Citation: *NG v Canada Employment Insurance Commission*, 2023 SST 807

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | N. G. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Anick Dumoulin |

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| **Decision under appeal:** | General Division decision dated August 18, 2022 (GE-22-1359) |

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| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | December 13, 2022 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | June 20, 2023 |
| **File number:** | AD-22-649 |

## Decision

[1] The appeal is dismissed.

## Overview

[2] The Appellant, N. G. (Claimant), is appealing the General Division decision. The General Division found that the Claimant lost his job because of misconduct. In other words, it found that he did something that caused him to lose his job. 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 disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made legal and jurisdictional errors. The Claimant primarily argues that the General Division failed to decide whether his employer's policy was lawful. He says that if it had considered the legality of the policy, it would have concluded that it was unlawful. He argues that the law does not require compliance with an unlawful policy, so there can be no misconduct in that case.

[4] The Claimant asks the Appeal Division to allow his appeal and find that he was not disqualified from receiving Employment Insurance benefits.

[5] 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

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

a) Did the General Division fail to consider whether the employer's policy was lawful?

b) Did the General Division misinterpret what misconduct means?

c) Did the General Division fail to consider whether the Claimant's employment agreement required vaccination?

## Analysis

[7] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[1]

### Did the General Division fail to consider whether the employer's vaccination policy was lawful?

[8] The Claimant argues that the General Division made a jurisdictional error. He argues that it should have considered whether his employer's vaccination policy was lawful.

[9] The Claimant argues that, if the General Division had gone through this exercise, it would have determined that his employer's vaccination policy was unlawful. He says that it was unlawful because it violated his human rights and section 7 of the *Canadian Charter of Rights and Freedoms*.

[10] The Claimant further argues that, as his employer's vaccination policy was unlawful, he did not have to comply with it. And, if he did not have to comply with the policy, he says that there could have been no misconduct.

[11] The Claimant writes:

> … an employer cannot implement a policy that supersedes our most sacred law. Therefore my employer […] has blatantly violated my rights and furthermore lied by stating I did not submit a creed based exemption letter.
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> I argue my right to a "creed" based holistic lifestyle were clearly violated. Which is further upheld by our Human Rights and Constitution.[2]

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[1] Section 58(1) of the *Department of Employment and Social Development Act*.
[2] Claimant's Application to the Appeal Division: Employment Insurance, at AD 1-5.

[12] The Commission agrees that the General Division should have addressed the issue. However, the Commission argues that even if the General Division had considered the matter, it would not have changed the outcome.

[13] Since the hearing in this matter, the Federal Court has addressed this very issue, in a case called *Cecchetto v Canada (Attorney General)*.[3] The Federal Court has provided direction and clarity on whether the General Division and Appeal Division have any jurisdiction or authority to consider the legality of an employer's policy.

[14] In that case, Mr. Cecchetto argued that the Federal Court should overturn the decision of the Appeal Division in his case. He argued that the Appeal Division failed to deal with the legality of requiring employees to undergo medical procedures including vaccination and testing.

[15] Mr. Cecchetto argued that because the efficacy and safety of these procedures were unproven, he should not have to get vaccinated. He claimed there were legitimate reasons to refuse vaccination. And, for that reason, he says there was no misconduct if he chose not to get vaccinated.

[16] 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.
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> [47] The SST-GD [Social Security Tribunal-General Division], 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." …
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> [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**

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

> **within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.** [Citation omitted]
>
> (My emphasis)

[17] The Appeal Division did not make any findings in the *Cecchetto* case about the merits, legitimacy, or legality of the vaccination policy. The Court said it was simply beyond the Appeal Division's scope to examine these issues. The Court determined that the General Division and Appeal Division have a limited role in what they can do. They are restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[18] There are some factual differences between the *Cecchetto* case and the Claimant's case, but the same underlying principles apply. It is clear from the *Cecchetto* case that any arguments about the legality of an employer's vaccination policy are irrelevant to the misconduct question.

[19] So, I find that the General Division did not make a jurisdictional error when it did not examine the legality of the Claimant's employer's vaccination policy. Arguments about the legality of an employer's vaccination policy were irrelevant to the misconduct issue. This is not to say that the Claimant is without any remedies, but if any, they lie outside the Employment Insurance scheme.

## Did the General Division misinterpret what misconduct means?

[20] The Claimant argues that the General Division failed to properly define what misconduct means. He argues that, as long as he was able to fulfill his duties, or if his employer could have accommodated him without requiring vaccination, then there can be no misconduct.

[21] The Claimant argues that vaccines do not prevent infection or transmission, and refusing to undergo medical treatment is not on the same level as refusing to perform an aspect of one's duties and responsibilities or refusing to attend work.[4] He claims that

[4] At approximately 10:21 of the audio recording of the Appeal Division hearing.

refusing to take an experimental vaccine has no relevance or effect on job performance, so there should be no misconduct found for refusing to abide by a vaccination policy.

[22] The Claimant notes that there have been decisions of the Social Security Tribunal in which appellants have neither been disentitled nor disqualified from receiving Employment Insurance benefits even after they refused vaccination.[5]

[23] The General Division wrote:

> [17] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional. [citation omitted] Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful [citation omitted] (or shows a wilful disregard for the effects of their actions on the performance of their job).
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> [18] The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law. [citation omitted]
>
> [19] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being dismissed because of it. [citation omitted]

[24] The Claimant agrees with the General Division that the *Employment Insurance Act* does not define what misconduct means. But he says that the Supreme Court of Canada has determined that there has to be a high threshold to establish misconduct. He argues that there has to be "serious misconduct, a habitual neglect of duty, incompetence, or conduct incompatible with the duties, or prejudicial to the employer's business, or if the employee has been guilty of wilful disobedience."[6]

[25] The Claimant relies on *Port Arthur Shipbuilding Co. v Arthurs et al.*[7] However, this decision does not deal with misconduct in the employment insurance setting. The

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[5] These cases include *T.C. v Canada Employment Insurance* Commission, 2022 SST 891 and *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[6] Claimant's arguments, referring to a Reference Guide for Appealing Denial of EI Benefits, prepared by the Justice Centre for Constitutional Freedoms, and letter dated June 6, 2022, addressed to the Minister of Employment, Workforce Development and Disability Inclusion, citing the dissenting opinion from *R v Arthurs, Ex p. Port Arthur Shipbuilding Co.* [1967] 2 O.R. 49 (CA) at para 11, at AD 2-7 and AD 2-12.
[7] *Port Arthur Shipbuilding Co. v Arthurs et al.*, [1968] SCJ No. 82 (QL).

decision deals with whether the employer had just cause to dismiss three employees. The decision is of no relevance to the issue of misconduct for the purposes of the *Employment Insurance Act*.

[26] The General Division relied on the definition for misconduct that the courts have set out. The General Division cited several Federal Court of Appeal cases. The General Division's definition was consistent with the definitions that the courts have long established.

[27] To some extent, the claimant disputes how the General Division applied the definition or the law to the facts of his case. But, as the Federal Court of Appeal set out in a case called *Quadir v Canada (Attorney General)*,[8] 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.

## Did the General Division fail to consider whether the Claimant's employment agreement required vaccination?

[28] The Claimant argues that the General Division failed to consider whether his employment agreement required vaccination. The Claimant argues that misconduct arises only if he did something or failed to do something that was required under his agreement.

[29] The Claimant states that his employment agreement did not require vaccination. He says that his employer unilaterally introduced a new policy that clearly violated the law and trampled his rights. He says that he did not agree with the new policy and should have been given accommodations without facing suspension or any job loss. The Claimant argues that his employer simply could not change or introduce new terms of that relationship, such as by introducing a new vaccine practice or policy.

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[8] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9. See also *Stavropoulos v Canada (Attorney General)*, 2020 FCA 109.

[30] So, if his employment agreement did not say anything about having to get vaccinated, then he says that he did not have to get vaccinated. And he argues that there was no misconduct then as he was fully compliant with the terms and conditions of his employment.

[31] This was the same argument that was raised in the *Cecchetto* case.[9] 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.

[32] 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.

[33] 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.

[34] 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.

[35] 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

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

arises out of Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[10]

[36] 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.

[37] 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.

[38] 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.

[39] 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.

[40] Here, the General Division did not address the issue about whether the Claimant's employment agreement required vaccination. The General Division did not have a complete copy of the Claimant's employment agreement to determine whether there were any provisions regarding vaccination or other. So, even if I were to agree

[10] *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.

with the reasoning set out in *A.L.*, the evidence falls short of being able to claim *A.L.* to be applicable.

– **The Claimant says that he fulfilled all of the duties under his employment agreement**

[41] The Claimant argues that misconduct arises only if there is a breach of the terms and conditions of one's employment. The Claimant says that he fulfilled all of the duties and responsibilities under his employment agreement, so says that there was no misconduct.

[42] The General Division determined that misconduct arises if a claimant knew or should have known that "his conduct could get in the way of **carrying out his duties** towards the employer and there was a real possibility of being dismissed because of it [citation omitted]" (my emphasis).[11]

[43] The Claimant argues that his refusal to comply with his employer's vaccination policy did not get in the way of his ability to perform the duties required of him under his employment agreement. He says that he fulfilled all of the duties that were required of him under his agreement. So, he argues that, based on the definition for misconduct that the General Division set out, there was no misconduct in his case.

[44] However, it is clear from the evidence that the Claimant's employer deemed vaccination to be an essential condition of the Claimant's employment. Given the reasoning set out in *Cecchetto*, it is clear that an employer may introduce a new policy or practice with which employees must comply, even if employees otherwise fulfill the duties required of them under their employment agreement.

– **The Claimant says his employer should have accommodated him**

[45] The Claimant argues that there was no misconduct as his employer could have readily provided accommodations, such as allowing him to work from home. He argues that the General Division made an error in failing to recognize this.

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[11] General Division decision, at para 19.

[46] The General Division determined that its role was not to decide whether the Claimant's employer should have accepted his request for an exemption based on his creed. The General Division determined that its role was to focus on the conduct that led to the Claimant's dismissal and to decide whether that constituted misconduct for the purposes of the *Employment Insurance Act*.

[47] The General Division's ruling in this regard is consistent with the legal authorities. In a case *Mishibinijima v Canada (Attorney General)*,[12] (which the General Division also referred to, although for other reasons), 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.

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

## Conclusion

[50] The General Division should have addressed the Claimant's argument that his employer's vaccination policy was unlawful. However, that did not change the outcome.

[51] The General Division relied on the definition of misconduct that the courts have long established, and it did not misinterpret what misconduct means.

[52] Finally, while the Claimant's employer introduced a new policy, it was permitted to do so. It was irrelevant whether the vaccination policy was ineffective, illegal, or

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unreasonable, for the purposes of assessing whether misconduct arose. The General Division simply did not have the authority to address these considerations.

[53] The appeal is dismissed.

Janet Lew
Member, Appeal Division