Citation: *TM v Canada Employment Insurance Commission*, 2023 SST 193

Social Security Tribunal of Canada
Appeal Division

Decision

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

Decision under appeal:	General Division decision dated July 20, 2022 (GE-22-986)

Tribunal member:	Melanie Petrunia
Type of hearing:	Videoconference
Hearing date:	December 19, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 23, 2023
File number:	AD-22-591

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, T. M. (Claimant) was placed on an unpaid leave of absence from her job for failing to comply with her employer's COVID-19 vaccination policy. She applied for regular employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving benefits because she was suspended due to her own misconduct.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division found that the Claimant was suspended because she did not comply with her employer's vaccination policy. It decided that this was misconduct and dismissed her appeal.

[5] The Claimant is now appealing the General Division decision. She argues that the General Division made an error of law and based its decision on an important error of fact. Specifically, the Claimant argues that the General Division failed to consider a meeting between the Claimant and the employer when determining whether she was aware that she could be suspended for not complying with the policy.

[6] I find that the General Division did not make any errors. For this reason, I am dismissing the Claimant's appeal.

Preliminary matters

[7] The Claimant submitted new evidence to the Tribunal after the hearing relating to her grievance. I have not taken this new evidence into consideration because it was not before the General Division.

[8] The Appeal Division generally does not accept new evidence about the issues that the General Division decided, with few very limited exceptions.[1] This is because the Appeal Division is not rehearing the case. The Appeal Division looks at the evidence that the General Division had before it and decides whether it made certain errors.

[9] I find that the new evidence does not fall into any of the exceptions allowing me to take it into consideration.

Issues

[10] The issues in this appeal are:

a) Did the General Division base its decision on an important error of fact by failing to take into consideration the meeting between the Claimant and her employer on September 21, 2021?

b) Did the General Division err in law in its application of the test for misconduct?

Analysis

[11] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[2]

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

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[1] The Federal Court of Appeal has said in a case called *Shamra* v *Canada (AG),* 2018 FCA 48, on a judicial review, the only exceptions where the Court can accept new evidence is where the new evidence provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly.
[2] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division did not base its decision on a factual error

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19. The Claimant received a copy of the policy on September 7, 2021. According to the policy, all employees had to provide proof of vaccination, or an approved medical or human rights code exemption, by September 20, 2021.[3]

[13] The medical exemption was available for employees with documented proof of anaphylaxis or a history of myocarditis/pericarditis. The human rights code exemption required that the employer's form be signed by a faith leader.

[14] Employees who were not vaccinated by September 20, 2021, were required to attend an education session and provide proof of a first dose of the vaccine by October 8 and a second dose by October 31, 2021.[4]

[15] The Claimant was not vaccinated by September 20, 2021, and did not have an approved exemption. She met with her employer on September 21 and September 27, 2021. At the meeting on September 21, 2021, the Claimant told her employer that she was trying to have her request for a human rights code exemption notarized.

[16] The Claimant testified before the General Division that she had a negative reaction to a vaccine in childhood and worried this could happen again.[5] She said that she told her employer about her concerns. The Claimant said that her employer told her that she had until October 7, 2021, to get vaccinated if she did not get an exemption from her doctor.[6]

[17] At the meeting on September 27, 2021, the Claimant provided her exemption request based on religious creed and requested to work from home while it was considered. She was placed on a leave of absence that day.[7]

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[3] General Division decision at para 17.
[4] General Division decision at para 17.
[5] General Division decision at para 18.
[6] General Division decision at para 18.
[7] General Division decision at para 20.

[18] The General Division found that the Claimant was aware of the employer's policy. It found that, at the time of the meeting on September 27, 2021, she knew that she could be suspended for not complying with the policy.[8]

[19] The Claimant argues that the General Division failed to consider the September 21st meeting when it found that the Claimant was aware, on September 27th, that she could be suspended from her employment. The Claimant says that she told the employer that she was in the process of obtaining an appointment with her doctor to find out if she could get the vaccine. She told her employer that she needed a medical opinion due to her previous allergic reaction.

[20] The Claimant argues that she was still waiting for a medical assessment at the time of the September 27th meeting. She says that she told this to her employer and did not think she could legally be disciplined while undergoing medical testing.

[21] The General Division found that the Commission met its burden to prove that the Claimant was suspended due to her misconduct. It found that the employer's policy required proof of vaccination or an exemption, by September 20, 2021.

[22] The General Division refers to the Claimant's evidence regarding the meeting with the employer on September 21, 2021.[9] It notes that the Claimant told her employer at that time that she was trying to get her request for an exemption based on creed notarized. She testified that she had concerns about having a negative reaction to the vaccine and her employer told her that she had until October 7, 2021, to be vaccinated, if she did not get an exemption from her doctor.

[23] The General Division doesn't specifically discuss this meeting when it explains why it found that the Claimant lost her employment due to her misconduct. However, the General Division reviewed the facts that it was relying on in making that determination.

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[8] General Division decision at para 53.
[9] General Division decision at para 18.

[24] The General Division found that the Claimant was aware of the vaccination policy and was aware that failing to comply with the policy could result in her suspension. In support of these findings, the General Division relied on the following findings of fact:

- the policy required proof of vaccination or an exemption by September 20, 2021;
- the Claimant did not provide proof of her vaccination status or secure an exemption by September 20th;
- she submitted a religious exemption form after September 20th but it wasn't signed by a religious leader as required by the policy; and
- she was trying to get assessed to see if she could get a medical exemption but had not provided proof of an exemption by September 20th. [10]

[25] The General Division relied on a letter in the file from the Claimant's employer dated September 27, 2021.[11] The letter refers to the meeting held that day and states that the Claimant was provided an opportunity to review the policy and participate in training. It also states that the Claimant confirmed that she will not comply with the policy, is unwilling to reconsider and understands that failing to comply could result in disciplinary action.

[26] The General Division also relies on a letter from the Claimant to the employer. In this letter she states, "I conscientiously object to participating in a compelled vaccination mandate."[12] The Claimant goes on to state that she cannot in good conscience cooperate with the employer's vaccination policy.[13]

[27] I have listened to the hearing before the General Division. The Claimant testified that she told the employer on the 21st that she was trying to get her religious creed exemption notarized and trying to get appointment with her doctor. She was asked what

[10] General Division decision at para 52.
[11] GD2-29
[12] General Division decision at para 45.
[13] GD3-65

the supervisor said in response. She stated that she didn't know, they were just reading from a page. She said that she did tell the employer that she could go into a walk-in clinic to get vaccinated if she got approval from a doctor. She understood that she had until October 7th to get first her vaccination.

[28] The General Division asked the Claimant if she was aware of the policy and the need to comply by September 20, 2021. She said that she knew she had to inform the employer by September 20th of her medical status.[14] She told the employer that she was in the process of getting her religious exemption notarized and didn't want to tell them her private medical information.[15] According to the evidence, the Claimant did not communicate this to the employer until after September 20, 2021.

[29] I find that the General Division's findings are supported by the evidence. While the Claimant may have believed that her employer had a duty to accommodate her, she was also aware that she was not vaccinated and did not have an approved exemption by the deadline in the policy. The letter from the employer confirms that the Claimant was aware of the consequences of not complying.

[30] I am not allowed to reweigh the evidence.[16] The General Division's determinations were made with regard to the evidence before it. Not specifically referring to the Claimant's evidence regarding the meeting on September 21st in its analysis is not an error of fact made in a perverse of capricious manner. The General Division's findings are supported by the evidence in the file.

[31] The General Division's reasons show that it understood the Claimant's evidence regarding the meeting on September 21, 2021. The Claimant argues that the General Division did not consider these acts when applying the test for misconduct. The General Division supported its findings with relevant evidence. I cannot intervene on the basis of a disagreement with the application of settled legal principles to the facts of a case.[17]

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[14] Recording of hearing before the General Division at approximately 29:45.
[15] Recording of hearing before the General Division at approximately 1:08:00.
[16] see *Rouleau v Canada (Attorney General*), 2017 FC 534.
[17] See *Garvey v Canada (Attorney General),* 2018 FCA 118.

The General Division did not err in law

[32] The Claimant argues that the General Division misconstrued her argument when it found that she was asking to be accommodated. She argues that the fact that she was undergoing medical testing means that it was reasonable for her to assume she would not be disciplined. This is because the employer has a duty to accommodate her.

[33] Both the Claimant's submissions and testimony before the General Division confirmed that she received the employer's policy on September 7, 2021. She was aware that the policy stated employees had to show proof of vaccination or a medical or creed exemption by September 20, 2021. She was also aware that failing to comply could result in discipline.[18]

[34] The General Division set out the legal test for misconduct. It noted that there is misconduct if a claimant knew, *or should have known*, that she could be disciplined as a result of her conduct.[19]

[35] It is not clear from the record that the General Division misconstrued the Claimant's arguments. In the Claimant's Notice of Appeal to the General Division, she refers to communications with the employer and ongoing efforts to be medically evaluated after the date of her suspension. The Claimant argues that she was prematurely terminated before she could determine if she could medically comply with the policy.

[36] The General Division notes in its decision that the Claimant was ultimately terminated on February 14, 2022. Its jurisdiction was limited to the reconsideration decision concerning the Claimant's suspension and it made no findings with respect to the termination.[20] It is unclear from the record that the Claimant was arguing that she did not believe that she could be subject to <u>any</u> discipline while waiting for medical testing.

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[18] GD2-12
[19] General Division decision at para 24.
[20] General Division decision at para 57.

[37] The Claimant highlights that she argued that she reasonably believed she could not be disciplined, not that she was asking to be accommodated. I don't find that this argument was sufficiently clear such that it was an error of law for the General Division not to clearly address it. Furthermore, I have found above that there was sufficient evidence that the Claimant was aware of the potential consequences of failing to adhere to the policy.

[38] I find that the distinction in the argument that the Claimant refers to would not have had any bearing on the outcome given the General Division's factual findings concerning the Claimant's awareness of the September 20th deadline in the policy and the potential consequences of not complying.

[39] The General Division applied the proper legal test to the facts. It did not make an error when it concluded that the Claimant was not in compliance with the employer's policy when she was suspended. It found that this conduct was conscious and that she knew of the potential consequences. Based on these determinations, the General Division found that the requirements for misconduct under the EI Act were met.

[40] I find that the Claimant's arguments do not show an error of law by the General Division. The General Division did not base its decision on an important error of fact when it concluded that the Claimant was suspended because of misconduct.

Conclusion

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

Melanie Petrunia
Member, Appeal Division