Citation: *SJ v Canada Employment Insurance Commission*, 2023 SST 682

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. J.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated August 16, 2022 (GE-22-593)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	April 20, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	June 2, 2023
File number:	AD-22-670

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, S. J. (Claimant), a registered nurse, is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended and then lost her job because of misconduct. In other words, it found that she did something that caused her to be suspended and then dismissed. She had not complied with her employer's COVID-19 vaccination policy. The General Division found that there was misconduct.

[3] The General Division also found that the Claimant was not available for work. As a result, the General Division determined that the Claimant was not entitled to receive Employment Insurance benefits.

[4] The Claimant argues that the General Division made legal and factual errors. She argues that she did not have to comply with her employer's vaccination policy because it would have required her to disclose her vaccination status. She argues that she has a fundamental legal right to privacy, so she did not have to disclose her vaccination status. So, if she did not have to disclose her status, she says that her employer had no right to either suspend or dismiss her from her employment. She says that, in that case, there could have been no misconduct.

[5] The Claimant also argues that her employer's vaccination policy had to be interpreted in a manner that is consistent with and complies with existing laws, including the *Occupational Health and Safety Act* (OHSA). In the event of any conflict, she says the OHSA prevails. She says the OHSA says that one's privacy is paramount and supersedes her employer's rights to require disclosure of one's vaccination status.

[6] The Claimant notes her collective agreement did not require vaccination or disclosure of her vaccination status. She argues that, because her employer introduced

a new policy that was not part of her employment contract, she did not have to comply with the new policy. And, if she did not have to comply with the new policy, then she says that there was no misconduct if she did not comply with it.

[7] On the issue of availability, the Claimant argues that the evidence at the General Division showed that she was available for work. She acknowledges that she does not have details regarding her job search efforts, but says that Service Canada did not let her know that it was an issue. When she learned that her availability was an issue, it was too late for her to be able to collect this information.

[8] The Claimant asks the Appeal Division to allow the appeal and to find that she is entitled to receive Employment Insurance benefits.

[9] The Commission argues that the General Division did not make any errors on either the misconduct or availability issue. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

Misconduct

a) Did the General Division misinterpret misconduct?

b) Did the General Division fail to consider the Claimant's privacy rights when it considered whether there was misconduct?

c) Did the General Division fail to consider whether the employer's vaccination policy was consistent with various laws, including the OHSA?

d) Did the General Division fail to consider the Claimant's collective agreement?

e) Did the General Division fail to consider whether the Claimant's employer could have provided alternatives to its vaccination policy?

Availability

f) Did the General Division overlook any evidence regarding the Claimant's availability?

Analysis

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

[12] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Misconduct

Did the General Division misinterpret what misconduct means?

[13] The Claimant argues that the General Division misinterpreted what misconduct means. She claims that for misconduct to arise, there has to be an intentional or negligent breach of an obligation set out in the contract of employment.

[14] The Claimant also argues that misconduct is reserved for only certain behaviour or conduct. She says that past cases of misconduct did not involve making choices that impacted bodily integrity, whereas her employer's vaccination policy impacted her bodily integrity and autonomy and deprived her of any choice. She says that refusing to comply with her employer's vaccination policy fell far short of the type of behaviour that could be labelled as misconduct.

[15] The Claimant also says that because her employer did not prove that vaccination or disclosure of her vaccination status was necessary, that she did not have to comply with her employer's vaccination policy.

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

[16] The General Division defined misconduct as follows:

> [30] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted]
>
> [31] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law. [Citation omitted]
>
> [32] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out her duties toward his employer and that there was a real possibility of suspended or let go because of that. [Citation omitted]

[17] The General Division explained why it found that the Claimant conduct was wilful and why it amounted to misconduct. The General Division cited the definition of misconduct from several Federal Court of Appeal cases. The General Division relied on these decisions in coming to its definition of misconduct.

[18] The General Division applied the law to the facts. Its findings were consistent with the law and were based on the evidence before it. The General Division did not misinterpret what misconduct means. The General Division did not make an error when it defined misconduct as it relied on the definition for misconduct that the courts have long established.

[19] In part, the Claimant disputes how the General Division applied the definition or the law to the facts of her case.

[20] As the Federal Court of Appeal set out in a case called *Quadir*,[2] the application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. The Appeal Division does not have any jurisdiction to interfere with General

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[2] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9. Affirmed by *Stavropoulos v Canada Attorney General)*, 2020 FCA 109.

Division decisions on matters of mixed fact and law. I will not consider the Claimant's arguments where they concern questions of mixed fact and law.

Did the General Division fail to consider the Claimant's privacy rights when it considered whether there was misconduct?

[21] The Claimant had privacy concerns over the vaccination policy. She preferred not to disclose her vaccination status. She says that her actions were based on applicable privacy laws. So, she says that as she was within her rights not to disclose her vaccination status, there could have been no misconduct.

[22] The General Division acknowledged the Claimant's arguments over her privacy concerns. The General Division determined that it did not have any authority to decide the issue about her privacy rights, so she had to seek any remedies elsewhere.

[23] The General Division correctly identified the scope of its authority. The General Division was limited to determining whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*. So, while the Claimant was trying to protect her privacy rights, at the same time, her employer continued to require compliance with its vaccination policy.

[24] The General Division had to focus on:

- what was required of the Claimant by her employer's vaccination policy,
- whether the Claimant met her employer's requirements under that policy, and
- whether the Claimant's behaviour amounted to misconduct.

The Claimant's privacy concerns were irrelevant to the misconduct question.

[25] This is not to say that the Claimant is without her remedies where her privacy is concerned. The Claimant may well have remedies available to her against her employer

for any breaches of her privacy rights or for not taking appropriate steps to safeguard her privacy. But that is a matter for another forum.

Did the General Division fail to consider whether the employer's vaccination policy was consistent with various laws?

[26] The Claimant argues that the General Division failed to consider the legality of her employer's vaccination policy and whether it was consistent with various laws.

[27] The Claimant says that her employer did not have any legal authority to impose its vaccination policy on her because it was inconsistent with existing laws. She says that the policy violated her rights to bodily integrity and autonomy, and violated the Nuremberg Code. She says the policy was discriminatory.

[28] The Federal Court has addressed this issue. In a case called *Cecchetto v Canada (Attorney General)*,[3] 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.

[29] The Court wrote:

> [46] As noted earlier, it is likely that the Applicant [Cecchetto] 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.
>
> [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 [the vaccination policy]. That sort of**

[3] *Cecchetto v Canada (Attorney General*), 2023 FC 102.

> **finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.** [Citation omitted][4]
>
> (my emphasis)

[30] 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 very 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.

[31] I understand that Mr. Cecchetto is seeking to appeal his case. However, I am required to follow the law as it currently stands, and that includes applying the Federal Court's decision in *Cecchetto*.

[32] Given the Court's decision in *Cecchetto*, it is clear that the Claimant's arguments about the legality of her 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 the Claimant's collective agreement?

[33] The Claimant argues that the General Division failed to consider the terms and conditions of her collective agreement. She argues that, if the General Division had considered her collective agreement, it would have determined that she did not have to undergo vaccination. The collective agreement did not say anything about having to get vaccinated.

[34] The General Division did not address this argument, although the Claimant clearly raised it in her Notice of Appeal to the General Division.[5]

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[4] See *Cecchetto*, at paras 46 to 48.
[5] See Claimant's Notice of Appeal – Employment Insurance – General Division, at GD 2-10.

[35] This was the same argument that was raised in *Cecchetto*.[6] Mr. Cecchetto's employment agreement did not require vaccination. He began working for his employer in 2017, well before the pandemic began. His employer later adopted the provincial health directive that required it to implement vaccination or regular testing. The employer adopted the policy unilaterally, without Mr. Cecchetto's consent.

[36] 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, his employer could subsequently introduce a policy that required vaccination. The Court did not examine the reasonableness of the employer's vaccination policy, nor examine whether it was consistent with the employment agreement or with any laws.

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

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

[39] As an aside, it has become well established that, in a unionized setting, an employer may unilaterally bring in new policies or rules, even if the union disagrees. An employer can do this if it meets what is generally known as the "KVP test." The test arises out of Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[7]

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[6] See *Canada (Attorney General) v Cecchetto*, 2023 FC 102.
[7] *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1695), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (O.N.L.A.). The new rule or policy has to satisfy certain requirements. For instance, it must not be inconsistent with the collective agreement, must not be unreasonable, must be clear and unequivocal, must be brought to the attention of the employee affected before the company can act on it, the employee must have been notified that a breach of the new rule could result in their dismissal if the rule is used as a basis for dismissal, and the company should have consistently enforced the rule.

[40] Under the “KVP test,” the new rule or policy has to satisfy certain requirements. One of these requirements is that the new rule or policy cannot be unreasonable.

[41] In *Cecchetto*, the Court did not consider nor address the “KVP test.” The Court held that it was beyond the jurisdiction or authority of the General Division (and Appeal Division) to address the merits, legitimacy, and legality of an employer’s policy. So, if the Court determined that the General Division could not consider the legality of a policy, it would make little sense that the General Division would have the authority to consider its reasonableness.

[42] The Court briefly addressed *A.L.*, a decision issued by the General Division. In that case, the General Division found that A.L.’s employer had unilaterally introduced a vaccine policy. A.L. did not comply with the vaccine policy. Even so, the General Division found that there was no misconduct. Among other things, the General Division found that the collective agreement in that case expressly allowed A.L. to opt out of vaccination.

[43] The Court distinguished *A.L.* on its facts. It noted that the General Division found that there were specific provisions within A.L.’s collective agreement regarding vaccination.

[44] Here, the General Division did not have a copy of the Claimant’s collective agreement to determine whether there were any provisions regarding vaccination or other. So, even if I were to agree with the reasoning set out in *A.L.*, the evidence falls short of being able to claim *A.L.* to be applicable.

Did the General Division fail to consider whether the Claimant’s employer could have provided her with alternatives to its vaccination policy?

[45] The Claimant argues that the General Division failed to consider whether her employer could have provided alternatives to its vaccination policy. She says, for instance, that her employer could have accepted infection control measures. She says

such measures would not have jeopardized workplace safety. She was always agreeable to undergo testing and educate herself.

[46] The General Division noted the Claimant's argument that her employer failed to accommodate her because she was willing to do rapid testing. The General Division determined that it did not have the authority to decide whether the Claimant's employer failed to accommodate her.

[47] The General Division's ruling in this regard is consistent with the legal authorities. In a case called *Mishibinijima*,[8] the Federal Court of Appeal held that the issue of whether an employee should have received an accommodation is an irrelevant consideration when it comes to the question of misconduct.

[48] So, the General Division correctly determined that it did not have the authority to decide whether the Claimant should have received an exemption from the employer's vaccination policy, for the purposes of deciding whether there was any misconduct.

Availability

Did the General Division overlook any evidence regarding the Claimant's availability?

[49] The Claimant argues that the General Division overlooked some of the evidence that showed that she was available for work.

[50] The Claimant acknowledges that she does not have details regarding her job search efforts, but says that Service Canada did not let her know that it was an issue. When she learned that her availability was an issue, it was too late for her to be able to collect this information.

[51] A factual error under section 58(1) of the *Department of Employment and Social Development Act* arises when the General Division bases its decision on an erroneous

[8] *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 17.

finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[52] Thus, for such a factual error to have arisen, the General Division had to have based its decision on a finding of fact that it made without regard for the material before it. So, if the General Division overlooked some of the evidence, this would be a basis for the Appeal Division to intervene.

[53] However, that is not the case here. The General Division made its decision based on the evidence that was before it. The Claimant may have been unaware of the evidence that she had to collect to show that she was available for work, but she was not forthcoming with some of the evidence that she did have. On top of that, the General Division did not cause or lead the Claimant to be unaware of her obligations, or somehow prevent her from being able to provide this information.

[54] The General Division did not overlook the evidence. There simply was little supporting evidence that showed that the Claimant was available for work, other than the Claimant's own assertions. The General Division was entitled to draw the conclusions that it did on the evidence that was before it.

Conclusion

[55] The appeal is dismissed.

[56] The General Division did not address one of the Claimant's primary arguments. It did not consider the Claimant's collective agreement. Even so, this would not have changed the outcome.

[57] The General Division did not make any errors when it concluded that there was misconduct and that the Claimant had not proven that she was available for work.

Janet Lew
Member, Appeal Division