



Citation: *NZ v Canada Employment Insurance Commission*, 2023 SST 372

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. Z.

Respondent: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Decision under appeal: General Division decision dated October 17, 2022
(GE-22-2135)

Tribunal member: Janet Lew

Type of hearing: Teleconference

Hearing date: February 27, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: March 22, 2023

File number: AD-22-833

Decision

[1] The appeal is dismissed. The General Division misstated some of the evidence and it failed to address some of the issues before it. However, this does not change the outcome.

Overview

[2] The Appellant, N. Z. (Claimant), is appealing the General Division decision. The General Division found that the Claimant lost his job because of misconduct. In other words, it found that he did something that caused him to lose his job. He had not complied with his employer's Covid-19 vaccination policy. As the General Division determined that there was misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made several legal and factual errors. Primarily, he argues that the General Division failed to consider the legality of his employer's policy. He argues that his employer's policy was unlawful and, for that reason, says he did not have to comply with it. He argues that, if he did not have to comply with it, there was no misconduct on his part.

[4] The Claimant asks the Appeal Division to give the decision he says the General Division should have given. He says that the Appeal Division should order the Respondent, the Canada Employment Insurance Commission (Commission) to issue a formal apology to him for, and to either pay him Employment Insurance benefits, or to return any Employment Insurance contributions he has ever made.

[5] The Commission acknowledges that the General Division did not address the issue of the legality of the employer's vaccination policy. Even so, the Commission says that it would not have changed the outcome. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

- a) Did the General Division make a factual error when it found that the Claimant lost his job because he did not follow his employer's vaccination policy?
 - i. Did the General Division misstate the Claimant's evidence?
 - ii. Was the employer's termination letter determinative of the misconduct question?
- b) Did the General Division fail to consider whether the employer's vaccination policy was part of the Claimant's employment contract?
- c) Did the General Division fail to consider the legality of the employer's vaccination policy?

Analysis

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

[8] For factual errors, the General Division had to have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Did the General Division make a factual error when it found that the Claimant lost his job because he did not follow his employer's vaccination policy?

[9] The Claimant argues that the General Division made a factual error when it found that he had been dismissed because he did not follow his employer's vaccination policy. The Claimant denies that there was any connection at all between his dismissal and the issue over whether he did not comply with his employer's vaccination policy.

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

[10] The Claimant points to his employer's termination letter.² His employer wrote that it dismissed the Claimant "on a without cause basis." In other words, the Claimant says that there was no particular reason why his employer dismissed him.

[11] This is important because, as the General Division stated, for misconduct to arise, the Claimant had to have lost his job because of something that he did. So, if the employer dismissed him for reasons unrelated to whatever he might have done, that may not amount to misconduct.

[12] The Claimant argues that, if his employer had dismissed him because he had failed to comply with its vaccination policy, it should have set this out in its termination letter. The Claimant argues that the termination letter represents a legal document for which his employer can be held accountable.

[13] The Claimant argues that neither the Commission nor the General Division should be able to rely on anything that the employer subsequently reported that explained why it had dismissed the Claimant from his job. The Claimant says that the employer's claims that it dismissed him because he did not comply with its vaccination policy is contradictory. He says that the claims contradict the fact that employer said in its termination letter that it did not have any cause to dismiss the Claimant from his employment.

[14] The Claimant also states that lawyers likely advised his employer on how to frame the dismissal letter, so it could evade any accountability or liability for wrongful dismissal.³

– **The General Division decision**

[15] At paragraph 9 of its decision, the General Division wrote that the "Claimant agrees that he was let go because he did not follow his employer's vaccination mandate."

² See employer's letter dated December 6, 2021, at GD 2-9 to GD2-10 (and at GD 3-23 to GD 3-24).

³ See also at approximately 45:00 of the audio recording of the General Division hearing.

– **The General Division misstated the Claimant’s evidence**

[16] The Claimant denies that he agreed that this employer dismissed him because he failed to comply with its vaccination policy.

[17] Indeed, the Claimant has consistently denied that his employer dismissed him for not complying with its vaccination policy.

- In his application for Employment Insurance benefits, the Claimant stated that he was dismissed due to a shortage of work⁴
- When the Claimant spoke with the Commission on January 13, 2022, he claimed that his employer dismissed him because of a shortage of work⁵
- When the Claimant spoke with the Commission on March 15, 2022, he denied that his employer stated it had dismissed him because he had refused to comply with its vaccination policy⁶
- The Claimant asked the Commission to reconsider its decision denying him benefits. He wrote that he had been dismissed without cause. He noted that his employer gave a contradictory story when it told the Commission it had dismissed him for not complying with its vaccination policy⁷
- When the Claimant spoke with the Commission on May 18, 2022, he stated that he had been terminated without cause. He stated that his employer did not have any reasons to dismiss him. He reportedly could not recall whether his termination had anything to do with non-compliance with the employer’s vaccination policy. He questioned why Service Canada would not accept that his employer dismissed him without cause, as its termination letter set out.⁸

⁴ See Claimant's application for Employment Insurance benefits filed on December 2, 2021, at GD 3-6.

⁵ See Call Back dated January 13, 2022, at GD 3-22.

⁶ See Supplementary Record of Claim on March 15, 2022, at GD 3-25.

⁷ See Claimant’s request for reconsideration, filed April 11, 2022, at GD 3-53.

⁸ See Supplementary Record of Claim on May 18, 2022, at GD 3-60.

- denied that his employer stated it had dismissed him because he had refused to comply with its vaccination policy⁹
- in his Notice of Appeal to the General Division, the Claimant again pointed out that his employer's termination letter did not offer any reason for dismissal. His employer did not mention his refusal to comply with its vaccination policy.¹⁰
- At the General Division hearing, the Claimant testified that his employer never told him why it dismissed him.¹¹ They fired him without cause, which he says means that the employer stated that he did not do anything wrong. He says this means that even his employer is of the view that there was no misconduct.

[18] I do not see any evidence that shows that the Claimant agreed that his employer dismissed him because he failed to comply with its vaccination policy. It is clear that the General Division misstated the Claimant's evidence when it found that he had agreed that his employer dismissed him for non-compliance with its vaccination policy.

[19] While the General Division misstated the Claimant's evidence, does this mean that the employer's termination letter is determinative of why it dismissed the Claimant?

– The employer's termination letter is not determinative of the misconduct question

[20] The Claimant argues that his employer's termination letter is definitive proof that it dismissed him without cause—for reasons unrelated to its vaccination policy. The letter says that the employer dismissed him without cause. He says both the Commission and the General Division should have disregarded other reasons the employer gave to the Commission explain why it dismissed him.

⁹ See Supplementary Record of Claim on March 15, 2022, at GD 3-25.

¹⁰ See Notice of Appeal, filed June 21, 2022, at GD 2-14.

¹¹ At approximately 47:30 to 50:55 of the audio recording of the General Division hearing.

[21] As the General Division pointed out, the Federal Court of Appeal has said that any agreement or other document from the employer does not settle the question of whether there was misconduct or not. Rather, it is up to the General Division to look at all of the facts and decide whether there was misconduct. The Court wrote:

According to the jurisprudence of this Court ... the mere existence of a settlement agreement is not determinative of whether an employee was dismissed for misconduct: see *Canada (A.G.) v Peruss* (December 14, 1981), A-309-81 (FCA) [unreported], *Canada (A.G.) v Wile* (November 30, 1994), A-233-94 [unreported], and *Canada (A.G.) v Boulton* (1990), 208 N. R. 63 (FCA).

It is the Board's function to assess the evidence and to arrive at its own conclusions. It is not bound by how the employer and employee characterized the grounds on which the employment was terminated... The fact that the settlement agreement required the employer to withdraw the allegation of dismissal for because cannot be treated as conclusive of whether there was actually misconduct for the purposes of the *Act*.¹²

[22] The General Division determined that it was not bound by the employer's termination letter that said the Claimant was dismissed without cause. The General Division reviewed the evidence before it and came to its own conclusion. It concluded that the Claimant lost his employment because he did not get vaccinated or get an exemption from his employer's vaccination policy.

[23] It is not up to the Appeal Division to re-assess the evidence and come to its own conclusion unless the General Division overlooked or misapprehended the evidence.

[24] The General Division did not directly address the employer's statements that it provided to the Commission.¹³ But, it is clear that the General Division considered the employer's statements. The employer told the Commission that the Claimant continued to be non-compliant with its vaccination policy after six weeks. So, it dismissed him for

¹² See *Canada (Attorney General) v Morris*, 1999 CanLII 7853 (FCA). "Board" refers to the Board of Referees, the predecessor to the General Division, and "Act" refers to the *Unemployment Insurance Act*, which has since been renamed the *Employment Insurance Act*.

¹³ See Supplementary Records of Claim, dated December 13, 2021 (GD 3-12), March 15, 2022 (GD 3-26), and May 17, 2022 (GD 3-57).

that reason. The General Division accepted this as the reason for the Claimant's dismissal.

[25] In summary, the General Division appropriately determined that it was not bound by the employer's termination letter to explain the Claimant's dismissal, and that it was responsible for assessing the evidence to see what led to the dismissal.

Did the General Division fail to consider whether the employer's vaccination policy was part of the Claimant's employment contract?

[26] The Claimant argues that the General Division failed to consider whether his employer's vaccination policy formed part of his employment contract. He argues that, as vaccination was not required under his contract, he did not have to comply with it. And, if he did not have to comply, then he says misconduct did not arise.

[27] The Claimant made this point in his Notice of Appeal to the General Division. He noted that the Commission had advised him that misconduct arises if his conduct prevented him from completing his normal duties for which he had been hired to perform. He questioned how refusing vaccination prevented him from completing his normal job duties as an engineer, for which he had been hired.¹⁴

[28] The Claimant also argued in his Notice of Appeal that under section 6.5.10 of the Digest of Benefit Entitlement Principles, he could expect his employer to respect the terms of the employment agreement.¹⁵

[29] It is clear that the Claimant made these arguments at the General Division. The General Division should have addressed the Claimant's arguments that he did not have to comply with the vaccination policy because it did not form part of his employment contract.

¹⁴ See Notice of Appeal to General Division, filed June 21, 2022, at GD 2-14.

¹⁵ See Claimant's arguments, at GD 2-4 and GD 2-8.

Did the General Division fail to consider the legality of the employer's vaccination policy?

[30] The Claimant argues that the General Division failed to consider the legality of his employer's vaccination policy. He argues that misconduct does not arise if he did not comply with an unlawful policy. He claims that the vaccination policy was unlawful as it violated several laws.

[31] The Commission agrees that the General Division did not address the Claimant's argument on this point. The General Division should have addressed the Claimant's argument that his employer's vaccination policy was unlawful, and that misconduct did not arise if he did not comply with the policy.

Fixing the error

[32] Unless the outcome remains the same, the Appeal Division has two options for fixing errors: it can return to the matter to the General Division for a redetermination or it can give the decision that the General Division should have given in the first place.

[33] Generally, it would be appropriate to substitute one's own decision for the General Division decision if the underlying facts are not in dispute, the evidentiary record is complete, and the parties received a fair hearing at the General Division and had a full and fair opportunity to present their case at the General Division.

[34] There were no procedural issues at the General Division. Each party had a full and fair opportunity to present their respective cases at the General Division.

[35] The parties agree on the basic underlying facts. The Claimant's employer introduced a vaccination policy that did not form part of the Claimant's original employment contract. The employer required employees to provide proof of vaccination or submit to weekly antigen testing. Non-compliance would lead to an unpaid leave of absence. After six weeks, the employer would pursue disciplinary action which could include termination. The Claimant did not comply with the employer's vaccination policy.

[36] For these reasons, I find it appropriate to give the decision that the General Division should have given. In other words, I will be considering the Claimant's arguments about the legality of the employer's vaccination policy and whether his employer's vaccination policy formed part of his employment contract.

– **Legality of policy**

[37] The Claimant denies that there was any misconduct. He says his employer's policy was unlawful. In particular, the Claimant argues that his employer's vaccination policy violated several laws and legal principles, including the *Canadian Bill of Rights*, the *Canadian Charter of Rights and Freedoms*, and the *Canadian Criminal Code*. He argues that, as the vaccination policy was unlawful, he did not have to comply with it. And, he says that if he did not have to comply, then there was no misconduct.

[38] In a case called *Cecchetto v Canada (Attorney General)*,¹⁶ the Federal Court addressed this very issue. Mr. Cecchetto argued that the decisions of both the General Division and the Appeal Division should be overturned because they did not deal with:

... his fundamental questions about the legality of requiring employees to undergo medical procedures (i.e. vaccination and testing) where the efficacy and safety of such procedures have not been established. He says that he has been fired because of his personal medical choices, and the decision-makers in his case have failed to address whether that was lawful.¹⁷

[39] The Court determined that neither the General Division nor the Appeal Division have any authority to assess or rule on the merits, legitimacy, or legality of a vaccination policy.¹⁸

[40] The Court found that the General Division and Appeal Division have a "narrow and specific role" which in that case was to determine why Mr. Cecchetto had been dismissed from his employment and whether that reason constituted "misconduct" for the purposes of the *Employment Insurance Act*.

¹⁶ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

¹⁷ See *Cecchetto*, at para 2.

¹⁸ See *Cecchetto*, at paras 46 to 48.

[41] The Court found that it was not unreasonable that neither the General Division nor the Appeal Division addressed Mr. Cecchetto's legal arguments. The arguments simply fell outside the scope of the General Division and Appeal Division's legal mandate or jurisdiction.

[42] The Claimant urges me to disregard *Cecchetto* as he says it would lead to an absurd outcome. He argues that an employer cannot ask an employee to do something that they do not have right to do, such as, for instance, requiring an employee to perform a sexual act. He says that if an employee refused and then the employer dismissed that employee, surely that would not constitute misconduct. The Commission agrees that, for this particular example from the Claimant, there would be no misconduct.

[43] I have to decide this appeal based on the facts before the General Division. And, based on those facts, the Court has made it clear that I do not have any authority to address the merits, legitimacy, or legality of his employer's vaccination policy in deciding whether the Claimant lost his job because of misconduct.

[44] The Court also made it clear that, while the Claimant may not be satisfied with the Employment Insurance scheme, "there are ways in which his claims can properly be advanced under the legal system."¹⁹

– **The Claimant's employment contract required him to comply with his employer's vaccination policy**

[45] The Claimant argues that, if his employer did not already specifically include the vaccination policy in the original employment contract, that it could not later bring in a new policy and require him to comply with it.

[46] The Claimant argues that misconduct did not arise because he performed all of the duties required of him under the terms of his employment agreement. He says that

¹⁹ See *Cecchetto*, at para 49.

non-compliance with the vaccination policy did not prevent him from carrying out his duties and did not impact his ability to perform them.

[47] The Claimant and employer entered into an employment relationship in March 2021. The Claimant notes that, by then, the pandemic was peaking. Vaccines were about to become widely available. In other words, he says that his employer could have included the vaccination policy in the employment contract, but it did not.

[48] The Claimant's employment contract is set out at pages GD 2-42 to GD 2-46 of the General Division hearing file.²⁰ The document is titled, "Confidential Offer of Employment."

[49] Under the heading "Company Rules & Safety Procedures," the agreement reads:

You agree that you will adhere to all Employer policies, rules, systems and procedures as outlined in the [employer] Employee Handbook and Health & Safety procedures that are in place during your employment. [The employer] requires acknowledgement of your receipt and acceptance of the Employee Handbook and relevant policies no later than one week after employment commences. [The employer] reserves the right to change (add or delete) the provisions of any of these at any time.

[50] While the employment contract did not specifically include anything about getting vaccinated, it gave the employer wide latitude to change its policies, rules, systems, and procedures. As the Claimant had agreed to adhere to all policies, this necessarily extended to the employer's vaccination policy.

[51] The employer viewed the vaccination policy as part of its health and safety procedures. As it set out in the vaccination policy, it was "committed to providing a safe working environment."²¹ It expected all workers to be vaccinated against Covid 19 and other viruses, "as recommended by the Ontario Ministry of Health."²² It also wrote that it

²⁰ See conditional offer of employment, dated March 3, 2021, at GD 2-42 to GD 2-46.

²¹ See employer's vaccination policy, at GD 2-27 (also at GD 3-28 and GD 3-34).

²² See employer's vaccination policy, at GD 2-27.

expected compliance with “applicable health and safety measures to reduce the hazard of Covid-19 virus.”²³

[52] The broad provisions of the employment contract to which the Claimant had agreed required him to comply with his employer’s vaccination policy.

Conclusion

[53] The appeal is dismissed. The General Division misstated the Claimant’s evidence. It also failed to consider whether the employer’s vaccination policy formed part of the Claimant’s employment contract and the legality of the employer’s policy. Although the General Division misstated the evidence and failed to consider some of the Claimant’s arguments, the outcome remains the same.

Janet Lew
Member, Appeal Division

²³ See employer's vaccination policy, at GD 2-27.