Citation: *TH v Canada Employment Insurance Commission*, 2023 SST 183

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	T. H.
Representative:	P. C.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated August 11, 2022 (GE-22-1295)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	December 16, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 18, 2023
File number:	AD-22-656

Decision

[1] The appeal is dismissed.

Overview

[2] T. H. is the Claimant. He worked as a bus operator for a public transit system. The Claimant's employer placed him on an unpaid leave on November 21, 2021, and then terminated him on December 31, 2021, because he did not comply with the employer's Covid-19 vaccination policy.

[3] The Claimant applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) disqualified the Claimant from benefits for reason he lost his job due to misconduct.

[4] The Claimant appealed to the Tribunal's General Division who dismissed his appeal. The General Division decided the Commission had proven that the Claimant was suspended and lost his job due to misconduct.

[5] The Claimant is now appealing to the Tribunal's Appeal Division. He argues that the General Division didn't follow procedural fairness, made errors of law, errors of jurisdiction and based its decision on important errors of fact.

[6] I am dismissing the appeal. The Claimant has not shown that the General Division made any reviewable errors.

New evidence

[7] In my decision granting the Claimant permission to appeal, I decided I would not accept new evidence the Claimant had provided with his request for permission to appeal. Some of that information included hyperlinks to information about immunization in Canada, and information about harm from vaccinations.[1]

[1] Leave to Appeal decision dated October 21, 2022.

[8] However, the Claimant clarified at his hearing that he had submitted that hyperlink information to the General Division and he was able to point to it in the record. Since this material had already been submitted to the General Division, I confirmed at the hearing that I would consider it.[2]

– Post-hearing evidence

[9] I permitted the Commission to provide post-hearing case law references in support of its argument that mandatory vaccination policies have generally been found to be reasonable.[3] The Commission's material was sent to the Claimant with an opportunity to reply. The Claimant provided responding submissions and case law references.[4]

[10] However, the Claimant also included new evidence with his submissions in the form of his collective agreement and an interest arbitration decision referring to his union contract.[5]

[11] I advised the Claimant by letter of January 4, 2022, that I would accept his submissions and case law, but I was not going to accept his new evidence. I provided reasons for that decision in the letter.

[12] The Claimant responded with an objection to my decision not to accept his new evidence. [6]I acknowledge his objection. However, I have already decided I will not accept that new evidence and explained my reasons for doing so in my letter of January 4, 2022. I have nothing further to add to those reasons.

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[2] GD6A-1 and GD10-2.
[3] AD6.
[4] AD7 and AD9.
[5] AD9-2 to AD9-381 and AD9-402 to AD9-428.
[6] AD10-2.

Issues

[13] The issues in this appeal are:

a) Did the General Division breach procedural fairness?

b) Did the General Division misapply the legal test for misconduct?

c) Did the General Division base its decision that the Commission had proven the Claimant was suspended and lost his job due to misconduct on important errors of fact or overlook any important evidence when it made that decision?

d) If the General Division made any of the above-noted errors, what should the remedy be?

Analysis

[14] The Claimant argues the General Division breached procedural fairness, made errors of law and jurisdiction and based its decision on important errors of fact.

[15] If established, any of these types of errors would allow me to intervene in the General Division decision.[7]

The General Division did not breach procedural fairness

[16] The Claimant submits that the General Division decision contains some biased opinions. [8]He also says the General Division proceeding wasn't fair.

[17] The Claimant argues that, although he doesn't think the hearing itself was unfair, he was surprised when he got the unfavourable decision. He now thinks that the General Division member was trying to lead him down a certain path due to the questions being asked and that the member was trying to pry information out of him. He believed the member did not really grasp what he was saying that he made a risk-

[7] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[8] AD1-12.

reward choice to not take the vaccine. He wonders if all the case law and safety documentation he provided had been read by the member.

[18] The Commission submits that there is no evidence that suggests the General Division was biased against the Claimant in any way, or that it did not act impartially; nor is there is any evidence to show there was a breach of natural justice.

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

[20] 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.[9]

[21] 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.

[22] 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.[10]

[23] I have listened to the audio recording of the General Division hearing. The recording reveals the Claimant was given a full and fair hearing. The member clearly explained the hearing procedure to the Claimant and offered the Claimant flexibility in how he presented his case.

[24] The member carefully listened to the evidence from both the Claimant and his witness. The member asked many questions to clarify the testimony and the documentation the Claimant had provided. The member explained the Commission's position to the Claimant and asked for his response. After asking questions, the

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

member gave the Claimant an opportunity to tell her anything else he thought was important.[11] The Claimant raised no concerns of bias at the General Division hearing.

[25] 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 that it was more likely than not that the General Division would not decide the case in a fair manner. It is appropriate for the General Division member to ask questions to clarify the evidence and to understand the parties' position. I see no suggestion that the Claimant was being led in a certain direction.

[26] 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.

[27] The hearing process was fair. The Claimant was given notice of the hearing, was provided with the Commission's documentation in advance of the hearing and so was aware of the case he had to meet. He was also given a full opportunity to respond to the Commission's position.

The General Division did not make an error of law or jurisdiction by considering the issue under appeal to be one of misconduct

[28] The Claimant maintains he wasn't dismissed but voluntarily left his employment without just cause. He says the General Division made an error of law by considering the issue to be one of misconduct rather than whether he voluntarily left his employment without just cause. He says the first decision letter he received from the Commission said he voluntarily left his employment without just cause. He submits that he did have just cause for voluntarily leaving.

[29] The General Division did not make an error of law or jurisdiction by considering the issue before it to be that of misconduct.

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[11] I heard this from the audio recording of the General Division hearing at approximately 0:1:28.

[30] The Claimant provided the General Division with a copy of an initial decision letter from the Commission dated February 18, 2022. That letter said that the Commission had disqualified the Claimant from benefits from November 19, 2021, for reason he had voluntarily left his employment without just cause.[12]

[31] The Commission did not file this decision letter with its documentation, but rather filed an initial decision dated March 9, 2022, which said that the Claimant was not entitled to EI benefits from November 21, 2021, because he lost his employment as a result of misconduct.[13]

[32] I can understand how the two different initial decisions letters might have been confusing to the Claimant. However, after the Commission conducted a reconsideration, the Commission issued a reconsideration decision of March 21, 2021, which provides that the Claimant is not entitled to benefits from November 21, 2021, because he lost his employment on November 19, 2021, due to misconduct.[14]

[33] The Claimant appealed that reconsideration decision to the General Division.

[34] The *Employment Insurance Act* (EI Act) allows disqualification from benefits if a person has either voluntarily left their employment without just cause or lost their job due to misconduct.[15]

[35] These provisions are found in the same section of the EI Act because it is not always clear whether the separation from employment resulted from an employee being dismissed for misconduct or from the employee deciding to leave.

[36] The law says it is open to the General Division to make a finding on either of those grounds, where the reason for separation from employment is not clear.[16]

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[12] GD10-54.
[13] GD3-68.
[14] GD3-78.
[15] See section 30(1) of the *Employment Insurance Act* (EI Act).
[16] See *Canada (Attorney General) v Desson*, 2004 FCA 303 (CanLII).

[37] The General Division decided that the Claimant was put on an unpaid leave on November 21, 2021, and was terminated on December 31, 2021. The General Division noted that the unpaid leave of absence was not taken voluntarily by the employee. It was mandatory and imposed by the employer for not complying with their policy.

[38] The General Division noted that the unpaid leave was similar to a suspension because the Claimant was not allowed to return or continue working and referred to the employer's information to the Commission that non-compliance would lead to a "suspension" without pay.

[39] The General Division found as a fact the Claimant had been terminated on December 31, 2021, based on his testimony, the records of employment and other documentation in the file.[17]

[40] In this case, the reason for separation was clear. There was no evidence before the General Division to suggest that the Claimant had voluntarily taken an unpaid leave or voluntarily left his employment. The evidence all pointed to a suspension and termination.

[41] The General Division did not, therefore, make an error of law or jurisdiction by considering the issue before it as one of misconduct. There was an evidentiary basis for doing so.

The General Division did not misinterpret what "misconduct" means

[42] The Claimant submits that the General Division made an error of law in deciding his conduct was misconduct because:

- the General Division did not consider that his union had filed a policy grievance, making the policy unlawful until proven otherwise.
- The General Division did not consider whether the policy violated his rights under the *Charter* and other laws, such as privacy legislation.

[17] See paragraphs 15 to 18 of the General Division decision.

- The General Division did not consider that his rights under the *Canadian Bill of Rights* had been violated.

- The General Division did not address the multiple statutes and case law he had listed in his submissions.

[43] The Commission maintains the General Division applied the correct legal test for misconduct, as described by the Federal Court of Appeal.

[44] The Claimant worked as a bus operator for a public transit system. He was a unionized worker. The Claimant was placed on an unpaid leave on November 21, 2021, and then terminated on December 31, 2021.

[45] The General Division had to decide whether the Commission had proven that the Claimant was suspended and terminated due to misconduct.

[46] The law says that a claimant who is suspended because of misconduct is not entitled to receive benefits until the period of suspension expires, the claimant loses or voluntarily leaves their employment, or the person accumulates enough hours of insurable employment with another employer to qualify for benefits.[18]

[47] The law also says that a claimant is disqualified from receiving benefits if they lost their employment because of their misconduct.[19]

[48] Misconduct is not defined in the *Employment Insurance Act* (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.[20] Misconduct also includes conduct that is so reckless that it is almost wilful.[21]

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[18] See section 31 of the EI Act.
[19] See section 30(1) of the EI Act.
[20] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[21] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[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.[22]

[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.[23]

[52] The General Division did not misinterpret what misconduct means or misapply the legal test. The General Division stated the proper legal test.[24] The General Division also applied that legal test to the facts.

[53] The General Division considered that the Claimant's employer implemented its Covid-19 mandatory vaccination policy effective September 7, 2021.[25]

[54] The General Division considered the terms of the policy. The General Division noted that the policy required employees to obtain their first Covid-19 vaccination by September 30, 2021. Employees were also required to disclose their vaccination status by October 6, 2021. Employees were required to obtain their second Covid-19 vaccination by November 20, 2021. The policy said that vaccination for Covid-19 is a precondition to employment.

[55] The policy provided for exemption from vaccination for medical reasons or for human rights reasons. The General Division considered that the Claimant did not ask his employer to consider him for any exemption, so he had not proven that he was exempt from the policy.

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[22] See *Attorney General of Canada v Secours*, A-352-94.
[23] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[24] See paragraphs 38 to 41 of the General Division decision.
[25] GD3-72 to GD3-75.

[56] The General Division found as a fact the Claimant had been informed of the employer's policy by September 7, 2021.[26]

[57] The General Division decided the Claimant had enough time to comply with the policy and noted that there were extensions to the deadlines as a result of an injunction proceeding.

[58] The General Division found that the Claimant knew what was expected of him because the policy was first communicated to the Claimant around September 7, 2021. Also, he had met with his supervisor around October 26, 2021, and the policy was again communicated to him verbally and in writing at that time.

[59] The General Division decided that the Claimant willfully chose not to comply with the policy for his own personal reasons. He made a conscious choice to not comply with the employer's policy because he did not agree with the policy.[27]

[60] The General Division found that since the Claimant did not comply with his employer's Covid-19 policy by disclosing his vaccination status and being fully vaccinated, he was placed on an unpaid leave on November 21, 2021, and then terminated on December 31, 2021.[28]

[61] The General Division decided that the Claimant knew or ought to have known that his conduct in refusing the comply with the policy could lead to a suspension and dismissal because the consequences of non-compliance were communicated to him verbally and in writing on October 26, 2021.[29] Specifically, the employer's letter of October 26, 2021, clearly said that if the Claimant did does not comply, he would be put on an unpaid leave of absence and dismissed.[30]

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[26] See paragraphs 25 to 27 of the General Division decision.
[27] See paragraphs 45 to 47 of the General Division decision.
[28] See paragraph 33 of the General Division decision.
[29] See letter of October 26, 2021, at GD11-3.
[30] See paragraphs 48 to 50 of the General Division decision.

[62] The General Division also accepted the Commission's information, obtained from the employer that employees were warned about the consequences.[31]

[63] The General Division concluded, therefore, that the Commission had proven the Claimant had been suspended and terminated for misconduct.

[64] The General Division did not make an error of law in how it interpreted or applied the legal test for misconduct. The General Division stated and applied the legal test for misconduct, as described by the Federal Court of Appeal.[32]

– The General Division did not make an error of law or jurisdiction by not considering whether the employer's policy violated the collective agreement

[65] The Claimant submits that the General Division made an error of law or jurisdiction by not considering that the employer's policy violated his collective agreement. He submits that since his union had filed a policy grievance, the policy was unlawful until proven otherwise. He maintains that it was not misconduct to fail to comply with an illegal policy.

[66] The General Division acknowledged the Claimant's argument that the Covid-19 policy was illegal but said that it did not have authority to decide that argument. The General Division said its role was to decide whether there was misconduct under the EI Act. The General Division pointed out that the Claimant's recourse was to pursue an action in court, or any other Tribunal that may deal with his arguments, noting his union had already filed grievances.[33]

[67] I see no error of law or jurisdiction in this conclusion. The General Division correctly decided it has no authority to make a ruling that the employer's policy violated the collective agreement. That is the jurisdiction of a labour arbitrator. The General Division's jurisdiction in this case was limited to deciding whether the Claimant's conduct amounted to misconduct under the EI Act.

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[31] See paragraph 51 of the General Division decision.
[32] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[33] See paragraphs 57 to 59 of the General Division decision.

[68] The law says that misconduct includes a breach of an express or implied duty resulting from the contract of employment.[34]

[69] So, the General Division did have the authority to decide, in the context of the misconduct test, whether complying with the employer's Covid-19 policy was an express or implied duty of the Claimant's employment.

[70] The General Division did decide this issue. The General Division decided that complying with the employer's Covid-19 policy was a condition of the Claimant's employment.

[71] The General Division noted that the policy stated that its purpose was to "take every precaution reasonable in the circumstances for the protection of the health and safety of workers, in accordance with their obligations under the *Occupational Health and Safety Act*, from the hazard of covid19." As well, the policy said that vaccination was a precondition for employment.[35]

[72] The General Division considered that the Ontario Human Rights Commission has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code* as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated.[36]

[73] The General Division generally accepted that the employer could choose to develop and impose policies at the workplace and in this case, the employer imposed a vaccination policy because of the Covid-19 pandemic.

[74] The General Division concluded the policy became a condition of the Claimant's employment when it was introduced by the employer. The General Division decided the

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[34] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA 314.
[35] See paragraphs 20 to 22 of the General Division decision.
[36] See paragraph 53 of the General Division decision.

Claimant breached the policy when he chose not to comply with it and that interfered with his ability to carry out his duty to the employer.[37]

[75] The evidence before the General Division was that the policy was enacted pursuant to the employer's obligations under *the Occupational Health and Safety Act* to take every precaution reasonable in the circumstances for the protection of the health and safety of workers, from the hazard of Covid-19. The policy also contained a provision that compliance was a pre-condition of employment.

[76] So, the General Division was entitled to conclude, on the evidence before it, that complying with the Covid-19 policy was a duty the Claimant owed to his employer. The evidence was that there was a lawful basis for the policy.

[77] On the other hand, there was no evidence before the General Division that the policy or any part of it had been determined in labour arbitration to be void or non-applicable to the Claimant for reason it violated the collective agreement.

[78] The Claimant had filed copies of his personal grievance and the union's policy grievance in evidence.[38] They referred to various section numbers of the collective agreement and various laws that were purportedly breached by the policy.

[79] However, the grievances merely raise allegations of breaches of various laws and the collective agreement. They are not evidence that any of those allegations was successful in arbitration.

[80] The Claimant did not provide any testimony about the content of any specific provisions in his collective agreement that were purportedly violated, nor had he filed his collective agreement in evidence. He also did not explain how the employer's policy did not meet the requirements, as described in labour law, for an employer to unilaterally

[37] See paragraph 55 of the General Division decision.
[38] GD2-10 to GD2-14.

introduce a new policy or rule in a unionized environment.[39] So, there was no evidentiary basis or substantive argument to support the Claimant's position.

[81] The Claimant now relies *on AL v Canada Employment Insurance Commission* where a member of the General Division concluded that the Commission had not shown that the claimant's collective agreement contained an express duty of vaccination.[40] The member also decided that vaccination was not an implied term of that claimant's employment.

[82] The *AL* case is under appeal. That case turned on the specific terms of the collective agreement. One of the key facts was that the collective agreement included some specific provisions regarding vaccination (with reference to the influenza vaccine) and which made it clear that it was the employee's choice whether to get vaccinated. In the Claimant's case, it is unknown what his collective agreement said about vaccination, if anything.

[83] I am not bound to follow the *AL* decision and I would also note that the *AL* case is at odds with multiple decisions from the Tribunal that have decided that failing to comply with an employer's policy, despite the substance of the policy, is misconduct.[41]

[84] The Federal Court, in a recent case called *Cecchetto v Canada (Attorney General* (*Cecchetto*) confirmed that the *AL* case was particular to its facts and did not establish any kind of blanket rule that applies to other factual situations.[42]

[85] The General Division did not make an error of law or jurisdiction in not deciding whether the employer's policy violated the collective agreement. The General Division's

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[39] 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).
[40] See *AL v Canada Employment Insurance Commission*, 2022 SST 1428 at AD7-3.
[41] See, for example, *LL v Canada Employment Insurance Commission*, 2022 SST 882 (CanLII); See also *GL v Canada Employment Insurance Commission*, 2022 SST 1382; See also *SP v Canada Employment Insurance Commission*, 2022 SST 1322; See also *CH v Canada Employment Insurance Commission*, 2022 SST 1264.
[42] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.

conclusion that complying with the employer's Covid-19 policy was a duty owed by the Claimant to the employer was supported by the evidence before it.

[86] The General Division's conclusion that a wilful breach of the policy was consistent with the law. The Federal Court of Appeal has repeatedly decided that a deliberate violation of the employer's policy is considered to be misconduct.[43]

– The General Division was not required to decide whether the employer's policy violated the *Charter* or other laws

[87] The Claimant submits that the General Division erred in law in failing to decide whether his employer's policy violated the *Charter*.[44] He also says the General Division erred in law by failing to decide whether the policy violated any of the statutes he referred to in his submissions to the General Division, which included privacy legislation.[45]

[88] The Claimant filed with the General Division, a copy of a "Notice of Liability" to his employer. This document asserted many claims about the legality of the employer's policy, including claims that it violated sections 2, 7, 8 and 15 of the *Charter*.[46] Copies of his grievance and the union's policy grievance, on file, also alleged violations of the *Charter* and various other laws.[47]

[89] Although the General Division did not refer specifically to the *Charter* or these other laws in its decision, I am satisfied the General Division was aware the Claimant believed the employer's policy was illegal in various ways and he believed that his fundamental rights and freedoms had been violated by the employer's policy.

[90] Specifically, the General Division acknowledged that the Claimant had argued the policy was illegal, the employer was not entitled to ask him about his vaccination

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[43] 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.
[44] AD5.
[45] See GD2-20 to GD2-21 for statutes the Claimant alleged had been breached by the employer's policy.
[46] GD2-121 to GD2-125.
[47] GD2-10 to GD2-14.

status, the employer failed to accommodate him, and his rights were being abused by the employer.[48]

[91] The General Division found it had no jurisdiction to decide these issues. It said it had to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act and that the Claimant's recourse was to pursue an action in court, or any other Tribunal that may deal with his particular arguments. [49]

[92] The General Division did not make an error of law or jurisdiction by not deciding whether the employer's policy violated any of the Claimant's *Charter* rights or other laws.

[93] The General Division's jurisdiction arises from the EI Act. The General Division was limited to deciding whether the Claimant was suspended and was terminated due to misconduct under the EI Act. A direct finding about whether the Claimant's employer's policy violates the *Charter* or other laws is within the jurisdiction of a labour arbitrator. That falls outside the scope of the misconduct test under the EI Act.

[94] The Federal Court and Federal Court of Appeal has instructed that the question of whether an employer's policy or rule has resulted in a breach of an employee's human rights is not relevant to the question of whether an employee's conduct amount to misconduct and there are other avenues to pursue such arguments.[50]

[95] Further, the Federal Court in the *Cecchetto* case has said that whether the employer's policy or rule violates other laws is also outside the scope of the narrow test for misconduct under the EI Act.[51]

[96] In *Cecchetto*, the claimant's employer, a hospital, had required employees to follow Directive 6, issued by the Chief Medical Officer of Health for Ontario. The claimant had been put on an unpaid leave and then terminated as he had not gotten

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[48] See paragraph 57 of the General Division decision.
[49] See paragraphs 57 to 59 of the General Division decision.
[50] See *Dubeau v Canada (Attorney General),* 2019 FC 725 (CanLII); See also *Paradis v. Canada (Attorney General)*, 2016 FC 1282 (CanLII).
[51] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.

vaccinated or provided antigen test results as he was required to do by Directive 6. He applied for EI benefits but was not paid benefits as the Commission decided he had been suspended and terminated due to misconduct.

[97] The General Division had decided in that case that the claimant was aware of the policy, his refusal was wilful and his failure to comply with the policy was the direct cause of his dismissal. This led the General Division to conclude that the claimant had lost his job because of his misconduct.

[98] The claimant in that case sought permission to appeal the General Division's decision to the Appeal Division. He argued the General Division had not considered that the vaccine had not completed safety and efficacy trials at the time of his dismissal. He felt that he was being discriminated for his personal medical choice, citing the *Canadian Bill of Rights*. He maintained he had the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[99] The Appeal Division refused permission to appeal. In so doing, the Appeal Division noted that the General Division could not make a ruling in relation to misconduct based on the other legislation cited by the claimant, because it was bound to apply the law as set out by the binding legal precedents. The Appeal Division found that the fact that the claimant may have avenues of recourse under other legislation did not undermine the General Division's finding that the Commission had proven that the employer dismissed the claimant because of his misconduct, and therefore he was not entitled to EI benefits. The claimant sought judicial review of that decision at Federal Court.

[100] The Federal Court agreed with the Appeal Division that the General Division did not have jurisdiction to address the types of issues the claimant had raised. In that regard the Federal Court said,[52]

> "While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises

[52] See *Cecchetto v Canada (Attorney General),* 2023 FC 102 at paragraph 32.

> – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address."

[101] The Federal Court pointed out that the fundamental legal, ethical, and factual questions the claimant was raising were beyond the scope of the case and it was not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.[53]

[102] The Federal Court went on to say that that there have been other challenges to COVID-19 policies and legal requirements, some of which were still underway. The Federal Court noted that many of those cases raise the kinds of questions regarding fundamental rights and freedoms under the *Charter* and the factual basis for imposing vaccine and/or mask or face covering requirements that the claimant had put forward. The Federal Court noted that it was simply making the point that there were other ways the Claimant could properly advance his claims under the legal system.

[103] I understand the *Cecchetto* decision to be making clear that claims about whether an employer's policy violates laws, including those that protect fundamental rights and freedoms, are outside the scope of the Tribunal's mandate which is narrowly limited to deciding the question of misconduct under the EI Act. These other arguments, the Federal Court instructs, are properly advanced in other forums.

[104] I find, therefore, that the General Division did not make an error of law or jurisdiction by not considering whether the Claimant's policy violated the *Charter* or the other laws the Claimant believed the policy to have violated.

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[53] See *Cecchetto v Canada (Attorney General),* 2023 FC 102 at paragraph 46.

[105] The General Division's decision to focus on the narrow question of whether the Commission had proven the Claimant's conduct was misconduct was consistent with the law.

– The General Division did not make an error of law or jurisdiction by not considering whether the Claimant's rights under the *Canadian Bill of Rights* had been breached

[106] The Claimant maintains that the General Division made an error of law or jurisdiction by failing to consider that his rights under the *Canadian Bill of Rights* had been violated. Specifically, he says the General Division should have decided whether his rights under section 1(a) and 1(b) of the *Canadian Bill of Rights* were violated.

[107] The Claimant submitted a copy of the *Canadian Bill of Rights* to the General Division.[54] The Claimant did not provide any written submissions about this particular statute in the documentation he filed with the General Division.

[108] At the hearing, the General Division member asked the Claimant why he had submitted that document. The Claimant explained that he felt his rights under 1(a) and 1(b) were being abused by his employer. He said he didn't understand why they were this far along as he didn't do anything wrong. He said he deserved EI benefits and he didn't break any laws.[55]

[109] The General Division did not specifically address the *Canadian Bill of Rights* in its decision. However, it was not required to.

[110] This statute is a quasi-constitutional statute that requires that federal statutes be construed and applied in a manner so as not to abrogate, abridge, or infringe or authorize the abrogation, abridgement, or infringement of any of the rights or freedoms recognized in the statute.[56]

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[54] GD6A-2.
[55] I heard this from the audio recording of the General Division hearing at approximately 0:1:20.
[56] See section 2 of the *Canadian Bill of Rights*.

[111] While the Claimant alleged certain provisions in the *Canadian Bill of Rights* applied to him, he did not explain how those provisions applied to him, with reference to any evidence. He did not make any submissions about how misconduct should be interpreted having regard to those rights.

[112] Rather, his explanation focused on the fact he believed his employer was abusing his rights and his belief that he deserved EI benefits as he didn't break any laws. But these arguments don't relate to the *Canadian Bill of Rights*.

[113] So, the General Division did not make an error of law by not specifically addressing the *Canadian Bill of Rights* because the arguments the Claimant made concerning that statute did not actually relate to that statute.

[114] However, the General Division did properly address the substance of the arguments the Claimant raised.

[115] Specifically, the General Division acknowledged that the Claimant's argument that his employer was abusing his rights. As above, the General Division properly found this issue was outside the question it had to decide concerning misconduct.

[116] The General Division also acknowledged that the Claimant did not have wrongful intent but found the Claimant's conduct was still misconduct because the employer introduced a policy making vaccination a condition of his employment and he chose not to comply.[57]

[117] This finding was consistent with the law. It was not necessary for Claimant's conduct to be illegal or that he had a wrongful intent for the conduct to amount to misconduct.[58]

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[57] See paragraph 46 of the General Division decision.
[58] See *Attorney General of Canada v Secours,* A-352-94.

– The General Division did not have to address in its reasons every case and statute the Claimant provided

[118] The Claimant maintains the General Division made an error of law by not addressing every case reference and statute he provided in his submissions.[59] Since these were not referred to in the decision, he questions whether they were considered by the General Division.

[119] A failure to provide sufficient reasons can amount to an error of law.

[120] The General Division is not required to address in its reasons every argument that is canvassed before it.[60] However, the General Division's reasons must be sufficiently clear to explain why a decision was made and provide a logical basis for that decision. The reasons must also be responsive to the parties' key arguments.[61]

[121] I am satisfied that even though the General Division did not refer to every specific statute and case reference the Claimant provided, that the General Division was alive to key issues and arguments the Claimant was making and addressed those arguments in its reasons.

[122] The General Division's reasons clearly explained why it concluded the Commission had proven the Claimant had been suspended and terminated due to his misconduct. The reasons provided a logical basis for that conclusion. Specifically, the General Division explained that the Claimant had deliberately chose not to comply with the employer's policy for personal reasons, knowing the consequence for that could be an unpaid leave and termination and that amounted to misconduct under the EI Act.

[123] The Claimant's main arguments were that his conduct in failing to comply with the policy was not misconduct because he believed the policy violated the collective agreement and various other laws. He also argued that his rights had been breached by the employer's policy. He maintained that he chose not to follow the employer's policy

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[59] GD2-20 to GD2-21.
[60] See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 (CanLII).
[61] See *Canada (Attorney General) v Hoffman*, 2015 FC 1348 (CanLII).

as he didn't think vaccination was safe. He also argued that his witness, who had also been put on leave and terminated for the same reason as him had received EI benefits.

[124] The General Division's reasons were responsive to these arguments. The General Division acknowledged the Claimant's health concerns about the vaccine but considered that the Claimant's decision was a personal decision. The General Division addressed why it couldn't consider the Claimant's other arguments about the legality of the policy or the breach of his rights. The General Division explained why the Claimant's situation was different from his witness's situation.

[125] The General Division was not required to address every statute and case reference submitted by the Claimant. Since the General Division's reasons explained to the Claimant why the General Division had decided the Commission had proven that he had been suspended and terminated due to misconduct and responded to his key arguments, the General Division's reasons were sufficient.

[126] So, the General Division did not make an error of law by providing insufficient reasons.

The General Division did not base its decision on errors of fact or overlook any key evidence

[127] The Claimant submits that the General Division based its decision that the Commission had proven he had been suspended and terminated due to misconduct on errors of fact. He also says the General Division overlooked key evidence.

[128] The Claimant argues that the General Division:

- made an error of fact that the employer extended the deadline for compliance with the vaccine because of the injunction filed by the union, when instead it was because not enough employees complied.
- overlooked the Claimant's testimony that the employer violated its own policy by telling the Claimant he didn't have to watch the education video.

- overlooked the Claimant's testimony that he offered to pay for testing himself.

- overlooked the Claimant's testimony and documentation that he made a risk/reward decision to decline the vaccination based on his review of literature and the fact he knew people who had suffered injury and death following vaccination.

- overlooked the testimony of the Claimant's witness that the employer had predetermined to refuse all exemptions, and that the employer had initially said testing would be an option. The Claimant says the General Division also overlooked the rest of his testimony which corroborated how own testimony.

[129] The Appeal Division can only intervene in certain kinds of errors of fact. The Appeal Division can intervene where 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.[62]

[130] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[63]

[131] 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.[64]

[132] I can assume that the General Division considered all the evidence, even if it didn't refer to every piece of it. However, the General Division must address important pieces of evidence, especially evidence that is counter to its findings.[65]

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[62] See section 58(1)(c) of the DESD Act.
[63] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII).
[64] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII).
[65] See *Simpson v Canada (Attorney General),* 2012 FCA 82.

[133] The reason for extension of the deadline for compliance with the policy was not relevant to whether the Claimant's conduct amounted to misconduct. So, even if the General Division made a mistake about this reason, the General Division did not base its decision on this mistake.

[134] The General Division didn't have to mention evidence about the employer's conduct in telling the Claimant he didn't have watch the education video or in failing to provide the Claimant a testing alternative, as this evidence was not relevant to the question of misconduct under the EI Act.

[135] This is because the focus in the misconduct test is not the conduct of the employer, but rather that of the employee.[66]

[136] The General Division did not overlook the Claimant's evidence that he made a risk/reward decision to decline the vaccination based on his review of literature and the fact he knew people who had suffered injury and death.

[137] The General Division noted in its decision that the Claimant had health concerns about the Covid-19 vaccine.[67] The General Division's decision was based on the fact the Claimant made a personal and deliberate choice not to follow the policy.

[138] The Claimant filed documentation relating to the safety and efficacy of the vaccine with the General Division. The General Division did not specifically address this documentation. However, it did not have to. The General Division cannot make findings on the safety or efficacy of vaccinations. This is beyond its jurisdiction.

[139] The General Division's jurisdiction in this case was limited to deciding whether the Commission had proven the Claimant was suspended and terminated due to misconduct under EI Act, as the Federal Court of Appeal has defined that test.[68] The General Division decided that issue.

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[66] See *Paradis v Canada (Attorney General),* 2016 FC 1282. See also *Canada (Attorney General) v McNamara,* 2007 FCA 107.
[67] See paragraph 5 of the General Division decision.
[68] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

– The General Division did not overlook any key testimony from the Claimant's witness

[140] The Claimant says the General Division overlooked testimony from his witness.

[141] Specifically, he argues that the General Division overlooked the testimony from his witness that the employer had predetermined to refuse all exemptions, and his testimony that the employer had initially said testing would be an option, as well as the rest of his testimony which corroborated the Claimant's testimony.

[142] The General Division noted that the Claimant's witness testified that he had the same job and employer as the Claimant and that he was approved for EI benefits based on similar circumstances.

[143] The General Division pointed out that there was one distinguishable fact which was that the witness had asked his employer for an exemption based on creed, which they rejected. However, the Claimant did not ask his employer for an exemption, but simply chose not to comply because he disagreed with the policy.[69]

[144] I have listened to the audio recording of the General Division hearing to see if the General Division overlooked any key evidence from the Claimant's witness or failed to account for any of that evidence that might have been contrary to its conclusion.

[145] I will summarize the main points from the testimony of the Claimant's witness:[70]

- The witness had the same position and the same seniority as the Claimant. He was placed on an unpaid leave on November 21, 2021, and terminated on December 31, 2021, for the same reason, which was due to not disclosing vaccination status.

- He was approved for EI by Service Canada despite being terminated for the same reason as the Claimant.

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[69] See paragraph 54 of the General Division decision.
[70] I heard this from the audio recording of the General Division hearing at approximately 0:1:30 to 0:1:55.

- Early on, the CEO of the employer had promised not to terminate anyone for vaccine status and testing was discussed back and forth with the union. Other transit systems were giving that option so they thought that would be offered to them.

- He didn't think it would get the point of termination as there were a lot of mixed messages from the union and management. At first the union highly recommended the workers not disclose status through the employer's portal but then the union changed course on that. After that the employer came on aggressively, using threatening language with the employees.

- The employer moved the deadline for compliance a few times.

- The employer's portal did not include the option to not disclose. He thinks that disclosing health information is not legal. There was a security hack, and some confidential information was breached.

- He requested an exemption based on creed and was denied within an hour. The employer said he didn't meet the guidelines for that exemption. He doesn't know anyone who got a religious exemption, although he heard people in management might have been given exemptions.

- He questions the safety and efficacy of the vaccines, given information from one of the manufacturers of the vaccine.

- He attended a meeting with the employer prior to November 20, 2021, where he was warned of consequences that they could not show up on the property after that date. He asked about the option of testing. He wasn't getting any answers other than it was a done deal. There were threats of termination after a certain deadline.

- Vaccination was not a precondition of his employment when he signed up. The collective agreement was not amended. An individual and group grievance had been filed.

[146] I do not see any key testimony from the witness that the General Division may have overlooked that could have impacted the outcome. The evidence was for the most part consistent with the Claimant's evidence.

[147] The General Division addressed the evidence that ran counter to its finding, the fact the witness had been approved for EI benefits. The General Division explained why it found the witness's situation different from the Claimant's situation.

[148] The General Division did not have to refer to the witness's testimony that the employer had predetermined to refuse exemptions vaccinations, given the Claimant never made an exemption request. This fact was not relevant.

[149] The testimony from the witness did not contradict the General Division's finding that the Claimant knew or ought to have known that his conduct in not complying with the policy could result in an unpaid leave and termination.

[150] Although the witness suggested there were initially mixed messages, and that testing was discussed as an option, he confirmed that he attended a meeting prior to November 20, 2021, where he was warned of the consequences.

[151] This testimony was consistent with the Claimant's testimony that after a meeting with his supervisor around October 26, 2021, he was given a letter dated October 26, 2021, that explained the consequences of non-compliance.[71]

[152] I am satisfied that the General Division did not base its decision on any important errors of fact, and it did not overlook or misconstrue any key evidence when it made its decision.

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[71] See paragraphs 30 to 32 of the General Division decision.

Conclusion

[153] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal.

Charlotte McQuade
Member, Appeal Division