



Citation: *Canada Employment Insurance Commission v JB*, 2023 SST 1062

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Dani Grandmaître

Respondent: J. B.

Decision under appeal: General Division decision dated December 29, 2022
(GE-22-2861)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: April 27, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: August 10, 2023

File number: AD-23-83

Decision

[1] The appeal is allowed. The General Division erred in law in its interpretation of misconduct and exceeded its jurisdiction. I have given the decision that the General Division should have given. The Claimant was suspended due to misconduct and is not entitled to receive employment insurance (EI) benefits.

Overview

[2] The Respondent, J. B. (Claimant), worked in administration for a federal government department. Her employer implemented a mandatory COVID-19 vaccination policy requiring employees to disclose their vaccination status. The Claimant did not disclose her vaccination status. She was placed on an unpaid leave of absence for not complying with the policy.

[3] The Claimant applied for EI regular benefits. The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Claimant could not be paid benefits because she was suspended due to her own misconduct.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division allowed the Claimant's appeal. It found that the Commission had not met its burden of proving that the Claimant breached an express or implied duty arising out of her employment contract.

[5] The Commission is now appealing the General Division decision. The Commission says that the General Division exceeded its jurisdiction when it found that the employer's vaccination policy was not an express or implied term of employment. It also argues that the General Division misinterpreted misconduct as it is used in the *Employment Insurance Act* (EI Act).

[6] I am allowing the appeal. The General Division made an error of law and exceeded its jurisdiction. I have made the decision that the General Division should have made and find that the Appellant is disentitled from receiving EI benefits because she was suspended due to misconduct.

Issues

[7] The issues in this appeal are:

- a) Did the General Division err in law in its interpretation of misconduct as it is used in the EI Act?
- b) Did the General Division exceed its jurisdiction when it found that the vaccination policy did not impose an express or implied duty on the Claimant?
- c) If so, how should the error be fixed?
- d) Has the Commission proven that the Claimant was suspended due to misconduct?

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:¹

- 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 decision

[9] The Claimant's employer introduced a COVID-19 vaccination policy requiring employees to confirm their vaccination status by October 29, 2021.² The policy also stated that employees who did not comply would be placed on an unpaid leave of

¹ 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).

² GD3-18

absence by November 15, 2021. The Claimant did not disclose her vaccination status and was placed on a leave of absence.³

[10] The General Division decided that the Claimant's unpaid leave of absence was consistent with a suspension.⁴ It also found that the reason that the Claimant was suspended was because she was not in compliance with the employer's vaccination policy.⁵

[11] The General Division then considered whether this reason for the Claimant's suspension is considered misconduct according to the EI Act. It stated that the Commission has the burden of proving that the Claimant's actions constituted misconduct.⁶ The General Division said that the Commission must prove these three elements:

- That the Claimant's conduct was wilful;
- That there was a breach of an express or implied duty arising out of the Claimant's employment contract; and
- That the Claimant knew or should have known that her conduct could get in the way of carrying out her duties to her employer and that there was a real possibility she could be let go.⁷

[12] The General Division noted that it has to focus on the Claimant's conduct only and not how the employer behaved.⁸ It can only consider the EI Act and not whether the Claimant was wrongfully dismissed or should have been accommodated by the employer.⁹

³ General Division decision at para 29.

⁴ General Division decision at para 12.

⁵ General Division decision at para 15.

⁶ General Division decision at para 21.

⁷ General Division decision at para 18.

⁸ General Division decision at para 19.

⁹ General Division decision at para 20.

[13] The General Division found that the Commission had not proven that the Claimant breached an express or implied duty arising out of her employment contract. It stated that an express duty was something specifically noted in an employment contract or so fundamental that it is obvious.¹⁰

[14] In finding that there was no express duty, the General Division relied on the fact that there was no evidence of an explicit requirement for the Claimant to accept any vaccination required by the employer.¹¹ It found that the Commission offered no evidence that the Claimant agreed either in her collective agreement or a memorandum of understanding to be vaccinated prior to her suspension.¹²

[15] The General Division found that the Commission also did not prove that there was an implied duty arising from the Claimant's employment contract. It found that the Commission did not provide any evidence that the Claimant was required to accept all of the employer's policies.¹³ It noted that the requirement to accept medical treatment in order to maintain employment goes beyond the expectation to comply with health and safety standards.¹⁴

[16] The General Division found that the employer unilaterally imposed a new essential condition of employment with the consent of the Claimant or her union's bargaining agent.¹⁵ Because this essential condition was not part of the Claimant's employment contract when she was hired, the General Division determined that there was no express or implied duty to comply with the vaccination policy.¹⁶

[17] The General Division stated that there was no evidence of Federal or Provincial legislation requiring employees to be vaccinated against COVID-19.¹⁷ It found that the

¹⁰ General Division decision at para 36.

¹¹ General Division decision at para 35.

¹² General Division decision at para 39.

¹³ General Division decision at para 41.

¹⁴ General Division decision at para 42.

¹⁵ General Division decision at para 44.

¹⁶ General Division decision at para 45.

¹⁷ General Division decision at para 50.

employer chose to implement its policy without consulting the Claimant's bargaining agent.¹⁸

[18] With respect to the other elements of the test for misconduct, the General Division found that the Claimant was aware of the policy and the consequences of not complying. It found that the Claimant's actions were intentional.¹⁹ However, it decided that these factors were irrelevant because the Commission did not prove that the Claimant breached an express or implied duty arising from her employment contract.²⁰

[19] The General Division went on to consider the legality of the Claimant's decision not to be vaccinated. It found that the Claimant had a legal right to refuse any medical treatment, which makes vaccination voluntary.²¹ It found that exercising a legal right cannot be considered misconduct.²²

– **The Commission's appeal**

[20] The Commission argues that the General Division misinterpreted misconduct according to the EI Act. It says that the General Division erroneously conflated two different legal concepts: whether there was an express or implied duty arising from the Claimant's employment and whether the employer's policy was validly imposed.²³

[21] The Commission argues that it was an error of law to consider the validity of the employer's policy. The employer's conduct is not relevant to the determination of misconduct. The Commission says that only the employee's actions, and whether she wilfully failed to comply with the policy, are considered in a misconduct analysis.²⁴ Whether the Claimant was exercising a legal right when she chose not to comply is not relevant.

¹⁸ General Division decision at para 50.

¹⁹ General Division decision at para 53.

²⁰ General Division decision at para 55.

²¹ General Division decision at para 62.

²² General Division decision at para 65.

²³ Appellant's written submissions (AD3-10) at para 16.

²⁴ AD3-11 at para 19.

[22] The Commission also argues that the General Division exceeded its jurisdiction by considering the conduct of the employer and applying labour and employment law principles. It says that whether a claimant's suspension or dismissal is justified according to labour law principles is irrelevant in the employment insurance context.

[23] The Commission argues that it was outside of the General Division's jurisdiction to consider the validity of the vaccination policy in the context of the Claimant's collective agreement. The Commission says that this determination belongs in the grievance process and goes beyond the scope of a misconduct analysis.²⁵

[24] The Claimant argues that the employer's policy violated employee's rights and was illegal. She challenges the efficacy of the vaccine and points out that the policy did not allow for alternatives, such as testing.

[25] The Claimant says that it is a gross mischaracterization to say that refusing to comply with an illegal policy is misconduct. She argues that it was the employer who engaged in misconduct. The Claimant says that the General Division did not make any reviewable errors.

The General Division misinterpreted misconduct in the EI Act

[26] Misconduct is not defined in the EI Act, but it has been interpreted by the Federal Court and the Federal Court of Appeal. The Courts tell us that there will be misconduct where a claimant knew, or should have known, that their conduct could get in the way of carrying out their duties to the employer, and there was a real possibility of being let go.²⁶

[27] The conduct at issue must be wilful, meaning that it was conscious, deliberate or intentional. Misconduct also includes conduct that was so reckless that it is almost wilful.²⁷

²⁵ AD3-9 at para 13.

²⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁷ See *Mishibinijima and Canada (Attorney General) v Secours*, [1995] FCJ No 210.

[28] There must be a causal link between the claimant's alleged misconduct and their job. The misconduct must therefore constitute a breach of an express or implied duty resulting from the employment contract.²⁸ Is it the employee's conduct at issue in a misconduct analysis, not the what the employer did, or did not do.²⁹

[29] It was an error of law to consider the conduct of the employer when determining whether there was an express or implied duty arising from the Claimant's employment contract. The General Division acknowledged the Commission's argument that the vaccination policy introduced by the employer established a duty.³⁰ It rejected that argument because the employer unilaterally imposed the policy.³¹

[30] By examining the employer's conduct in introducing the policy, the General Division erroneously shifted the focus away from the conduct of the Claimant. The courts have repeatedly stated that questions concerning the actions of the employer are for other forums, such as a human rights tribunal or the grievance process.³²

[31] The General Division had to decide whether the Claimant was aware of the vaccination policy and what was required of her, whether she consciously and deliberately chose not to comply, and whether she knew the potential consequences of her actions.

[32] In its decision, the General Division found that the Claimant was aware of the policy and what was required of her in order to comply.³³ It found that the Claimant

²⁸ See *Canada (Attorney General) v Lemire*, 2010 FCA 314. See also *Canada (Attorney General) v Brissette (C.A.)*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684: "[A] condition may be express or implied and may relate to a concrete or more abstract requirement."

²⁹ See *Canada (Attorney General) v Bedell*, (FCA), [1984] FCJ No 515.

³⁰ General Division decision at para 46.

³¹ General Division decision at para 47.

³² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

³³ General Division decision at para 26.

knew that she would be placed on a leave of absence if she did not comply.³⁴ The General Division found that the Claimant made a decision not to comply.³⁵

[33] Despite these clear findings, the General Division found that the Claimant's conscious decision not to comply with the vaccination policy was not misconduct. Although there was no question that the employer had implemented a policy that the Claimant was aware of, the General Division found that the policy did not impose an express or implied duty on the Claimant.

[34] In order to make this determination, the General Division looked at the conduct of the employer. It found that the employer unilaterally imposed the policy without consulting with the union or bargaining agent.³⁶ The General Division devotes a significant portion of its analysis to the employer's decision to implement the policy, without consultation and in the absence of a legislative requirement.

[35] In its analysis, the General Division properly cites binding caselaw and states that it is to consider the conduct of the Claimant, and not the employer. However, its analysis then focuses on the employer's conduct in implementing the vaccination policy. This was an error of law.

The General Division exceeded its jurisdiction

[36] The General Division exceeded its jurisdiction by considering whether the Claimant's suspension was justified and by assessing the conduct of the employer.

[37] The General Division acknowledged that the actions of the employer are not relevant to the misconduct analysis.³⁷ It then focused on the conduct of the Claimant when she decided not to comply with the vaccination policy, in other words, her reasons for not complying.

³⁴ General Division decision at para 28.

³⁵ General Division decision at para 53.

³⁶ General Division decision at para 50.

³⁷ General Division decision at para 57.

[38] The General Division found that the Claimant had a right to refuse medical treatment and that she could not be found to be doing something wrong by exercising this legal right.³⁸ The General Division stated:

In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's policy, and led to her suspension, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the Act.³⁹

[39] There is, however, guidance from the Federal Court of Appeal with respect to the jurisdiction of the Tribunal. The Court has repeatedly said that it is not within the Tribunal's jurisdiction to decide whether the severity of the penalty is justified or whether the claimant's conduct was a valid ground for dismissal.⁴⁰

[40] Rather than looking at what the Claimant's conduct was, the General Division focused on why she did what she did and her justifications for not complying with the policy. I find that the General Division exceeded its jurisdiction by making a decision on the justification for the Claimant's dismissal.⁴¹

[41] The General Division also went beyond its jurisdiction when it determined that the employer's policy was unilaterally imposed and therefore the Claimant did not have an express or implied duty to comply.

[42] The General Division referred to the policy, which the Commission had provided. The policy at issue is the Policy on Covid-19 vaccination for the Core Public Administration Including the Royal Canadian Mounted Police.⁴² The Claimant worked in administration for a federal government department.

³⁸ General Division decision at para 60.

³⁹ General Division decision at para 65.

⁴⁰ *Canada (Attorney General) v. Marion*, 2002 FCA 185 (CanLII), [2002] F.C.J. No. 711

⁴¹ *Canada (Attorney General) v. Jolin*, 2009 FCA 303

⁴² GD3-27 to 42.

[43] The General Division found that the employer unilaterally implemented the policy because there was no evidence that it opened a negotiation with the bargaining agent to amend the employment agreement.⁴³ It decided that the employer had essentially reopened the employment agreement and imposed a new essential condition of employment without the Claimant's consent.⁴⁴ This determination was not within its jurisdiction.⁴⁵

[44] The recent decision from the Federal Court, *Cecchetto v. Canada (Attorney General)*, confirmed the limited jurisdiction of the Tribunal to make decisions about the legality of a vaccination policy. That case also concerned a unilaterally implemented vaccination policy.⁴⁶

[45] The Court in *Cecchetto* addressed the limits on the Tribunal's jurisdiction in these matters:

Despite the Applicant'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-General Division.⁴⁷

[46] The Court confirmed that the claimant's decision not to comply with the vaccination policy breached a duty to the employer and he had lost his job due to misconduct.⁴⁸

[47] I find that the General Division made an error of law by misapplying the legal test for misconduct. It exceeded its jurisdiction by considering the conduct of the employer in

⁴³ General Division decision at para 43.

⁴⁴ General Division decision at para 44.

⁴⁵ I note that the policy at issue was implemented pursuant to sections 7 and 11.1 of the *Financial Administration Act*, which provide broad powers to the Treasury Board over human resource matters, including the right to unilaterally implement workplace rules, within certain limits: see *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55.

⁴⁶ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

⁴⁷ See *Cecchetto* at para 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251; and *Canada (Attorney General) v Lee*, 2007 FCA 406.

⁴⁸ See *Cecchetto* at para 30, citing *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

implementing the vaccination policy and whether the Claimant's suspension was justified.

Remedy

[48] At the hearing before me, the Commission argued that, if I find that the General Division made an error, then I should give the decision the General Division should have given.⁴⁹ The Claimant did not take a position on remedy but felt that there may need to be another hearing if she is unsuccessful in this appeal.

[49] 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 Claimant was suspended due to misconduct

[50] I find that the Commission has proven that the Claimant was suspended because of misconduct. The evidence establishes the following facts:

- The employer implemented a policy requiring employees to be vaccinated unless they had an approved accommodation for medical or human rights reasons.⁵⁰
- The Claimant was aware of the policy and the possibility that she could be suspended or dismissed if she did not comply.⁵¹
- The Claimant chose not to disclose her vaccination status to the employer.⁵²
- The Claimant was suspended by the employer for not complying with the policy.

⁴⁹ Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

⁵⁰ See the policy at GD3-27 to GD3-42.

⁵¹ General Division decision at para 53.

⁵² General Division decision at para 53.

[51] I find that these facts establish that the Claimant was suspended because of misconduct. The Claimant was aware of the policy and acknowledged that she made a deliberate decision not to comply. She testified that it was a personal decision not to be vaccinated or inform her employer of her vaccination status. She knew this decision could result in her suspension or dismissal.

[52] The employer's conduct in implementing the policy is not relevant, nor are the Claimant's reasons for not wanting to comply. I understand that the Claimant had concerns about the vaccine and her privacy, but there are other forums for bringing forward these complaints.

Conclusion

[53] The appeal is allowed. The General Division exceeded its jurisdiction and made an error of law. The Claimant was suspended due to misconduct and is disentitled from receiving benefits.

Melanie Petrunia
Member, Appeal Division