said that the Claimant was not to be terminated and all discipline associated with the employer's policy was to be removed from his employee file.[55]

[102] The General Division acknowledged this evidence but did not consider whether it had any impact on its finding that Claimant was suspended due to misconduct.[56]

[103] There is case law from the Federal Court of Appeal that suggests where a settlement contradicts an employer's earlier assertion of misconduct, while not determinative, the settlement can be relevant to the question of whether the employee's conduct is misconduct under the EI Act.[57] I see no reason why this law would not similarly apply to the issue of a suspension for misconduct.

[104] The case law says that the General Division is not bound by how the employer and employee might characterize the way employment has ended. It is the General

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[54] See AD3-4 for the Commission's agreement that the General Division erred in law.
[55] See GD6-11.
[56] See paragraph 39 of the General Division decision.
[57] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).

Division's role to assess the evidence and decide whether the Claimant's conduct amounted to "misconduct" under the EI Act.

[105] The case law also says, however, that before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence in respect of the misconduct, which would contradict the earlier position taken by the employer. Some weight may also be given to situations where there is reinstatement, or the employee is given meaningful compensation.[58]

[106] Since the employer had agreed to remove any disciplinary consequences associated with the unpaid leave, this was relevant evidence that the General Division needed to analyze to see whether it impacted its conclusion that the Claimant's conduct amounted to misconduct. Respectfully, by not doing so, the General Division made an error of law.

[107] As I have found an error of law, I can intervene in the General Division decision.[59]

Remedy

[108] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.[60]

[109] Both parties want me to make the decision the General Division should have given.

[110] I am satisfied the parties had a full and fair opportunity to present their case to the General Division, so this is an appropriate case for me to substitute my decision.

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[58] See *Canada (Attorney General) v Boulton*, A-45-96; See also *Canada (Attorney General) v Courchene*, 2007 FCA 183 (CanLII).
[59] Section 58(1)(c) of the DESD Act says an error of law is one of the grounds of appeal.
[60] See section 59(1) of the DESD Act.

[111] I must decide whether the removal of disciplinary consequences by the employer makes a difference to the General Division's finding of misconduct.

[112] The Claimant argues that since his employer revised his period of leave to be non-disciplinary, it should not be considered misconduct.

[113] The Commission maintains the employer's characterization of the leave does not change the fact that the Claimant was suspended due to his own misconduct.

[114] I find the employer's decision to remove disciplinary consequences associated with the unpaid leave does not change the result. I find the Commission has proven that the Claimant was suspended due to his misconduct.

[115] The Claimant was put on an eight-week unpaid leave as he had not complied with the employer's Covid-19 policy. I have no reason to disturb the General Division's finding of fact that the Claimant was aware of the policy requirements and knew that by failing to comply with the employer's policy, he would be placed on an unpaid eight-week leave. The Claimant was sent multiple letters from the employer making this clear.[61]

[116] The Claimant acted willfully in not complying with the employer's safety policy, knowing he was at risk of an unpaid leave. He was, therefore, suspended due to his own misconduct.

[117] The employer's removal of disciplinary consequences associated with the leave does not contradict the earlier position taken by the employer. Rather it reflects a change in circumstances.

[118] In that regard, the letter of March 3, 2022, provides that the employer had an obligation under the *Occupational Health and Safety Act* to keep its workplace safe and protect its workers. The letter explains that at the onset of the pandemic, the employer implemented multiple measures including its Covid-19 policy in September 2021. The letter went on to say that, as referenced in the policy, the provincial and regional

[61] GD6.

approach to controlling the spread of Covid-19 remained fluid and the policy was subject to amendment from time to time.

[119] The letter notes that given the current de-escalated state of the pandemic including the removal and pending removal of many provincial mandates and the high vaccination rate among the employer's staff, the employer was taking the opportunity to review its policy and in particular the consequences for non-compliance.

[120] The employer explained that it had reached out to unions groups and parties and had agreed to amend the policy to remove any disciplinary consequences for non-compliance. It was noted individuals who remained in non-compliance would be subject to an unpaid administrative leave. The letter went on to say that the Claimant's unpaid leave would be converted to an administrative leave, and he would remain on leave until the earlier of his compliance with the policy, or April 22, 2022. It was also noted that any discipline associated with the Covid-19 policy would be removed from the Claimant's employee file.[62]

[121] So, the employer's letter makes clear that the revision of the Claimant's leave to be an unpaid administrative leave with no disciplinary consequences was not as a result of a contradiction or change in the employer's initial position but was rather due to a change in circumstances which included the de-escalated state of the pandemic and the high vaccination rate among the staff.

[122] There is no evidence that the employer decided to compensate the Claimant for any part of the leave, and he was not retroactively re-instated. So, I do not find the employer's removal of disciplinary consequences from the leave changes my finding of misconduct.

[123] I find, therefore, the Claimant was suspended due to his own misconduct.

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[62] GD6-11 to GD6-13.

Conclusion

[124] The appeal is dismissed. Although the General Division made an error of law, I reach the same result as the General Division. The Claimant was suspended due to his misconduct.

Charlotte McQuade
Member, Appeal Division