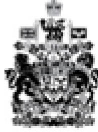

Citation: *BL v Canada Employment Insurance Commission*, 2023 SST 483

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. L.
Representative:	A. C.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated November 17, 2022 (GE-22-2839)

Tribunal member:	Melanie Petrunia
Type of hearing:	Videoconference
Hearing date:	February 8, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	April 21, 2023
File number:	AD-22-867

Decision

[1] The appeal is dismissed. The General Division erred in law by not addressing the Claimant's arguments, but the outcome is the same. The Claimant lost his job due to his own misconduct.

Overview

[2] The Appellant, B. L. (Claimant), was placed on an unpaid leave of absence and then terminated from his employment for failing to comply with his employer's COVID-19 vaccination policy. He applied for regular employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disqualified from receiving benefits because he was let go due to his own misconduct.

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

[5] The Claimant is now appealing the General Division decision. He argues that the General Division made an error of law and based its decision on an important error of fact. The Claimant says that the General Division failed to consider his arguments concerning Ontario's *Occupational Health and Safety Act* (OHSA).[1]

[6] I am dismissing the appeal. The General Division made an error of law by not considering one of the Claimant's arguments or providing reasons why it wasn't doing so. I find that this doesn't change the result. The Claimant was terminated due to his own misconduct.

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[1] *Occupational Health and Safety Act*, RSO 1990, c O.1

Preliminary matters

[7] This matter was initially scheduled to be heard on January 25, 2023. On January 24, 2023, the Commission wrote to the Tribunal to request an adjournment because the representative on the file had left on an unexpected and indefinite leave of absence.[2] The matter needed to be assigned to a new representative and the Commission advised that they would be available the week of February 6, 2023.

[8] The Claimant's representative was contacted by the Tribunal to determine his availability for a rescheduled hearing. I granted the Commission's adjournment request and the hearing was rescheduled for February 8, 2023, when both parties indicated they were available. On January 24th, the Commission also filed its written submissions, which was the statutory deadline.[3]

[9] On January 27, 2023, the representative for the Claimant filed submissions raising concerns regarding the granting of the adjournment and the Commission's submissions.[4] The Claimant requested the following relief:

a) That the Commission not be permitted to tender or lead the evidence provided at any date beyond January 24, 2023, including January 24, 2023 as a date;

b) Costs personally against the Commission's counsel on a substantial indemnity basis;

c) Costs personally against the Commission on a substantial indemnity basis;

d) The Claimant to be paid EI benefits in full until the proper hearing date; and,

e) An acknowledgement from the Commission that they committed an error of law, and a fresh member to lead this matter.[5]

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[2] AD6
[3] AD7
[4] AD8
[5] AD8-223

[10] The issues raised by the Claimant were addressed at the hearing as preliminary matters. I gave my decision on the relief sought orally, with the written reasons to follow with the decision on the merits of the appeal. These are my reasons.

[11] With respect to item (a), the Commission has not attempted to tender or lead any evidence. The written submissions that they provided do not refer to any evidence not already in the file. These submissions were provided by the deadline of January 24, 2023.

[12] The deadline for written submissions is established in section 55 of the *Social Security Tribunal Rules of Procedure*.[6] The parties must file any arguments no more than 45 days after the Tribunal grants leave to appeal. In this case, that deadline was January 24, 2023.[7]

[13] This deadline was also provided in the Notice of Hearing which was sent to the Claimant's representative.[8] He indicated at the hearing that he would have also filed written arguments if he had known he could. The Notice of Hearing clearly sets out that the parties may file written arguments and provides the deadline for doing so. The Claimant's representative also had the opportunity file written submissions and was advised of this opportunity.

[14] The Claimant argues that the adjournment request was a smokescreen to allow the later submission of new evidence which would otherwise have not been allowed. I find that:

a) There was no new evidence being submitted;

b) The submissions were filed by the deadline; and

[6] *Social Security Tribunal Rules of Procedure (Rules),* SOR/2022-256
[7] See section 55(1) of the Rules.
[8] See AD0-2 which states: "You have until January 24, 2023 to send us submissions (your arguments). Or, you can send us a letter stating that you have no submissions to file."

c) There is no evidence of ill-intent by the Commission in making the adjournment request.

[15] When asked about the assertion that the Commission was trying to admit new evidence, the Claimant's representatives argued that they refer to facts that were not part of the hearing before the General Division, noting the references to documents. He also argued that the Commission didn't attend the hearing at the General Division and should not be allowed to make arguments at the Appeal Division.

[16] Claimant's representative was adamant at the hearing that he did not have the documents marked GD3, the Commission's reconsideration file. He stated that he only had what he had, himself, filed with the Tribunal. I offered to adjourn the matter to ensure that the parties had all of the same documents that the Tribunal has.

[17] The documents marked GD3, the Commission's reconsideration file, are referred to throughout the General Division decision and the Commission's submissions. The representative wished to proceed with the hearing despite his insistence that he had not been provided with any of the documents referenced in the Commission's submissions.

[18] I have listened to the hearing before the General Division. During the preliminary remarks, the General Division asked the Claimant's representative (the same representative was at both the General and Appeal Division), if he received the package of documents sent to him by email on August 30th and September 7th. The representative confirms that he received them. Among these documents is GD3.[9]

[19] The Claimant's representatives argue that the Commission should not be permitted to rely on case law in their submissions because they did not provide copies or a Book of Authorities. I find no merit to these arguments.

[20] The Commission filed its submissions by the deadline. No new evidence was tendered and the parties are permitted to reference case law in their submissions. The Rules do not require the parties to provide copies of the case law referenced.

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[9] Recording of hearing before the General Division at 3:30 to 5:00.

[21] The Commission is also entitled to appear and make representations at the hearing before the Appeal Division despite not attending the General Division hearing in person. The Commission, as is often the case, chose to rely on written arguments at the General Division.

[22] With respect to items (b) and (c) above, I have no authority to order costs against the Commission or against a specific representative of the Commission.

[23] Similarly, for item (d), it is not within my jurisdiction to order that the Claimant be paid EI benefits on an interim basis.

[24] Finally, I cannot order that the Commission acknowledge that they committed an error of law. It is not within my jurisdiction nor is there any basis to conclude that they have committed an error of law.

– **Allegation of bias**

[25] The Claimant also requested at item (d) that a fresh member head this matter. I clarified at the hearing whether the request was for a new Commission representative or that I recuse myself. The Claimant argued that I should recuse myself. His position was that granting the adjournment demonstrated bias and the matter should be heard by another member of the Appeal Division.

[26] When a party alleges bias and makes a request that the Tribunal member recuse themselves, the member must decide whether the party has raised a reasonable apprehension of bias.[10]

[27] The Supreme Court of Canada has imposed a high standard of proof on parties alleging bias.[11] This is because there is a presumption of judicial and quasi-judicial neutrality. The test is whether an informed person, considering the matter realistically and practically, would conclude that the decision-maker is biased.

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[10] See *Grigorenko* v *Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8320.
[11] See *Committee for Justice and Liberty* v *Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

[28] The Claimant's evidence of bias was the fact that I had granted the adjournment request made by the Commission. He also relied on the fact that the adjournment was granted *ex parte*, meaning without asking the Claimant for his position. He says that the Rules do not allow this.

[29] The Rules address requests for adjournments. Rule 43 (3) states:

> The Tribunal may reschedule the hearing only if it is necessary for a fair hearing. The Tribunal decides whether to reschedule without asking the other parties for arguments unless fairness requires the Tribunal to ask.

[30] Rule 17 provides that the Tribunal hears appeals in a way that allows the parties to fully participate.

[31] I granted the Commission's request for an adjournment because I decided that that it was necessary for a fair hearing. The Commission was entitled to have a representative present in order to fully participate. The Claimant was not asked for his position, given the lateness of the request, but was asked for his availability to ensure that the matter could be rescheduled for the earliest possible date when all parties were available.

[32] I found that the fact that an adjournment request was granted does not give rise to a reasonable apprehension of bias and the test for recusal was not met.

Issues

[33] The issues in this appeal are:

a) Did the General Division err in law by failing to consider the Claimant's arguments concerning the *Occupational Health and Safety Act*?

b) Did the General Division base its decision on an important mistake about the facts?

c) If so, how should the error be fixed?

Analysis

[34] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[12]

- 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 overlooked the Claimant's argument

[35] The Claimant had the option, under his employer's vaccination policy, to undergo weekly testing in lieu of being vaccinated. If he had received a valid exemption, the employer would pay for the tests. Without an exemption, the Claimant was responsible for any associated costs.

[36] In his Notice of Appeal to the General Division, the Claimant argued that his employer was required to pay for his tests and compensate him for his time travelling to undergo testing. He relied on the OHSA. He argued that his termination was an improper reprisal because he acted in accordance with the OHSA.[13]

[37] I have listened to the hearing before the General Division and the Claimant reiterated these arguments. His representative referred again to the provisions in the OHSA outlined in the Notice of Appeal.

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[12] 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).
[13] GD2-5

[38] In its decision, the General Division found that the Claimant lost his job because he didn't comply with his employer's vaccination policy. He refused to provide proof of vaccination or have weekly testing.[14]

[39] The General Division found that the vaccination policy required employees to attest to being fully vaccinated or do weekly testing. The policy was communicated to the Claimant. The General Division found that the Claimant knew or should have known that he could be dismissed if he did not comply with the policy. It found that his decision not to report his vaccination status or do weekly testing was wilful.[15]

[40] The General Division acknowledged that the Claimant argued the employer should have paid for testing. He said that he would have considered weekly testing if the employer had paid for it. It noted that employees who were exempt from being vaccinated for religious or medical reasons would have their testing paid for by the employer. The Claimant did not request an exemption.[16]

[41] The General Division thoroughly reviewed the evidence. However, it did not address the Claimant's argument that the employer was not complying with the OHSA. The argument was clearly set out in both the Notice of Appeal, and in the oral submissions.

[42] I find that the General Division made an error of law by providing insufficient reasons. The General Division is not required to address every argument that is made before it.[17] However, the reasons must be sufficiently clear to explain why a decision was made and provide a logical basis for that decision. The reasons must also be responsive to the parties' key arguments.[18]

[43] The General Division clearly explained why it found that the Claimant lost his job due to misconduct. It did not respond to the Claimant's key argument concerning the

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[14] General Division decision at para 8.
[15] General Division decision at para 57.
[16] General Division decision at paras 40 to 42.
[17] See *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII).
[18] See *Canada (Attorney General) v Hoffman*, 2015 FC 1348 (CanLII).

OHSA, or explain why it was not addressing it. This was the primary argument advanced by the Claimant and the General Division was required to address it or explain why it was not considering it.

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

[44] The Claimant argues that the General Division based its decision on an important factual error when it found that the Claimant refused to take weekly tests. He says that he did not have the financial ability to take the tests even if he had wanted to.

[45] The General Division found that the Claimant did not comply with the vaccination policy, including the optional weekly testing. It supported its finding with evidence from the hearing.

[46] The General Division reviewed the Claimant's testimony. He explained that attending a pharmacy for testing would have put him at greater risk of contracting COVID-19. He also argued that it would have taken too much of his paycheque.[19]

[47] The General Division noted the evidence from the file including the Commission's conversations with the Employer. The Employer had stated that it would pay for testing for employee's who were exempted from the policy for religious or medical reasons. The Claimant did not request an exemption.[20]

[48] I find that the General Division explained the reasons for its factual finding and supported this finding with evidence. It considered the Claimant's argument that he did not want to pay for testing. The General Division did not base its decision on an important error of fact.

[49] The Claimant did not disclose his vaccination status or do weekly testing as required by the policy. The reasons why he did not comply were considered by the General Division. It was open to the General Division to determine that the Claimant made a conscious and deliberate decision not to comply.

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[19] General Division decision at paras 41 and 42.
[20] General Division decision at para 40.

Remedy

[50] To fix the General Division's error, I can give the decision that the General Division should have given or I can refer this matter back to the General Division for reconsideration.[21]

[51] The record in this matter is complete. The General Division did not acknowledge or address the Claimant's argument concerning the OHSA but did thoroughly review the evidence. I find that this is an appropriate case in which to substitute my own decision. The facts are not in dispute and the evidentiary record is sufficient to enable me to make a decision.

The OHSA does not apply

[52] The Claimant argues that the employer is subject to the OHSA. He says that the legislation requires the employer pay for the Claimant's testing. The Claimant relies on section 26 of the OHSA and says that the requirement for weekly testing is a "medical surveillance program." He argues that the employer breached its statutory duty to assume financial responsibility for his participation in the medical surveillance program.

[53] The relevant section of the legislation reads:

> 26 (1) In addition to the duties imposed by section 25, an employer shall,
>
> (…)
>
> (h) establish a medical surveillance program for the benefit of workers as prescribed;
>
> (…)
>
> (3) If a worker participates in a prescribed medical surveillance program or undergoes prescribed medical examinations or tests, his or her employer shall pay,

[21] Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

> (a) the worker's costs for medical examinations or tests required by the medical surveillance program or required by regulation;
>
> (b) the worker's reasonable travel costs respecting the examinations or tests; and
>
> (c) the time the worker spends to undergo the examinations or tests, including travel time, which shall be deemed to be work time for which the worker shall be paid at his or her regular or premium rate as may be proper.

[54] These provisions clearly refer to a prescribed medical surveillance program and prescribed medical examinations and tests. The term "prescribed" is defined in the OHSA and means prescribed by a regulation made under the OHSA.[22]

[55] While the Claimant may feel that the vaccine policy and associated testing amounts to a medical surveillance program, it would need to be a program prescribed by regulation for the section to apply.[23] There are no regulations prescribing the establishment of a medical surveillance program that apply to the Claimant.

[56] The provisions of the OHSA referred to by the Claimant's representative are not applicable. Having found that section 26(3) is not applicable, I find that the Claimant was not subject to reprisal for having sought compliance with the OHSA. There is no evidence that the employer acted in a way that contravened the OHSA.

[57] The General Division did not make any other reviewable errors. So, there is no reason to disturb the General Division's finding of misconduct.

[58] I agree with the findings of the General Division that the Claimant lost his job because he did not comply with the vaccination policy. The policy was communicated to the Claimant and he was aware that he could be terminated if he did not comply. The Claimant's made a conscious and deliberate decision not to comply with the policy.

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[22] See OHSA at s. 1.
[23] See *Stelwire Ltd. and U.S.W.A., Loc. 5328, Re,* 1996 CanLII 20232.

Conclusion

[59] The appeal is dismissed. The General Division made an error of law by not providing adequate reasons about an argument raised by the Claimant. However, this error does not affect the outcome. The Claimant lost his job due to misconduct.

Melanie Petrunia
Member, Appeal Division