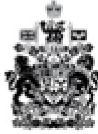

Citation: *GM v Canada Employment Insurance Commission*, 2023 SST 675

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated August 29, 2022 (GE-22-1680)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	December 15, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	June 1, 2023
File number:	AD-22-638

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, G. M. (Claimant), a procurement officer with the local transit authority, is appealing the General Division decision.

[3] The General Division found that the Claimant had been suspended from his job because of misconduct. In other words, it found that he did something that caused him to be suspended. He did not comply with his employer's COVID-19 vaccination policy. Having determined that there was misconduct, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made jurisdictional, legal, and factual errors when it found that there was misconduct in his case.

[5] The Claimant does not dispute the basic facts. He did not comply with his employer's vaccination policy because he did not agree with it. He found it over-reaching and heavy-handed. He says that his employer could have provided alternatives. He says the consequences for not complying with the policy were severe.

[6] The Claimant argues that the General Division made a legal error by failing to consider the fact that his collective agreement did not require him to get vaccinated. He also argues that the General Division misinterpreted what misconduct means. He says misconduct does not arise when a policy violates medical ethics and the *Canadian Charter of Rights and Freedoms*. He denies that his conduct was wilful so says there was no misconduct. He asks the Appeal Division to allow his appeal and find that he was not disentitled from receiving Employment Insurance benefits.

[7] The Respondent, the Canada Employment Insurance Commission (Commission) argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

(a) Did the General Division misinterpret what misconduct means?

(b) Did the General Division fail to apply *Syndicat Northcrest v Amselem*?

(c) Did the General Division fail to apply *T.C. v Canada Employment Insurance Commission*?

(d) Did the General Division fail to consider whether the employer's vaccination policy violated the *Canadian Charter of Rights and Freedoms* or was medically unethical?

(e) Did the General Division fail to consider the fact that the Claimant's collective agreement did not require vaccination?

(f) Did the General Division fail to consider whether the Claimant's employer could have provided him with alternatives to vaccination?

Analysis

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

[10] 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.

Did the General Division misinterpret what misconduct means?

[11] The Claimant argues that the General Division misinterpreted what misconduct means. He says that misconduct did not arise because he was exercising his freedom of conscience and religion when he did not comply with his employer's vaccination

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

policy. He says that he had a right to either refuse or accept vaccination. So, he says that the General Division made a mistake in finding that there was misconduct when he refused vaccination.

[12] The Claimant notes that the General Division relied on several decisions of the Federal Court of Appeal. But he says that those cases are factually distinguishable. He says those cases involve applicants who were not performing their duties at work.

[13] In his case, he says that nothing changed from the time that he began working from home to the time that his employer introduced its vaccination policy. He says that he was able to continue working from home and was able to continue performing all of his duties without having to undergo vaccination.

– **The General Division decision**

[14] The General Division defined misconduct as follows:

> 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] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to be doing something wrong) for his behaviour to be misconduct under the law. [Citation omitted]
>
> There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that. [Citation omitted][2]

[15] The General Division concluded that the Commission had proven that there was misconduct because it provided documentation from the employer that employees had to be fully vaccinated. Further, the General Division found that the Claimant had confirmed to the Commission that he was aware of his employer's vaccination policy and the consequences of failing to comply.

[2] See General Division decision, at paras 23 and 24.

[16] The General Division acknowledged that the Claimant had testified that his employer changed the terms of his collective agreement by introducing a vaccination policy. Even so, the General Division noted that the Claimant confirmed that he was aware that his employer could dismiss him for failing to comply with the vaccination policy. The General Division found that the Claimant's conduct was wilful because he made a conscious, deliberate, and personal choice not to comply with his employer's vaccination policy. So, it found that he lost his job because of misconduct.

[17] The Claimant denies that there was any misconduct. He denies that his conduct was wilful. He cited a case from New York,[3] but that case has no relevance. That case did not deal with misconduct under the *Employment Insurance Act*.

[18] The General Division explained why it found that the Claimant's conduct was wilful and why it amounted to misconduct. The General Division cited the definition of misconduct from several Federal Court of Appeal cases. It applied the law to the facts. Its findings were consistent with the law and based on the evidence before it. The General Division did not misinterpret what misconduct means.

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

[20] As the Federal Court of Appeal set out in a case called *Quadir*,[4] 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 Division decisions on matters of mixed fact and law.

[21] So, I will not consider the Claimant's arguments where they concern question of mixed fact and law.

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[3] See Claimant's submissions, at AD 2-12.
[4] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9. Affirmed at *Stavropoulos v Canada Attorney General)*, 2020 FCA 109.

Did the General Division fail to apply *Syndicat Northcrest v Amselem*?

[22] The Claimant argues that the General Division failed to apply *Syndicat Northcrest v Amselem*.[5] He says that this Supreme Court of Canada decision establishes that he was entitled to religious accommodation. He says his employer could not refuse his request when he asked to be exempted from its vaccination policy for religious reasons. He says that he did not have to show any objective religious obligation or requirement for him to invoke his religious freedoms.

[23] The Claimant argues that, as he was entitled to a religious accommodation, his employer was wrong to have suspended him from his employment. So, he says that there was no misconduct in his case.

[24] The Claimant argues that the General Division should have applied this decision in his case. That way, he says the General Division would have determined that he was entitled to a religious accommodation. And, it would have decided then that he did not have to get vaccinated, so there could have been no misconduct for non-compliance with the vaccination policy.

[25] The General Division acknowledged the Claimant's arguments. The General Division determined that it did not have the jurisdiction to decide whether the Claimant's employer infringed on the Claimant's religious rights. It determined that this was the role of other judicial authorities. The General Division noted that the Claimant exercised his rights by complaining to provincial authorities.[6]

[26] The General Division properly understood its limited role and the scope of its jurisdiction. It did not have the jurisdiction to decide whether the Claimant should have received a religious accommodation. As the Federal Court of Appeal ruled in *Mishibinijima v Canada (Attorney General)*,[7] the issue of whether an employer has a

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[5] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551.
[6] See General Division decision at paras 40 to 43.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

duty to accommodate an employee is an irrelevant consideration when it comes to the question of misconduct.

[27] Ultimately, the only issue that the General Division had to decide was whether the Claimant's actions met the definition of misconduct under the *Employment Insurance Act*.

[28] To be clear, I am not making any ruling, one way or the other, about the Claimant's entitlement to a religious accommodation. But the Claimant's recourse against his employer for any failure to appropriately provide accommodation lies elsewhere.

Did the General Division fail to apply *T.C. v Canada Employment Insurance Commission*?

[29] The Claimant argues that the General Division failed to apply its decision in *T.C. v Canada Employment Insurance Commission*.[8] The Claimant says that the *T.C.* decision shows that the decision in his case was unfair because his employer never complained about his performance either and did not reasonably accommodate him.

[30] In *T.C.*, the General Division found that the Commission had not proven that there was misconduct. The General Division found that T.C.'s employer had not given sufficient notice of its vaccination policy to T.C. before it dismissed him. The employer had given T.C. only two days to be vaccinated, and there was no written notice. The General Division also found that T.C. did not know and could not have known what the consequences would be if he did not comply with his employer's vaccination policy.

[31] The employer's satisfaction with T.C.'s work performance had no bearing on the outcome in *T.C.* The General Division allowed the appeal in *T.C.* because the applicant there had been unaware of the consequences if he did not comply with his employer's

[8] See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891 (The Social Security Tribunal file number is GE-22-829.)

policy, and because he did not have adequate notice of the policy to be able to comply within a reasonable timeframe.

[32] The *T.C.* decision is not relevant to the Claimant's circumstances. The evidence clearly shows that the Claimant's employer gave adequate notice of its vaccination policy, and that the Claimant was or should have been aware of the consequences of non-compliance. So the General Division did not make a legal error by not applying *T.C.* in the Claimant's case.

Did the General Division fail to consider whether the employer's vaccination policy violated the *Canadian Charter of Rights and Freedoms* or was medically unethical?

[33] The Claimant argues that the General Division failed to consider whether his employer's vaccination policy violated the *Canadian Charter of Rights and Freedoms* or was medically unethical.

[34] The Claimant argues that his employer's vaccination policy was medically unethical and that it violated the *Canadian Charter of Rights and Freedoms*. For that reason, he says that he did not have to comply with his employer's vaccination policy. He says that he had a right to consent to or refuse any medical treatment. He says that it is irrelevant whether that treatment could preserve life or health, though says that there is widespread evidence that COVID-19 vaccines are ineffective at addressing health and safety concerns.

[35] The Claimant argues that because he had a right to refuse vaccination, then he did not have to comply with the policy. And, if he did not have to comply, argues that there was no misconduct.

[36] The General Division acknowledged the Claimant's argument that his employer's policy was unethical and unconstitutional. The General Division concluded that the matter of whether the employer's vaccination policy was fair, reasonable, or constitutional was beyond its jurisdiction. The General Division determined that there were other avenues by which the Claimant could advance these arguments.

[37] Ultimately, 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*.

– ***Cecchetto v Canada (Attorney General)* says the merits, legitimacy, and legality of a vaccination policy are irrelevant to the misconduct question**

[38] The Federal Court has recently addressed whether the General Division should be considering whether an employer's vaccination policy has any merit, is legitimate, or lawful.

[39] In a case called *Cecchetto v Canada (Attorney General)*, 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.

[40] 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.

[41] 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.
>
> [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]
>
> (My emphasis)

[42] The Appeal Division did not make any findings in the Cecchetto case about the ethics or 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.

[43] It is clear from Cecchetto that the Claimant's arguments about the ethics or constitutionality 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 the fact that the Claimant's collective agreement did not require vaccination?

[44] The Claimant notes that his collective agreement did not require him to get vaccinated. He says that when his employer introduced its vaccination policy, it imposed a new condition of employment. But he says that as vaccination was not required under his employment agreement, he did not have to comply with the vaccination policy. So, he denies that there could have been any misconduct when he did not get vaccinated.

[45] The General Division acknowledged the Claimant's argument that his collective bargaining agreement did not require him to get vaccinated. The General Division did not directly address the Claimant's argument, but it is clear that it accepted that the employer could introduce a policy outside the collective bargaining agreement and that the Claimant would have to comply with that policy, as long as he had notice of that policy and knew what the consequences could be if he did not comply.

– An employer may unilaterally impose a new rule or policy

[46] 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. This is what is called the “KVP test.” The courts have consistently endorsed this test.

[47] Does this mean then that the General Division should have assessed the reasonableness of the employer’s vaccination policy? Because if the vaccination policy was unreasonable, then arguably, according to the KVP test, the employer was not allowed to unilaterally introduce its vaccination policy.

– The General Division has a limited role in what it can examine

[48] 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. That being the case, then the same should also apply when the issue of the reasonableness of a vaccination policy arises.

[49] This would mean that the General Division should have 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.

[50] After all, it would make little sense 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 were to have a broad mandate to decide the reasonableness of that policy.

[51] 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.

– In the *Cecchetto* case, the Federal Court accepted that the employer could unilaterally impose the policy

[52] In the Cecchetto case, the applicant Mr. Cecchetto argued that it is not misconduct to refuse to abide by a vaccine policy that an employer unilaterally imposed.

[53] 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.

[54] 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. The Court did not examine whether the policy was reasonable.

[55] 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.

[56] 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.

Did the General Division fail to consider whether the Claimant's employer could have provided him with alternatives to vaccination?

[57] The Claimant argues that his employer could have provided him with alternatives to vaccination. He worked remotely from home and could have continued working from home. His employer never mentioned that working remotely negatively impacted his performance. He also explains that he did not have any interaction with the public.

[58] While that may be true, as the Federal Court of Appeal ruled in *Mishibinijima*, the issue of whether an employer has a duty to accommodate an employee, i.e. provide alternatives, is an irrelevant consideration when it comes to the question of misconduct.

Conclusion

[59] The appeal is dismissed. The General Division did not misinterpret misconduct.

[60] The General Division also did not fail to consider whether the employer's vaccination policy was unethical or unconstitutional. The General Division simply did not have any authority to examine this issue. Its role is very limited. Its role is limited to examining why a claimant was dismissed from their employment and whether that reason constitutes misconduct. For the same reason, the General Division also did not fail to consider the Claimant's collective agreement.

[61] Finally, the General Division also did not fail to consider whether the Claimant's employer could have provided alternatives to vaccination. This was an irrelevant consideration when assessing whether misconduct took place.

[62] As the General Division noted, the Claimant may have avenues of recourse elsewhere to pursue his arguments.

Janet Lew
Member, Appeal Division