



Citation: *JH v Canada Employment Insurance Commission*, 2023 SST 508

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** J. H.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** J. Villeneuve

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**Decision under appeal:** General Division decision dated October 14, 2022  
(GE-22-2021)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference  
**Hearing date:** February 1, 2023  
**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** April 25, 2023  
**File number:** AD-22-769

## Decision

[1] The appeal is dismissed. The General Division did not make any reviewable errors when it found that the Claimant lost her job due to misconduct.

## Overview

[2] The Appellant, J. H. (Claimant), was dismissed 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 disqualified from receiving EI benefits because she lost her job due to her own misconduct. The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal.

[4] The Claimant is now appealing the General Division decision. She argues that the General Division made an error of law by agreeing with her employer and finding that she was dismissed for misconduct. She says that her dismissal violated her right to religious freedom and that this was discriminatory and unconstitutional.

[5] The Claimant also argues that the General Division erred in law when it found that the vaccination policy became a condition of the Claimant's employment when it was implemented by the employer.

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

## Issues

[7] The issues in this appeal are:

- a) Did the General Division err in law by failing to consider whether the employer discriminated against her when it denied her religious exemption request?

- b) Did the General Division err in law when it found that the vaccination policy became a condition of the Claimant's employment?

## Analysis

[8] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>1</sup>

- 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.

## The General Division did not make an error of law

### – Background facts

[9] The Claimant worked as a registered nurse. Her employer introduced a policy requiring vaccination against COVID-19 in August 2021. The policy was updated twice, in November and December 2021. The policy required employees to be fully vaccinated by February 7, 2022.<sup>2</sup>

[10] Initially, the policy allowed for employees who were not vaccinated to attend an education session and be tested twice a week. When the policy was updated, employees were required to be fully vaccinated unless they had an exemption.<sup>3</sup>

[11] The policy provided that disciplinary action would be taken against employees who did not comply, including termination.<sup>4</sup> The Claimant requested an exemption from

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<sup>1</sup> 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).

<sup>2</sup> General Division decision at paras 12 and 13.

<sup>3</sup> General Division decision at paras 12 and 13.

<sup>4</sup> General Division decision at para 12.

the policy for religious reasons which was denied. She did not get vaccinated. The Claimant was placed on an unpaid leave of absence for two weeks and then dismissed.<sup>5</sup>

– **The General Division decision**

[12] The General Division found that the reason the Claimant was dismissed was because she did not comply with the employer's vaccination policy. It then considered whether this reason is considered misconduct under the law.

[13] The General Division summarized the legal principles relevant to questions of misconduct based on case law from the Federal Court and the Federal Court of Appeal.<sup>6</sup> It found that the Commission had proven that there was misconduct. It based this finding on the following facts:

- The Claimant knew about the vaccination policy;
- She knew that she could be dismissed if she failed to follow the policy;
- The Claimant made a decision not follow the policy;
- This decision was conscious deliberate and intentional; and
- The Claimant was aware of the consequences of not following the policy.<sup>7</sup>

[14] The General Division took into consideration the Claimant arguments. She argued that her employer denied her religious exemption, which contravened the *Charter of Rights and Freedoms* and other laws.<sup>8</sup>

[15] The General Division found that the conduct of the employer is not relevant when determining whether the employee was dismissed for misconduct. The General Division

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<sup>5</sup> General Division decision at para 15.

<sup>6</sup> General Division decision at paras 22 to 24.

<sup>7</sup> General Division decision at para 34.

<sup>8</sup> General Division decision at para 35.

noted that there are other forums for making these arguments and that it had to focus its analysis on the Claimant's conduct.<sup>9</sup>

– **The Claimant's appeal**

[16] The Claimant argues that the General Division made an error of law. She says that she was terminated from her employment because her employer denied her request for an exemption based on her religious beliefs. She argues this was discriminatory and a violation of her Charter rights and that there was no misconduct.

[17] The Claimant says that she presented her employer with a letter from her pastor saying that she should be exempted from vaccination based on her sincere and firm religious beliefs. The employer unjustly denied her request and terminated her employment for misconduct.

[18] The Claimant argues that the General Division erred because it failed to properly consider that the employer discriminated against her when it denied her religious exemption request. Both the employer and the Commission disregarded her religious exemption request.

[19] The Claimant also argues that the General Division erred when it found that the vaccination policy became a condition of her employment. She says that the employer introduced a new policy without her consent. There was no vaccination requirement in her contract and not abiding by a new policy cannot be misconduct.

[20] The Commission argues that the General Division did not make any reviewable errors. It says that the reasonableness of the policy is not relevant to whether or not the Claimant's actions amount to misconduct.

[21] The Commission says that the General Division considered the Claimant's argument concerning the employer's denial of her exemption request. It says that there was no error of law in the General Division's decision when it concluded that there are

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<sup>9</sup> General Division decision at para 35.

other forums for these arguments and it isn't within the Tribunal's jurisdiction to decide if the Claimant's rights were violated.

[22] I find that the General Division did not err when it is found that it could not consider the employer's conduct. The General Division discussed the Claimant's argument that her employer's denial of her exemption request contravened the Charter and other laws.<sup>10</sup>

[23] The General Division found that the Claimant can raise these arguments in other courts and tribunals. It stated that the conduct of the employer is not relevant because its analysis has to focus on the conduct of the employee. The General Division said that it was not making decisions about whether the Claimant has a course of action under other laws and is limiting its analysis to the *Employment Insurance Act*.

[24] The General Division did not err in this determination. A recent Federal Court decision also confirmed what the other decisions cited by the General Division stated concerning the ability of the Tribunal to make decisions about the conduct of the employer.

[25] In *Cecchetto v. Canada (Attorney General)*, the Federal Court considered an Appeal Division decision denying leave to appeal.<sup>11</sup> That case also concerned misconduct and a refusal by a claimant to be vaccinated. The claimant said that there were legitimate reasons for his refusal to be vaccinated and he questioned the legality of the vaccination mandate.

[26] The Court found that these issues are beyond the mandate of the Tribunal. It confirmed that the Tribunal plays a narrow role, determining why a claimant was dismissed and whether that reason constitutes misconduct.

[27] The Court said that it is not within the jurisdiction of the Tribunal to make decisions about the merits, legitimacy, or legality of a policy. This decision, along with the other cases relied on by the General Division, make it clear that the employer's

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<sup>10</sup> General Division decision at para 35(a).

<sup>11</sup> See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

conduct in denying the Claimant's exemption request is irrelevant to the misconduct issue.

[28] The General Division did not make an error when it decided that it could focus only on the Claimant's actions. The Claimant may have had a very good reason for not being vaccinated but she was aware of the policy and the fact that she could be terminated for failing to comply.

[29] The General Division also did not make an error of law when it found that the policy became a condition of the Claimant's employment. The General Division noted that the employer has the ability to manage the day-to-day operations of the workplace. It found that the mandatory vaccination policy became a condition of employment once it was adopted by the employer.<sup>12</sup>

[30] In *Cecchetto*, the claimant also argued that it is not misconduct not to abide by a policy introduced without the employee's consent. His original employment contract did not include any vaccination requirements.

[31] The Court accepted that the employer can introduce a policy requiring vaccination even if it was not part of the original employment agreement. The Court found that the General Division had reasonably determined that the claimant's non-compliance with the policy constituted misconduct.

[32] The General Division did not err in law when it found that the employer could introduce the policy and that it became a condition of the Claimant's employment.

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<sup>12</sup> General Division decision at para 35(c).

## **Conclusion**

[33] The appeal is dismissed.

[34] The General Division did not err by failing to consider whether the employer discriminated against the Claimant or violated her rights. This was not within its jurisdiction.

[35] The General Division did not err when it found that the vaccination policy became a condition of the Claimant's employment once it was adopted by the employer.

Melanie Petrunia  
Member, Appeal Division