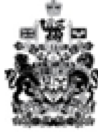

Citation: *WW v Canada Employment Insurance Commission*, 2023 SST 368

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	W. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated October 14, 2022 (GE-22-2423)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	February 14, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	March 27, 2023
File number:	AD-22-851

Decision

[1] The appeal is dismissed. The General Division did not consider (1) the legality of the employer's vaccination policy or (2) the issue about whether the Appellant, W. W. (Claimant), had to comply with a policy that was not part of his original employment agreement, but it would not have changed the outcome. The Claimant remains disqualified from receiving Employment Insurance benefits.

Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his employment because of misconduct. The Claimant had not complied with his employer's vaccination policy. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made jurisdictional and legal errors. In particular, the Claimant says the General Division failed to consider whether his employer's vaccination policy was lawful. He says that, if the General Division had considered the legality of the policy, it would have determined that the policy violated several laws. And that being the case, it would have concluded that there could have been no misconduct if he did not comply with the vaccination policy.

[4] The Claimant also argues that the General Division should have decided that he did not have to get vaccinated under the terms of his original employment contract. He says that the employer was not allowed to impose any new policies on him without his consent. So, he argues that non-compliance with his employer's new vaccination policy does not amount to misconduct.

[5] The Claimant asks the Appeal Division to allow his appeal and to find that there was no misconduct in his case.

[6] The Commission argues that the General Division did not make any errors. The Commission says that there was nothing unlawful about the employer's vaccination

policy and says employers may introduce such policies as it is consistent with their general duties to ensure workplace safety and health. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

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

b) Did the General Division fail to consider whether the Claimant had to comply with his employer's vaccination policy if his employment agreement did not require vaccination?

Analysis

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

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

[9] The Claimant argues that the General Division made a jurisdictional error. He argues that the General Division should have considered whether his employer's vaccination policy was lawful. He says that, if the General Division had accepted that is the policy was unlawful, it would have found that he did not have to comply with it, and that there was no misconduct.

[10] The General Division acknowledged the Claimant's argument that his employer's policy was illegal, discriminatory, and unfair, and that it violated several laws or legal principles.[2]

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[1] Section 58(1) of the *Department of Employment and Social Development Act*.
[2] See General Division decision, at paras 6 and 23.

[11] However, the General Division did not directly address the Claimant's arguments about the legality of the employer's policy. The General Division determined that the only issue it had to decide was whether the Claimant's actions met the definition of misconduct under the *Employment Insurance Act*.

[12] In granting leave to appeal on this matter, I noted that the Federal Court of Appeal had suggested that, as long as an employer's directive is lawful, an employee has to comply with that directive.[3] Failure to comply would be misconduct. I reasoned that what must flow from this is that if an employer's directive or policy is, on the other hand, unlawful, then there was an arguable case that an employee should not have to comply with such a policy and that it was arguable that there was no misconduct.

- ***Cecchetto v Canada (Attorney General)* says the legality of a vaccination policy is irrelevant to the misconduct question**

[13] The Federal Court has recently provided more clarity on this issue. In a case called *Cecchetto v Canada (Attorney General)*,[4] Mr. Cecchetto argued that the Federal Court should overturn the decision of the Appeal Division in his case. He said the Appeal Division had failed to deal with his questions about the legality of requiring employees to undergo medical procedures, including vaccination and testing.

[14] Mr. Cecchetto argued that because the efficacy and safety of these procedures were unproven, he should not have to get vaccinated. He says there were legitimate reasons to refuse vaccination. And, for that reason, he says misconduct should not have arisen if he chose not to get vaccinated.

[15] The Court wrote:

> [46] As noted earlier, it is likely that the Applicant [Ceccheto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.

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[3] See *Bedell*, A-1716-83.
[4] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> [47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted “misconduct.” …
>
> [48] **Despite the Claimant’s arguments, there is no basis to overturn the Appeal Division’s decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD**. [Citation omitted][5]
>
> (My emphasis)

[16] The Appeal Division did not make any findings in the *Cecchetto* case about the legality of the vaccination policy. The Court said it was simply beyond the Appeal Division’s scope. The Court determined that the Appeal Division has a limited role in what it can do. It is restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[17] It is clear from *Cecchetto* that the Claimant’s arguments about the legality of his employer’s vaccination policy are irrelevant to the misconduct question. For that reason, the General Division did not make an error when it decided that it could focus only on what the Claimant did or failed to do and whether that amounted to misconduct under the *Employment Insurance Act*.

Did the General Division fail to consider whether the Claimant had to comply with a policy that did not form part of his employment agreement?

[18] The Claimant argues that the General Division failed to consider whether he had to comply with his employer’s vaccination policy.

[19] The Claimant says that if the General Division had considered this issue, it would have found that the vaccination policy did not form part of his employment contract. As it was not part of his original employment contract, and as he says his employer was not allowed to impose new conditions of employment without his consent, he did not have

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[5] See *Cecchetto*, at paras 46 to 48.

to comply with the new policy. If he did not have to comply, he denies that there could have been any misconduct when he did not get vaccinated.

- **The Claimant relies on *AL v Canada Employment Insurance Commission***

[20] The Claimant relies on a case called *AL v Canada Employment Insurance Commission*.[6] In that case, the General Division examined whether AL lost her job because of misconduct. AL had not complied with her employer's vaccination policy. The General Division found there was no misconduct in AL's case because the employer had introduced a vaccination policy without consulting employees and getting their consent.

[21] The General Division determined that neither party could unilaterally impose new conditions to the employment agreement. The General Division found that only legislation allows an employer to act unilaterally and require compliance by an employee.[7]

[22] The Claimant argues that the General Division made an error in deciding that his recourse over any contractual issues was to pursue his case in a court or other tribunal. The Claimant argues that the same set of circumstances as in *AL* exist in his case. He also argues that the principles in *AL* apply (even if the General Division had not issued the *AL* decision until about two months after it issued its decision in his case).

[23] The General Division acknowledged the Claimant's argument that he was not contractually required to be vaccinated.[8]

- **An employer may unilaterally impose new terms outside the employment agreement**

[24] The fact that the employment agreement might not have contained any provisions for vaccination did not preclude the employer from unilaterally imposing new conditions or requirements on the Claimant.

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[6] See *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[7] See *AL*, at para 31.
[8] See General Division decision at para 33a).

[25] In *AL*, the General Division determined that neither party could unilaterally impose new conditions, but this finding is inconsistent with well-established law.

[26] In a unionized setting, an employer can unilaterally impose any rule or policy, even if the union disagrees, as long as it is consistent with the collective agreement and is reasonable.[9] This is what is called the “KVP test.” The courts have consistently endorsed this test.

[27] The Claimant’s employment was not in a unionized setting. But the courts have routinely used this approach outside the union setting.[10] In other words, as long as the employer’s policy or rule is consistent with the employment agreement and is overall reasonable, the employer may unilaterally impose new policies or rules.

- **The General Division has a limited role in the issues it can examine**

[28] If the Federal Court has determined that it lies beyond the scope of the General Division to assess the merits, legitimacy, or legality of an employer’s vaccination policy, then the same should also apply when the issue of the reasonableness of a vaccination policy arises.

[29] This would mean that the General Division has no role in deciding whether a vaccination policy is reasonable, whether it is for the purposes of assessing misconduct, or for some other purposes, such as in examining whether an employer can unilaterally impose a rule or policy in the workplace.

[30] After all, it would seem unreasonable if, on the one hand, the General Division has no mandate or jurisdiction to decide on the merits, legitimacy, or legality of a vaccination policy, but then, on the other hand, it was to have a broad mandate to decide on the reasonableness of that policy.

[9] See, for instance, *Communications, energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paras 25 to 26.
[10] See, for instance, *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

[31] The Federal Court has made it clear that the General Division and Appeal Division have a narrow and specific role. Their role is limited to determining why a claimant might have been dismissed from their employment and whether that reason constitutes misconduct.[11]

- **In the *Cecchetto* case, the Federal Court accepted that the employer could unilaterally impose a vaccination policy**

[32] In the *Cecchetto* case, the applicant relied on *AL,* much like the Claimant is in the appeal before me. Mr. Cecchetto argued that it is not misconduct to refuse to abide by a vaccine policy that an employer unilaterally imposed.

[33] It is clear from the evidence in the *Cecchetto* case that the applicant's employment agreement did not require vaccination. The applicant began his employment in 2017—well before the pandemic began. His employer later adopted the provincial health directive that required vaccination or regular testing. The employer adopted the policy unilaterally, without Mr. Cecchetto's consent.

[34] The Court noted this evidence. It was aware when Mr. Cecchetto started working and was aware that his employer adopted the provincial health directive. Mr. Cecchetto opposed the policy. The Court accepted that, even if vaccination did not form part of Mr. Cecchetto's original employment agreement, that his employer could subsequently introduce a policy that required vaccination.

[35] The Court found that the General Division had reasonably determined that Mr. Cecchetto had committed misconduct based on his non-compliance with that a policy that did not form part of his original employment agreement.

[36] The Court said that there could be some factual circumstances when *AL* is relevant. However, the Court made this comment in *obiter* and hence, it is not binding. Besides, the Court was quick to factually distinguish the case. It noted that in *AL*, the employer's policy required mandatory vaccination and did not provide for any

[11] See *Cecchetto*, at para 47.

exemptions or for testing as an alternative. Here, the Claimant's employer provided some accommodations, even if it did not extend any to the Claimant.

[37] While the Claimant's employment agreement did not require vaccination, it is clear from the *Cecchetto* case that an employer may introduce a new policy or rule, even if an employee disagrees with it and does not consent to it.

Conclusion

[38] The appeal is dismissed.

[39] The General Division did not fail to consider whether the employer's vaccination policy was lawful. The General Division simply did not have any authority to decide this issue.

[40] The General Division noted the Claimant's argument that he was not contractually required to be vaccinated. The General Division did not directly address this argument, but it would not have changed the outcome.

Janet Lew
Member, Appeal Division