Citation: *GG v Canada Employment Insurance Commission*, 2024 SST 676

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. G.
Representative:	Luke Effa
Respondent:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts

Decision under appeal:	General Division decision dated December 19, 2023 (GE-23-2986)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	June 4, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	June 18, 2024
File number:	AD-24-77

Decision

[1] I am dismissing G. G.'s appeal. She hasn't shown the General Division made an error.

[2] This means the General Division decision stands unchanged.

Overview

[3] G. G. is the Claimant in this case. She was hired by a British Columbia health authority (employer). She worked as a nurse at a general hospital. The employer suspended her and then let her go because she didn't get vaccinated against COVID-19 and give it proof of vaccination.

[4] She made a claim for Employment Insurance (EI) regular benefits.

[5] The Canada Employment Insurance Commission (Commission) decided she was suspended then lost her job for a reason that counts as misconduct under the *Employment Insurance Act* (EI Act).[1] So, it could not pay her EI benefits.

[6] The Commission upheld its decision on reconsideration. The Claimant appealed the Commission's decision to this Tribunal's General Division. It dismissed her appeal. The Appeal Division gave her permission to appeal that decision.

[7] The Claimant argues the General Division made two important factual errors. The Commission agrees the General Division made one important factual error. But it says that error doesn't affect the General Division's decision because the Claimant lost her job due to misconduct.

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[1] Section 30(1) of the *Employment Insurance Act* (EI Act) says a person is disqualified from getting any benefits if they lost any employment because of their misconduct. Section 31 says a person who is suspended from their employment because of their misconduct isn't entitled to receive benefits for a period of time. The EI Act doesn't define misconduct. The courts have done that. The General Division correctly summarizes the legal test for misconduct from paragraphs 18 to 23.

Preliminary matter: I am accepting new evidence

[8] The Claimant argues that the General Division made an important factual error when it found that the employer had a mandatory COVID-19 vaccination policy (vaccination policy). It says there was no evidence of that before the General Division.

[9] The Claimant wants to introduce new evidence that wasn't before the General Division. She sent the Appeal Division three affidavits. One was from a health care worker who had an offer of employment from the employer.[2] Two were from health care workers who worked for the employer.[3]

[10] Each health care worker says that neither the health authority nor the hospital implemented a "separate policy" requiring vaccination against COVID-19. Separate refers to a policy other than the Order of the Provincial Health Officer, made under British Columbia's *Public Health Act*. I will call this the PHO order.

[11] At the hearing, the Commission agreed with the Claimant's argument that I should accept the affidavits as general background information. This is one of the three recognized exceptions to the general rule that says the Appeal Division can't consider new evidence.[4]

[12] I don't accept that these affidavits fall under the general background exception. They give evidence to support the Claimant's argument about a key fact in this case—whether the Claimant's employer had a vaccination policy. She is relying on these affidavits to support her argument that she didn't lose her employment by reason of misconduct—not as general background.[5]

[13] I have decided to admit the three affidavits under another recognized exception. The Claimant is also relying on these affidavits to show a "complete absence of

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[2] See the affidavit at AD6-4 (Overvoorde affidavit).
[3] See the affidavits at AD6-6 (Effa affidavit) and AD6-8 (LaFleur affidavit).
[4] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 40.
[5] The Claimant recognizes this, when she argues the affidavits are, "information supporting my position that my employer did not have their own Covid-19 vaccination policy apart from the terms of the Provincial Health Order itself, which is pivotal to the issue of whether I engaged in misconduct or not." See her written argument at AD6-2, paragraph 4.

evidence" to support the General Division's finding that the employer had a vaccination policy. I am admitting them under that exception.

[14] This means I can consider the three affidavits when I decide whether the General Division made an important factual error.

Issues

[15] There are three issues in this appeal:

- Did the General Division make an important factual error when it found the employer had a vaccination policy?
- Did the General Division make an important factual error when it found the Claimant owed a duty to her employer to get vaccinated and give proof, even though she was a casual employee?
- If the General Division made an error, how should I remedy (fix) that error?

Analysis

[16] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix the error where a party shows the General Division made an important factual error.[6]

[17] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding the evidence.[7] In other words, the evidence goes squarely against or doesn't support a factual finding the General Division made.

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[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." This is what I mean by an error. And I wrote the error under section 58(1)(c) using plain language. I explain more about that error when I analyze the parties' arguments.
[7] Section 58(1)(c) of the DESD Act says it is a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

[18] The law also says I can presume the General Division reviewed all the evidence—it doesn't have to refer to every piece of evidence in its decision.[8]

[19] If I find the General Division didn't make an error, I have to dismiss the appeal.

The General Division didn't make an important factual error about the employer's vaccination policy

[20] The Claimant argued the following: "The dismissal of my appeal depended entirely upon the General Division's erroneous finding of fact that my employer had a Covid-19 vaccination policy, and I breached that policy."[9] She says there was no evidence to support this finding.[10] She added the finding is "purely speculative and ignores the entirety of the evidence to the contrary."[11]

[21] At the Appeal Division hearing, the Claimant said she wasn't disagreeing that the employer had an informal policy. The employer informally followed the PHO order and informally notified all nurses. And she said it was pretty clear staff had to be vaccinated in order to work. But she stuck to her position that the General Division's decision that she breached her employer's policy was wrong because there was no policy.

[22] The Commission argued that the evidence didn't support the General Division's finding that it was more likely than not that the employer had its own mandatory vaccination policy.[12]

[23] I don't accept that the General Division made an important error of fact when it found the employer had a vaccination policy, for two reasons.

[24] First, the parties' argument is based on a narrow reading of the General Division's reasons. Their reading ignores how the General Division understood the employer's policy and its reasons as a whole. When I review the General Division's

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[8] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.
[9] See the Claimant's appeal form at AD1-8, paragraph 4.
[10] See the Claimant's appeal form at AD1-8, paragraph 4.
[11] See the Claimant's appeal form at AD1-8, paragraph 4.
[12] See the Commission's written argument at AD7-4.

decision as a whole, I don't think it misunderstood or ignored evidence of whether the employer had a vaccination policy.

[25] The General Division didn't make a factual finding that the employer had its own vaccination policy document—a formal written policy. The General Division found the employer's policy was based on or consisted of the emails it used to implement the PHO order with its employees. Here are the parts of the General Division's decision that show me that:

- "The Appellant's employer says she was suspended and then let go because she did not comply with the COVID-19 vaccination policy mandated by the Provincial Health Order (PHO)."[13]

- "I find the Appellant was suspended and then dismissed because she failed to comply with the employer's emails, which set out its COVID-19 'policy.'"[14]

- "The documents on file show that the employer suspended and then dismissed the Appellant because she refused to be vaccinated against COVID-19 by the deadlines set out in the employer's emails (policy). The employer's policy and the PHO applied to all persons employed by a regional health board, the Provincial Health Services Authority, British Columbia emergency health services, the Providence Health Care Society, or a provincial mental health facility."[15]

- "Accordingly, I find the Appellant was suspended and then dismissed from her job because she refused to be vaccinated against COVID-19, as required by the employer's policy, in response to the PHO."[16]

[13] See General Division decision at paragraph 4.
[14] See General Division decision at paragraph 15.
[15] See General Division decision at paragraph 16.
[16] See General Division decision at paragraph 17.

- "The law does not say I have to consider how the employer behaved. I can't consider whether the PHO or the employer's actions or setting out policies in emails are reasonable."[17]

- "Did the employer have a policy? Yes. Although the employer did not send the Appellant a formal written policy, I find that it is more likely than not that the employer established a "policy" in response to the PHO. This is because the employer's emails clearly set out the employer's requirements (policy) in response to the PHO, that all employees be fully vaccinated against COVID-19 (the expressed or implied duty) and consequences for noncompliance."[18]

- "[T]he documents on file show the Commission also relied on evidence from the Appellant. That evidence includes the Appellant's statements that confirm her knowledge of the PHO, her receipt of the employer's emails, and the content of the employer's emails that were issued in response to the PHO."[19]

[26] The General Division might have more carefully defined and stuck to what it meant by the employer's policy. But it didn't misunderstand or ignore evidence when it found the employer had a vaccination policy. I have reviewed the documents and testimony from the General Division. The General Division's finding doesn't go against the evidence that was before it.

[27] The three affidavits I admitted as new evidence support the General Division's finding that the employer had a vaccination policy it communicated to employees, which implemented the PHO order. Each person says they received correspondence or a mass email from the employer about the new requirement to be vaccinated against

[17] See General Division decision at paragraph 22.
[18] See General Division decision at paragraph 28.
[19] See General Division decision at paragraph 31.

COVID-19. Each person also says this correspondence referred to the PHO order, not any specific policy or requirement from the employer or hospital.[20]

[28] Each person also says that, based on correspondence with the employer, they understand their employment was rescinded (or suspended and terminated) based on the PHO order and not a separate policy or requirement.[21] I give little to no weight to this understanding because they left out the evidence that supports it. They didn't attach any of the correspondence to their affidavits. So, I can't assess whether the evidence supports their understanding.

[29] There is a second reason the General Division didn't make an important factual error. It didn't base its decision on its finding that the Claimant's employer had a vaccination policy. It based its decision on the Claimant's wilful breach of the duty she owed her employer—to give proof of vaccination against COVID-19 by the deadline—while knowing the consequences of breaching that duty.[22]

[30] One way an employer creates and informs its employees about a duty is through a formal written policy. But that isn't the only way, and not what the law requires. The legal test for misconduct focuses on the duty itself—whether explicit or implicit—and the employee's wilful breach of that duty. The Commission has to prove the person willfully breached a duty they owed to their employer while knowing the consequences of doing that could include being let go or suspended. This is what the General Division decided the Claimant did.[23]

[31] So, the General Division based its misconduct decision on the Claimant's wilful breach of the duty it found in the employer's emails implementing the PHO order. It didn't base its decision on its finding that those emails were a vaccination policy. I can't accept the Claimant's distinction between a formal policy and what the General Division

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[20] See paragraph 4 at AD6-4 (Overvoorde affidavit); paragraphs 4 and 5 at AD6-6 (Effa affidavit); and paragraphs 4 and 5 at AD6-8 (LaFleur affidavit).
[21] See paragraph 6 at AD6-4 (Overvoorde affidavit); paragraph 7 at AD6-7 (Effa affidavit); and paragraph 7 at AD6-9 (LaFleur affidavit).
[22] See General Division decision at paragraphs 34, 39, 44, and 46.
[23] See General Division decision at paragraphs 34 to 39.

called the employer's informal policy. That distinction isn't legally relevant. It doesn't undermine the General Division's findings of fact about the employer's policy or the duty the Claimant owed to her employer.

[32] A recent Federal Court of Appeal decision supports my reasons.[24] That case also involved a COVID-19 provincial directive (Ontario) implemented by a health care sector employer (Lakeridge):[25]

> The Appeal Division reviewed the General Division's key findings. The General Division found that the appellant had been suspended and later terminated because **he failed to comply with Directive 6, which Lakeridge Health had implemented, as they were required** (General Division Decision at para. 46). **We disagree with the appellant's submission that there was no policy**. Lakeridge employees were required to provide proof of full vaccination against COVID-19, submit to regular antigen testing and provide verification of negative test results or obtain an exemption. The appellant chose none of these options [emphasis added].

[33] To summarize this section, the Claimant hasn't shown the General Division made an important factual error when it found her employer had a vaccination policy.

The General Division didn't ignore the Claimant's status as a casual employee—it wasn't legally relevant

[34] The Claimant argued that the General Division's misconduct finding was based on a misunderstanding about her casual employment status.[26] She said that, because she was a casual employee, she didn't owe her employer a duty to take shifts. So, she argues she didn't have to get vaccinated against COVID-19 because she didn't have to work. And she complied with the PHO order because she didn't work without being vaccinated.

[35] The Claimant's argument that the General Division made this factual error depends on her argument that she didn't owe her employer a duty to get vaccinated and

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[24] See *Cecchetto v Canada (Attorney General)*, 2024 FCA 102.
[25] See *Cecchetto v Canada (Attorney General)*, 2024 FCA 102 at paragraph 6.
[26] See the Claimant's appeal documents at paragraphs 17 to 21 at AD1-10 and AD1-11. And see the Claimant's written arguments at paragraphs 12 and 13, at AD6-3.

report her status to her employer. She says she didn't have that duty because her employer didn't have a policy. The General Division found the employer had a policy. Above, I found this wasn't an important factual error. So, I can't accept her argument that the only duty she owed to her employer was to comply with the terms of the PHO order by not working while unvaccinated.

[36] The General Division didn't ignore or misunderstand the Claimant's evidence about being a casual employee. It grappled with that evidence at paragraph 40. It decided it wasn't legally relevant to an issue it had to decide (misconduct) based on the legal test it had to apply.

[37] The General Division had already decided the Claimant's employer had a policy, she knew about, and her employer had suspended and let her go for misconduct. So, she could not work shifts because her employer suspended and then ended the employment relationship. It was no longer her choice as a casual employee whether she took a shift. This means the General Division didn't make an error when it decided the Claimant's casual employee status (in other words, this evidence) wasn't relevant to the misconduct issue it had to decide.

[38] The Claimant also argued the General Division made an important factual error when it didn't follow another COVID-19 misconduct decision the General Division had made. The claimant in the *AB* case was also a casual employee working for a health care authority that had to follow the PHO order.[27] The General Division decided the Commission hadn't shown the person lost her job due to misconduct.

[39] In *AB*, the General Division based its decision on two important findings of fact that are different from the Claimant's case. First, it found the Commission hadn't shown the employer had a policy. This meant the obligation she owed to her employer was solely from the PHO order. The PHO order said that unvaccinated staff could not be at work. And she didn't take shifts or go to work. Second, the General Division decided because she was a casual employee, she wasn't required to take shifts. So, by not

[27] See *AB v Canada Employment Insurance Commission*, GE-22-3735, February 28, 2023. Unpublished at time of writing.

working, she complied with the obligation she owed to her employer under the PHO order.

[40] At paragraph 45, the General Division correctly said it wasn't bound to follow this decision or other Tribunal decisions. And it explained why—the legal principle of *stare decisis*. This is all it had to do. So, it didn't make an important factual error by not following the General Division's decision in the *AB* case and basing its decision on the Claimant's casual employment status.

[41] Although the Claimant didn't argue the General Division's reasons were inadequate, I want to address that issue. Where the General Division doesn't give adequate reasons for its decision, it makes a legal error.

[42] When I read the General Division's decision as a whole, the reasons show that it decided the misconduct issue on the facts of the Claimant's case. These facts were different from the *AB* decision. In the Claimant's case, the General Division found the employer had a vaccination policy. And under that policy, all employees had a duty to get vaccinated and report to the employer by a specific date. The Claimant didn't do that. And that was misconduct. So, the General Division's reasons—including its reasons for not following the *AB* decision—weren't inadequate.

[43] Because the Claimant hasn't shown the General Division made an error, I don't have to consider the third issue (remedy).

Conclusion

[44] The Claimant hasn't shown the General Division made an error. So, I am dismissing her appeal.

Glenn Betteridge
Member, Appeal Division