Citation: *BF v Canada Employment Insurance Commission*, 2024 SST 30

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. F.
Respondent:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts

Decision under appeal:	General Division decision dated March 8, 2023 (GE-22-2995)

Tribunal member:	Janet Lew
Type of hearing:	In Writing
Decision date:	January 9, 2024
File number:	AD-23-339

Decision

[1] The appeal is dismissed. Even if the General Division misread a document, it did not change the outcome.

Overview

[2] The Appellant, B. F. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant lost her job because of misconduct. In other words, she had done something or had failed to do something that caused her to lose her job. The General Division found that she had not complied with her employer's vaccination policy. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors. In particular, she argues that she did not get a fair hearing. she also argues that the General Division made an important factual error about whether she had complied with her employer's vaccination policy.

[4] Under the policy, the Claimant was required to disclose her vaccination status. The Claimant says that she disclosed her vaccination status and therefore complied with her employer's vaccination policy. Having complied with her employer's vaccination policy, she denies that she committed any misconduct.

[5] The Claimant asks the Appeal Division to find that she did not commit any misconduct and to find that she is entitled to receive Employment Insurance benefits.

[6] The Commission agrees that the General Division made a factual error when it found that the Claimant had failed to report her vaccination status. However, the Commission argues that the General Division's error does not change the outcome as it says that she still committed misconduct. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

a) Did the Claimant get a fair hearing?

b) Did the General Division fail to apply the Digest of Benefit Entitlement Principles?

c) Did the General Division fail to decide whether the Claimant had been wrongfully dismissed?

d) Did the General Division properly weigh the evidence?

e) Did the General Division overlook some of the evidence relating to her medical fitness?

f) Did the General Division make a factual error about why the Claimant's employer dismissed her from her employment?

g) Did the General Division misread the evidence?

h) If the answer is "yes" to any of the above, does that change the outcome?

Analysis

[8] 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]

[9] For these types of 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]

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

The General Division gave the Claimant a fair hearing

[10] The General Division conducted a fair hearing. Although it accepted documents from the Commission after the hearing, the member gave the Claimant a fair opportunity to respond. The Claimant was able to file a response. Ultimately, the member did not accept the Claimant's response, ruling that the document was irrelevant and therefore inadmissible. But that did not mean the process was unfair as the General Division was entitled to assess the document and determine its admissibility.

[11] The Claimant argues that the General Division failed to give her a fair hearing because it accepted evidence and submissions from the Commission after the hearing on January 25, 2023, while rejecting her response to that document.

[12] The Social Security Tribunal (Tribunal) received supplementary representations from the Commission on January 25, 2023 (marked as GD10). The Commission was responding to the Claimant's documents (GD8) that she had filed on (Sunday) January 22, 2023. (The Tribunal did not manage to circulate the Claimant's late document to the Commission until the day before the hearing.)

[13] In its supplementary representations post-hearing (GD10), the Commission argued that the Claimant's new documents (GD8) were largely irrelevant, other than an exchange of email that the Claimant had with her case manager. The Commission argued that the emails showed that, despite her sick leave, the Claimant was aware that she had to follow her employer's vaccination policy. Otherwise, she faced dismissal.[3]

[14] The Claimant seems to be suggesting that the General Division should have rejected the Commission's post-hearing document (GD10) because the hearing had already concluded. However, the Commission was responding to documents (GD8) that the Claimant had filed close to the hearing date.

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[3] See Claimant's Supplementary Representations to the Social Security Tribunal-Employment Insurance section, at GD 10.

[15] The Tribunal wrote to the Claimant by email on February 2, 2023.[4] The Tribunal told the Claimant that it had received documents (GD10) from the Commission after the hearing. The member accepted the document. The Tribunal wrote, "if you have any additional arguments in response to the document, we must receive them by **February 10, 2023**."

[16] This timeframe was reasonable. The facts and issues involved were fairly straightforward.

[17] The Claimant contacted the Tribunal on February 17, 2023. The Claimant advised that she had missed the letter from the Tribunal inviting her to provide a response to the Commission's post-hearing document by February 10, 2023. Although the deadline had passed, the Tribunal still invited her to submit a response. The Claimant subsequently sent an email to the Tribunal with her arguments.

[18] The Claimant questioned the safety of COVID-19 vaccines. She had taken a screen shot of the U.S. Food and Drug Administration's list of possible adverse events of vaccines.

[19] The General Division did not accept the Claimant's email. The member explained that the Claimant's submissions were not relevant to any of the legal issues.[5] The General Division determined that it "[could not] second-guess the safety and effectiveness of COVID vaccines, or the reasonableness of an employer's COVID vaccination policy."[6]

[20] The Claimant says that this was unfair but the General Division was entitled to determine whether to accept or reject the Claimant's documents on the basis of relevancy. (Had the General Division accepted the Claimant's post-hearing response, as the Claimant says it should have, it would have then become an issue of the weight to assign to the response. But, this would not have satisfied the Claimant either. There

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[4] See Tribunal's letter dated February 2, 2023, at GD11.
[5] See General Division decision, at para 12.
[6] See General Division decision, at para 12.

is no doubt that the General Division would not have assigned any weight to her post-hearing evidence.)

[21] The General Division provided the Claimant with a copy of the Commission's post-hearing document and also provided her with a reasonable chance to respond. She filed a response. So, it cannot be said that the Claimant did not get a fair hearing. The General Division was entitled to determine the relevancy and admissibility of the Claimant's response.

The General Division did not make a legal error by failing to apply the Digest of Benefit Entitlement Principles

[22] The General Division did not make a legal error by failing to apply the Digest of Benefit Entitlement Principles.[7] The Claimant's allegations are against the Commission, rather than against the General Division.

[23] The Claimant argues that the General Division failed to apply Chapter 7 of the Digest of Benefit Entitlement Principles. She says that Chapter 7 requires the Commission to objectively evaluate the facts as presented by a claimant and their employer, and then decide in favour of the version of facts that seems the most credible. Chapter 7 does not say anything about what can be expected from the General Division.

[24] The Digest can be used as a guide by the General Division to interpret the *Employment Insurance Act* and the *Employment Insurance Regulations*. But the case law says that the Digest is not binding and does not replace the law itself.

[25] In a case called *Greey*, the Federal Court of Appeal described the Digest as "an interpretive guide that is not binding."[8] However, it "is entitled to consideration and may constitute an important factor in the interpretation of statutes".[9]

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[7] Digest of Benefit Entitlement Principles Chapter 7 - Section 2 - Canada.ca

[8] *Canada (Attorney General) v Greey*, 2009 FCA 296 at para 28.

[9] *Canada (Attorney General) v Greey*, 2009 FCA 296, at para 28, citing *Silicon Graphics Ltd. v Canada (C.A.),* 2002 FCA 250, [2003] 1 F.C. 447.

[26] Apart from the fact that the General Division was not required to follow the Digest, the Claimant's allegations are against the Commission.

[27] The Claimant says the Commission did not follow the Digest because it did not give her copies of its notes or a chance to respond to statements that her employer reportedly gave to the Commission. Her employer reportedly said that Employee Health cleared her for a return to work in December 2021. The Claimant denies that her physician medically cleared her for a for a return to work then.

[28] It may be that the Claimant did not receive copies of her employer's statements or get a full chance to respond to statements before the Commission made its decision or reconsidered its decision. But these shortcomings are those of the Commission, not of the General Division. They do not form the basis for a ground of appeal against the General Division.

[29] While there may have been procedural shortcomings in the Commission's handling of the claim, the General Division addressed them. The Tribunal provided both parties with a copy of all of the documents. The General Division also gave the Claimant a chance to fully respond to anything. She was permitted to file evidence and she also had a chance to give oral evidence at the General Division. In other words, if there were any procedural deficiencies by the Commission, in terms of disclosure and getting a chance to respond, the General Division corrected them.

The General Division did not make a legal error when it declined to decide whether the Claimant had been wrongfully dismissed

[30] The General Division did not make a legal error when it declined to decide whether the Claimant had been wrongfully dismissed.

[31] The Claimant argues that her employer wrongfully dismissed her as she was on a medical leave of absence. The Claimant went on a medical leave of absence on September 29, 2021.[10] Her employer expected her to return to work,[11] but she says that

[10] See Claimant's overview of facts, at AD 6-2, referring to physician's medical statement, at GD 8-4.
[11] See Claimant's overview of facts, at AD 6-2.

she had yet to receive a medical clearance to return to work. She notes that she had a follow-up consultation with her physician on January 11, 2022.

[32] As the General Division noted, it did not have any authority to decide whether her employer wrongfully dismissed her. The General Division's determination on this point was consistent with the case law.[12] It did not make a legal error on this issue.

[33] There are other avenues that the Claimant can pursue for wrongful dismissal. As the General Division noted, the Claimant has filed grievances against her employer.

The Appeal Division does not have the authority to examine whether the General Division properly weighed the evidence

[34] The Appeal Division does not have the authority to examine whether the General Division properly weighed the evidence.

[35] The Claimant argues that the General Division did not properly weigh the evidence. However, this matter falls outside the grounds of appeal under the *Department of Employment and Social Development Act*.

[36] The assignment of weight is a matter properly for the province of the trier of fact, as it is in the best position to assess the evidence and to determine the appropriate amount of weight to assign. I cannot conclude that the General Division should have placed more weight on or given greater consideration to any evidence that favoured the Claimant.

The Claimant argues that the General Division overlooked some of the evidence relating to her medical fitness

[37] The Claimant argues that the General Division overlooked the evidence. She denies that she committed any misconduct because she says she was not working and her doctor had not medically cleared for a return to work, She says the General Division overlooked this important consideration.

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[12] See, for instance, *Canada (Attorney General) v Caul*, 2006 FCA 251.

[38] The General Division was alive to this issue and to the Claimant's arguments. The General Division noted that the Claimant and the employer disputed whether she was fit to return to work from a medical leave. The General Division noted that her employer assessed that the Claimant was fit and that it had stopped her disability income-replacement payments. The Claimant on the other hand denied that she was well enough to return to work.[13]

[39] The General Division accepted the Claimant's evidence about the dispute. The General Division noted that she had filed evidence of her labour grievances against her employer related to her medical leave and income replacement benefit.[14]

[40] But it is also clear that the General Division did not decide whether the Claimant was medically fit to return to work. It was outside the scope of the General Division's powers to examine whether the Claimant was medically fit to return to work and to assess whether her employer had justifiably dismissed her. The General Division appropriately determined the scope of its powers.

[41] The General Division still had to determine whether there was any misconduct, despite the Claimant's dispute with her employer. It had to focus on whether the Claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.[15]

[42] Clearly, the General Division accepted that the Claimant's employment obligations extended to being vaccinated and reporting her status, even if there was a dispute over her medical fitness to return to work. The General Division properly applied the test for misconduct and found that there was evidence to conclude that there was misconduct.

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[13] See General Division decision, at para 20.
[14] See General Division decision, at para 21, citing the grievance form at GD 7-18.
[15] The Federal Court described the test for misconduct in *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 37.

[43] The issue regarding the Claimant's medical fitness to return to work—likely tied in to whether she was wrongfully dismissed during a medical leave of absence—can be addressed in another forum.

The General Division did not make a factual error about why the Claimant's employer dismissed her from her employment

[44] The General Division did not make a factual error about why the Claimant's employer dismissed her from her employment. Contrary to what the Claimant says, the General Division said the Claimant was dismissed because she did not get fully vaccinated, not just simply that she failed to report her vaccination status. This was consistent with the evidence. The General Division came to this determination much later in its decision.

[45] The Claimant argues that the General Division made an unsupported factual finding that she was dismissed for refusing to disclose her vaccination status.

[46] The General Division found that it had to decide why the Claimant lost her job, and whether the *Employment Insurance Act* considered that reason to be misconduct.[16]

[47] The Claimant says the General Division found that she lost her job because she failed to report her vaccination status. But, she says that the evidence shows that she had in fact reported her vaccination status. So, if she had reported her vaccination status, then she could not possibly have committed misconduct.

[48] The General Division discussed why the Claimant lost her job.[17] It did this under the heading, "The reason the [Claimant] lost her job." The General Division found that the Claimant's employer dismissed her because she had not complied with her employer's vaccination policy. In particular, it found that she had not reported her COVID vaccination status, which she was required to do under her employer's vaccination policy.

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[16] See General Division decision, at para 16.
[17] See General Division decision, at paras 17 to 25.

[49] If the General Division had concluded that failure to report was the sole reason for the Claimant's dismissal, I would have determined that it had made a factual error.

[50] The evidence shows that the employer expected the Claimant not only to report her status, but also to get vaccinated and to report that she was vaccinated.[18] Otherwise, she would be non-compliant with the employer's vaccination policy. But the General Division did not explain this vaccination requirement under its heading, "The reason the [Claimant] lost her job." It would have been helpful had it set this explanation out under this heading.

[51] Instead, the General Division described the extent of the Claimant's employment obligations much later on in its decision, under the heading, "The Commission has proven misconduct under the EI Act."

[52] The employer dismissed the Claimant because she had not fully complied with its updated policy. Under the updated policy, she was to be fully vaccinated and then report that she had gotten vaccinated. The General Division found that the Commission had proven misconduct as the evidence showed that the Claimant knew or should have known that, under her employer's vaccination policy, she had a duty to get fully vaccinated and to report her (updated) vaccination status, but chose not to comply.

[53] In other words, it is clear that the General Division determined that the Claimant had been non-compliant with her employer's vaccination policy because she did not get vaccinated and then report that she was vaccinated, and that this was the basis for her dismissal from her employment. This was consistent with the evidence.

[54] The Claimant denies that she was unprepared to get vaccinated but says that she wanted to make an informed decision. However, this does not mean that she was compliant with her employer's policy. And besides, as the General Division determined, the evidence suggested that the Claimant did not intend to get vaccinated, in light of her concerns about COVID vaccines.

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[18] See employer's emails of December 21, 2021, at GD 8-5

[55] There is one further point to address on this matter. The evidence does not include the actual notice of termination to confirm the basis for the Claimant's dismissal.

[56] Ostensibly, it appears that the employer reported to the Commission that it had dismissed the Claimant for failing to disclose her vaccination status. But it also seems from its communications with the Claimant and its employees that it contemplated that reporting necessarily included vaccination. In other words, the employer dismissed the Claimant because she had not reported that she was fully vaccinated.

[57] There is some conflicting evidence from the Claimant about what she understood was the reason for her dismissal.

[58] There is some evidence where she stated that she believed her employer dismissed her because it mistakenly believed that she had not reported her status at any time. But, there is also evidence that the Claimant stated that she understood that her employer dismissed her for not getting vaccinated and for not reporting that she was vaccinated:

- in her Application for Employment Insurance benefits, the Claimant stated that the employer's vaccination policy required that all employees had to declare their status and be injected with the COVID injection by a specific date.[19]

- when the Claimant spoke with the Commission, she advised that her employer terminated her because she had not provided proof of vaccination.[20]

[59] The Claimant went to some effort to persuade her employer that she should be exempt from vaccination over safety and efficacy concerns. She served a Notice of Potential Liability and Notice to Produce. This suggests that she was aware that reporting her status, on its own, was insufficient to comply with her employer's requirements and to maintain her employment. It is unlikely that she would have gone to

[19] See Claimant's Application for Employment Insurance benefits, at GD 3-9.
[20] See Supplementary Record of Claim dated May 17, 2022, at GD 3-41. She explained to the Commission why she did not plan on getting vaccinated.

this extent if she believed that reporting on her status was enough to comply with her employer's obligations.

[60] Finally, the employer's warning letter of notice of termination dated December 29, 2021 made it clear that the Claimant needed to be vaccinated, otherwise she would be subject to further disciplinary measures, up to and including dismissal.[21]

[61] The General Division was entitled to prefer the Claimant's evidence showing that she understood that her employer dismissed her for not providing proof of vaccination. This evidence was consistent with the Claimant's overall actions explaining why she did not get vaccinated.

The General Division misread the evidence

[62] The General Division misread the evidence. It found that a particular sentence in the employer's warning letter of notice of termination of December 29, 2021, imposed an ongoing obligation on the Claimant to continue to report her vaccination status.

[63] There was other evidence that required the Claimant to update her vaccination status after getting a first and second vaccine dose. However, the sentence in the December 29, 2021, letter did not impose any similar reporting obligation.

[64] The sentence in the letter reads:

> Further to the letter issued to you on December 23, 2021, this letter will serve to provide you with notice that should you fail to report your COVID-19 vaccination status by **tomorrow December 30, 2021 at 12:00 pm** your employment … will be terminated with cause, effective December 31, 2021.[22]

[65] The Claimant sys that she understood that she would need to report her vaccination status by December 30, 2021. The Claimant had reported her status before September 16, 2021. She reported then that she had not undergone vaccination. From

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[21] See warning letter of notice of termination, at GD 3-24 to 25 and GD 7-7 to 8.

[22] See General Division decision, at para 18 and warning letter of notice of termination, at GD 3-24 to 25 and GD 7-7 to 8.

the Claimant's perspective, she had already met her employer's reporting requirements in September 2021.

[66] The General Division noted the Claimant's argument that she met her duty to report her vaccination status to her employer. The General Division found that the Claimant regarded this as a one-time obligation. However, the General Division found, based on the sentence above, that the Claimant had, "an ongoing obligation to report her vaccination status"[23] and that the notice "clearly states she has to report her vaccination status at that time."[24]

[67] The Commission says that the General Division misstated the evidence on this point. The sentence clearly required the Claimant to report her vaccination by December 30, 2021, but it did not impose an ongoing obligation, nor state that she had to report her vaccination status again if she had previously reported her status.

Although the General Division misread a sentence, it did not change the outcome

[68] The General Division misread a sentence. The General Division's statement was technically correct that the Claimant had ongoing reporting obligations, but it relied on the wrong sentence. Although it relied on the wrong sentence, the balance of the evidence supported its conclusions that the Claimant had an ongoing obligation to report (that she was vaccinated).

[69] The warning letter also stated that the employer had informed the Claimant that failure to report her vaccination status **and proof of vaccination** would result in disciplinary action up to and including termination of her employment. The General Division would have properly set out the Claimant's reporting requirements if it had provided this further context and not relied solely on the one sentence in the letter.

[70] Other communications from the employer also confirmed the Claimant's duties to get vaccinated and to report the vaccination. In August 2021, the employer wrote to the

[23] See General Division decision, at para 23.
[24] See General Division decision, at para 23.

Claimant, saying, “Please note, **staff who are not vaccinated must also report**. I realize many of us already reported over the past weeks – we must report again and this time we need to provide proof of vaccination.”[25]

[71] Early on, the employer created some confusion over its requirements, but once it updated its policy in September 2021, it should have been clear by then that the reporting was connected to mandatory vaccination. Reporting on its own was insufficient to meet the employer’s requirements. Employees had to get vaccinated.[26]

– **The employer updated its vaccination and reporting requirements**

[72] The employer had updated its vaccination policy and with it, its reporting requirements. The employer stated that it had broadly communicated its updated requirements on October 7, 2021, and then directly to the Claimant on October 14, 2021.[27]

[73] Further, on October 29, 2021, the employer wrote to the Claimant by both email and regular mail.[28] The employer told the Claimant that she had until November 30, 2021, to show that she was fully vaccinated. The employer said that she would have to show that she had received both required doses of the COVID-19 vaccine. This required her to update her status: once after she had received a first dose and again, after she received a second dose.

[74] The General Division correctly noted that there was an ongoing obligation for the Claimant to report her vaccination status, but this was tied to getting the first and second doses.

[75] This context—that the employer required employees to report their vaccination status after a first dose and again after a second dose—was important in explaining the General Division’s determination that the Claimant had an ongoing obligation to report

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[25] See employer’s letter email dated August 31, 2021, at GD 7-5.
[26] See employer’s letter dated October 29, 2021, at GD 7-9.
[27] Employer’s letter dated October 29, 2021, at GD 7-9.
[28] See Employer’s letter dated October 29, 2021, with updated requirements, at GD 7-9.

her vaccination status. The General Division did not provide this context, and referred solely to the one sentence in the letter of notice of termination.

[76] The employer also advised the Claimant that failure to provide proof of vaccination by November 30, 2021 would result in her being deemed not fully vaccinated and non-compliant with the updated policy requirement.

[77] Finally, the employer also advised that those who were non-compliant with its mandatory vaccination policy would be subject to disciplinary measures, up to and including dismissal.[29]

[78] In an exchange of email with the Claimant on December 21, 2021, the employer also confirmed that before she could return from sick leave, she would have to "submit [her] vaccination status **and proof of vaccination immediately**" (My emphasis).[30]

[79] The employer wrote to the Claimant again later that same day. The employer advised her that the employer expected her to comply with the employer's policy and submit her vaccination status **and proof of vaccination** before returning to work on December 24, 2021.[31]

– **The Claimant did not fully comply with her employer's updated requirements**

[80] So, although the Claimant had reported her vaccination status early on, this was insufficient to preserve her employment. The letter of October 29, 2021, emails of December 21, 2021, and warning letter of December 29, 2021, stressed that she had to report her vaccination status **and get vaccinated**.

[81] The warning letter also said:

> As communicated on October 7, 2021, effective November 30, 2021, [the employer] requires all staff and physicians to be fully vaccinated for COVID-19, subject only to limited exemptions. Notwithstanding the above, should [she] report [her] status by December 30 at 12:00 PM, if [she was] not in compliance

[29] See employer's letter dated October 29, 2021, at GD 7-9.
[30] See case manager's email dated December 21, 2021, at GD 3-28.
[31] See case manager's email dated December 21, 2021, at GD 8-5.

> with Section 4.3 of the COVID-19 Vaccination Management Policy which requires mandatory vaccination, [she would] also be subject to further disciplinary measures, up to and including dismissal.[32]

[82] It was not enough for the Claimant to simply report on her vaccination status. The Claimant also had to show that she was fully vaccinated to avoid any disciplinary measures, including dismissal.

[83] The General Division arguably may have misstated the evidence in finding that the sentence in the warning letter meant that she to report her vaccination status again by December 30, 2021. But it did not change the outcome as the Claimant also had to show that she was fully vaccinated. The Claimant knowingly did not meet this requirement of her employer's policy, while being aware of the consequences, which meant that she had committed misconduct.

Conclusion

[84] The appeal is dismissed.

[85] The evidence does not support the Claimant's arguments that she was fully compliant with her employer's updated vaccination policy. Reporting on her status alone was insufficient. She also had to provide proof of vaccination.

[86] As the General Division determined, the Claimant knew or should have been aware of her employer's requirements and the consequences for non-compliance. The Claimant made a wilful and deliberate decision to not comply with her employer's vaccination policy. The Commission proved that there was misconduct under the *Employment Insurance Act*.

Janet Lew
Member, Appeal Division

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[32] See employer's warning letter of notice of termination, at GD 3-24 to 25.