Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 1695

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. W.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen

Decision under appeal:	General Division decision dated March 7, 2023 (GE-22-2346)

Tribunal member:	Janet Lew
Type of hearing:	In Writing
Decision date:	November 28, 2023
File number:	AD-23-351

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, J. W. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his job because of misconduct. He had not complied with his employer's vaccination policy.

[3] The Claimant argues that the General Division member was biased.

[4] The Claimant also denies that he committed any misconduct. He says his conduct did not amount to misconduct because his employer's vaccination policy was unlawful and unreasonable. He also says that for misconduct to arise there has to be a breach of an express or implied duty arising out of one's employment contract. And, in his case, he says that his employment contract did not require vaccination, so claims that he did not breach any duties. He also argues that misconduct does not arise if his dismissal was unlawful and if his employer could have accommodated him.

[5] The Claimant says the Appeal Division should allow his appeal. He says it should conclude that there was no misconduct and that he was not disqualified from receiving Employment Insurance benefits. He says the General Division should have made this decision in the first place.

[6] The Commission recommends that the Claimant's appeal be dismissed. The Commission says that, while the General Division may have failed to consider some of the facts, the Claimant nonetheless committed misconduct. So, the outcome would have been the same.

[7] I am dismissing the appeal. The General Division did not have the authority to consider much of the Claimant's arguments about whether misconduct arose. There was also no evidence to support the Claimant's allegations of bias.

Issues

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

a) Was the General Division member biased?

b) Did the General Division fail to consider the legality or reasonableness of the Claimant's employer's vaccination policy?

c) Did the General Division misinterpret what misconduct means?

d) Did the General Division fail to consider whether the Claimant's employer could unilaterally change the terms and conditions of his employment?

Analysis

[9] 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]

[10] For factual errors, the General Division had to have based its decision on that error, and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.[2]

The General Division member was not biased

[11] The Claimant suggests that the General Division member was biased. He says, "I justifiably wonder if the Canadian federal minister of Employment, Workforce Development and Disability's … public statements on October 21, 2021, prevent me from my right to an impartial (unbiased) decision-maker?"[3]

[12] The Claimant suggests that there is a relationship between the Social Security Tribunal and the Minister. But the Social Security Tribunal is an independent administrative tribunal. Members of both the General Division and the Appeal Division

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[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] See section 58(1)(c) of the DESD Act.
[3] See Claimant's submissions dated July 24, 2023, at AD4-7.

are fully independent and impartial decision-makers. Members do not work for or report to the Department or to the Minister.

[13] Members independently come to their own decisions, without any influence from the Minister, other politicians, the Commission, Employment and Social Development Canada, the Chairperson or any Vice-Chairpersons of the Tribunal, the Tribunal's Legal Services team, or even other Tribunal members.

[14] Any allegations of bias are serious and should not be made lightly. In *Committee for Justice and Liberty et al. v National Energy Board et al*., the Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion at the Federal Court of Appeal:

> [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[4]

[15] The threshold for meeting this test is high. As the courts have said, "An allegation of bias requires material evidence in support and cannot be made on mere suspicion, conjecture, or impression of an applicant."[5] Merely pointing to the Minister's statements and suggesting that the Minister somehow influenced the General Division member and the outcome is speculative. There is no evidentiary support for the Claimant's allegations of bias to meet this test.

The General Division did not fail to consider the legality and reasonableness of the Claimant's employer's vaccination policy

[16] The Claimant argues that the General Division failed to consider the legality and reasonableness of his employer's vaccination policy. But arguments about the legality

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[4] See *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1978 CanLII 2 (SCC), [1978] 1 SCR 369.
[5] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 81.

and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue.

[17] The Federal Court has held that the General Division and the Appeal Division do not have the authority to address these types of arguments. In *Cecchetto*, 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 within the mandate or jurisdiction of the Appeal Division, nor the SST-GD**. [Citation omitted][6]
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> (my emphasis)

[18] And more recently, the Federal Court has held that the General Division and Appeal Division, "are not the appropriate fora to determine whether the [employer's] policy or [the employee's] termination were reasonable."[7]

[19] So, the General Division did not fail to consider the legality or reasonableness of the Claimant's employer's vaccination policy.

The General Division did not misinterpret what misconduct means

[20] The Claimant argues that the General Division misinterpreted what misconduct means. He says that it failed to recognize that misconduct arises only if there is a

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[6] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[7] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 77.

breach of an express or implied duty resulting from the contract of employment. He also says that misconduct does not arise if the termination of his employment was unlawful.

[21] I find that the General Division did not misinterpret what misconduct means because it is now well established that an employer's vaccination policy does not have to be in the initial contract of employment. Thus, the Claimant's employment contract was irrelevant to the misconduct question. So were the issues of whether the Claimant had been wrongfully dismissed from his employment and whether the employer failed to give employees any options from having to undergo vaccination.

– **The General Division did not have to consider the Claimant's original employment contract**

[22] The Claimant says that the Federal Court of Appeal in the case of *Lemire*[8] established that for misconduct to arise for the purposes of the *Employment Insurance Act*, the conduct must "constitute a breach of an express or implied duty resulting from the contract of employment." He says that the General Division had to look at his employment agreement to determine whether he owed a duty to his employer to get vaccinated. If not, then he argues that his actions could not be viewed as misconduct.

[23] However, *Lemire* does not help the Claimant. Mr. Lemire was not in breach of his employment contract. But the Court of Appeal still found that there was misconduct. Mr. Lemire had breached a policy that was not part of his employment contract. This is confirmed where the Court wrote, "… The employer has a policy on this matter… The claimant was aware of the policy."[9] The Court of Appeal referred to the policy again, at paragraphs 17, 18, and 20. The Court noted that the employer had a policy that Mr. Lemire chose to disregard.

[24] Other cases also show that an employer's policies do not have to form part of the employment agreement for there to be misconduct:

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[8] See *Canada (Attorney Genera) v Lemire*, 2010 FCA 314.
[9] See *Lemire, at para 3.*

- In a recent case called *Matti*, the Federal Court determined that it was unnecessary for the employer's vaccination policy to be in the initial agreement, as "misconduct can be assessed in relation to policies that arise after the employment relationship begins."[10]

- In *Kuk*,[11] the appellant chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. The Federal Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Federal Court found that there was misconduct because Mr. Kuk knowingly did not comply with his employer's vaccination policy and knew what the consequences would be if he did not comply.

- In *Nelson*,[12] the appellant lost her job because of misconduct. The case did not involve vaccination. Ms. Nelson was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal found that there was misconduct. It was irrelevant that the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *Nguyen*[13] (which was referred to in the *Lemire decision),* the Federal Court of Appeal found that there was misconduct. Mr. Nguyen had harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and did not form part of his employment agreement.

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[10] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[11] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[12] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[13] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.

- In *Karelia*,[14] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Federal Court of Appeal determined that Mr. Karelia had to comply with them—even if the conditions were new—otherwise there was misconduct.

[25] In addition to *Matti* and *Kuk*, two other decisions address the misconduct issue. These two decisions are in the context of vaccination policies. In *Cecchetto*[15] and in *Milovac*,[16] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[26] As the courts have consistently ruled, the role of the General Division is narrow, when it comes to assessing misconduct under the *Employment Insurance Act*. It involves assessing whether the act or omission of an employee amounts to misconduct within the meaning of the *Employment Insurance Act.* In other words, did the employee intentionally commit an act (or fail to commit an act), contrary to their employment obligations.[17]

[27] As long as the General Division applied this test, then it did not misinterpret what misconduct means, even if the Claimant's conduct involved a policy that did not form part of his original contract obligations.

[28] Here, the General Division applied that test. It assessed whether the Claimant committed an act that went against his employer's policy. It also assessed whether he was aware of the consequences that could result if he did not follow his employer's policy. And finally, it assessed whether that conduct took place. The General Division

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[14] See *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.
[15] See *Cecchetto*.
[16] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[17] See *Kuk* and *Cecchetto*.

properly interpreted what misconduct means and applied that test to determine if the Claimant committed any misconduct.

– **The General Division did not have to consider whether the Claimant's dismissal from his employment was lawful**

[29] The Claimant argues that the General Division failed to consider whether his employer wrongfully dismissed him from his employment. He says when a dismissal is unlawful, there is no misconduct.

[30] I find that the General Division did not fail to consider this issue because the issue of wrongful dismissal is irrelevant to deciding misconduct under the *Employment Insurance Act*. The General Division does not have any authority to decide whether a claimant has been wrongfully dismissed. This issue is a matter for another forum.[18]

[31] This does not mean that the Claimant does not have any options. However, any recourse he may have against his employer for wrongful dismissal lie elsewhere. He can consult counsel for guidance on his best course of action.

– **The General Division did not have to consider whether the employer could have accommodated the Claimant**

[32] The Claimant argues that the General Division failed to consider whether his employer should have accommodated him, by providing options or alternatives to vaccination. That way, he would not have had to undergo vaccination.

[33] I find that the General Division did not fail to consider this issue because an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[19]

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[18] See *Davidson v Canada (Attorney General)*, 2023 FC1555 at para 77. See also *Kuk*, at para 36, citing *Paradis v Canada (Attorney General),* 2016 FC 1282 at paras 30-34.
[19] See *Kuk*, at para 36, citing *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 14.

The General Division did not fail to consider whether the Claimant's employer could unilaterally change the terms and conditions of his employment

[34] Contrary to the Claimant's arguments, the General Division did not fail to consider whether the Claimant's employer could unilaterally change the terms and conditions of his employment to require vaccination. The General Division did not have to consider this issue. The issue simply was not relevant to the General Division's determination of whether the Claimant had committed any misconduct.

[35] The Claimant argues that his employer was not allowed to change the terms and conditions of his employment by introducing new policies. So, he says that if his original contract did not require vaccination, he would not have to get vaccinated against his consent.

[36] However, as I have noted above, the issue regarding the Claimant's employment contract was an irrelevant consideration. An employer may introduce new policies. Those policies do not have to be part of the employment contract for misconduct to arise.

Conclusion

[37] The appeal is dismissed.

[38] The General Division did not make an error that falls within the permitted grounds of appeal.

Janet Lew
Member, Appeal Division