Citation: *AC v Canada Employment Insurance Commission*, 2024 SST 923

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | A. C. |
| **Representative:** | Daniel Freiheit |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Josée Lachance |

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| **Decision under appeal:** | General Division decision dated April 25, 2023 (GE-22-3220) |

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| **Tribunal member:** | Elizabeth Usprich |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | April 9, 2024 |
| **Hearing participants:** | Appellant<br>Appellant's representative<br>Respondent's representative |
| **Decision date:** | July 31, 2024 |
| **File number:** | AD-23-552 |

## Decision

[1] The appeal is dismissed.

[2] The General Division didn't make any reviewable errors.

## Overview

[3] A. C. is the Claimant. His employer implemented a policy during the COVID-19 pandemic. The policy included that all employees had to attest to their vaccination status.

[4] The Claimant felt that his vaccination status was his private medical information. He didn't believe his employer had the right to ask for this information. He didn't believe the policy was legal. Due to the Claimant not attesting to his vaccination status, his employer suspended him from working.

[5] The Claimant applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Commission) denied his request for EI benefits. It said the suspension was due to the Claimant's misconduct and he wasn't entitled for that reason.

[6] The Social Security Tribunal (Tribunal) General Division agreed with the Commission. The Claimant has appealed the General Division decision. The Claimant says the General Division didn't follow procedural fairness and made an error of law.[1]

[7] The Claimant argues the General Division didn't articulate or apply the test under the EI Act for misconduct properly. He argues he should be entitled to EI benefits.

[8] I disagree. The General Division didn't make a reviewable error. That means the appeal is dismissed.

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[1] The Application to the Appeal Division also stated the General Division made errors of fact. The narrowing of the issues was stated during the hearing. In the Claimant's Legal Representative's post-hearing submissions, see AD12-2, it says the sole issue before the Appeal Division is whether the General Division applied the test for misconduct properly.

## Preliminary matters

[9] This matter was held in abeyance for a lengthy period of time while the Claimant was given time to access information. During the time in abeyance there were many decisions from higher courts released.

[10] The Claimant's Legal Representative requested to have 60 days post-hearing to make submissions on recent case law from the Federal Court and Federal Court of Appeal surrounding similar issues. Given the lengthy amount of time the case was held in abeyance, I decided the Claimant's Legal Representative should have been aware of the more recent case law. The parties agreed to April 26, 2024 to make post-hearing submissions and were entitled to reply to each other by May 3, 2024.

## Issues

[11] The issues in this appeal are:

a) Did the General Division provide the Claimant with a fair process?

b) Did the General Division make an error of law by not considering the full test for misconduct under the Employment Insurance Act?

## Analysis

[12] I can intervene only if the General Division made a relevant error. There are only certain errors I can consider.[2] Briefly, the errors I can consider are about whether the General Division did one of the following:

- acted unfairly in some way
- decided an issue it should not have, or didn't decide an issue it should have
- didn't follow or misinterpreted the law
- based its decision on an important error about the facts of the case

[2] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

[13] The Claimant checked the boxes that the General Division didn't follow procedural fairness; the General Division made an error of law; and the General Division made an important error of fact.[3]

## The General Division provided the Claimant with a fair process

[14] The Claimant says the Hearing Member was biased. The Claimant says the Hearing Member was biased for two reasons. First, because it is alleged the Hearing Member stated the test for misconduct incorrectly. Second, because the Hearing Member asked what the Claimant's vaccination status was.

[15] The issue of natural justice and bias was a ground alleged on the Claimant's Notice of Appeal. I told the Claimant's Legal Representative that bias is a high bar to meet. He said he didn't want to belabour the point and said that I could just make a decision.[4] I told him he needed to put arguments forward for me to consider the issue. He didn't.

[16] Allegations of bias are very serious. Members are presumed to be impartial. The test for bias is whether a reasonably well-informed person would think, in the circumstances, that the member would not decide the case fairly.[5] It isn't enough to show suspicion of bias. There needs to be actual evidence of bias. This means the legal test for showing a decision-maker is biased is high.[6]

### – The Hearing Member didn't exhibit bias when she stated the test for misconduct

[17] The Hearing Member, as part of her preamble, explained the EI Act doesn't define misconduct.[7] She said that case law is looked at in terms of making a decision for what constitutes misconduct for EI purposes.[8]

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[3] These issues were narrowed at the Appeal Division hearing and further in post-hearing submissions from the Claimant's Legal Representative.
[4] Listen to the Appeal Division hearing recording at 00:47:30.
[5] See *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at page 394.
[6] See *SM v Minister of Employment and Social Development*, 2015 SSTAD 1050 at paragraph 17.
[7] Listen to the General Division hearing recording at 00:09:05.
[8] Listen to the General Division hearing recording at 00:09:10.

[18] The Claimant's Legal Representative objected to the test and said it wasn't the complete test.[9] The Claimant's Legal Representative said he would address this issue in submissions. The Hearing Member told the Claimant's Legal Representative that he was welcome to make submissions on his position.[10]

[19] The Claimant's Legal Representative later made submissions.[11] The Hearing Member considered what constituted misconduct and specifically refers to the decision the Claimant's Legal Representative was relying on.[12]

[20] I find this shows the Hearing Member kept an open mind and hadn't already decided any issue. She listened to the Claimant's Legal Representative. She considered the submissions he made. This means she wasn't biased.

– **The Hearing Member wasn't biased for asking a question that she told the Claimant he didn't have to answer**

[21] This case is about misconduct based on the Claimant's unwillingness to attest to his vaccination status. The Hearing Member at the General Division asked, "did you get the Covid vaccination?"[13] The Claimant asked if he had to answer and the Hearing Member said he didn't.[14] This is what is now being alleged as bias.

[22] I asked the Claimant's Legal Representative why he didn't raise any issue of bias during the hearing. He said he was taken off-guard when the Hearing Member asked the Claimant if he was vaccinated.[15]

[23] After listening to the hearing recording, I don't find the Hearing Member was biased for asking the question. I don't find this means that she had pre-decided the

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[9] Listen to the General Division hearing recording at 00:10:36.
[10] Listen to the General Division hearing recording at 00:10:44.
[11] Listen to the General Division hearing recording at 00:54:28. The Claimant's Legal Representative specifically says that the Federal Court of Appeal's decision of *Canada (Attorney General) v Lemire*, 2010 FCA 314 had to be taken into account.
[12] See the General Division decision at paragraph 47.
[13] Listen to the General Division hearing recording at 00:26:52.
[14] Listen to the General Division hearing recording at 00:27:17.
[15] Listen to the Appeal Division hearing recording at 00:44:32.

issue. She told the Claimant that he didn't have to answer the question and the hearing moved on.

[24] The facts of the case aren't really in dispute so it is unknown how this interaction tainted the hearing. Since the Claimant's Legal Representative didn't want to make submissions on the issue, I will make a decision based on the record. I don't find there is anything to suggest that the Hearing Member was biased. The Claimant received a fair hearing process.

## The General Division didn't make an error of law because it considered the full test for misconduct under the Employment Insurance Act

### – The legal test was properly stated

[25] The Claimant's Legal Representative now says the sole question for the Appeal Division is whether the General Division didn't articulate the correct test for misconduct.[16] I can't accept this argument for the reasons that follow.

[26] The test for misconduct is not contained in the *EI Act*. That means the General Division had to look at what case law says. The General Division did exactly this.[17]

[27] For misconduct to be found the Claimant must have done something wilful, but no wrongful intent is required. The General Division had to consider whether there was misconduct and whether that led to the Claimant's suspension.

[28] The Federal Court and Federal Court of Appeal have been extremely clear in numerous cases.[18] The focus is on the employee's actions and **not** the employer's. The General Division correctly considered this argument.[19] This means if an employee disagrees with an action by their employer, there are other avenues to bring their

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[16] See AD12-2.
[17] See the General Division decision at paragraphs 29 to 33.
[18] Recently, the Federal Court of Appeal addressed this in *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at paragraph 5. See also *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[19] See the General Division decision at paragraphs 33 and 42.

dispute.[20] In this case, the Claimant told the General Division he had filed a grievance against his employer.[21]

– **Express or implied clause**

[29] The Claimant's Legal Representative argues the General Division didn't apply the misconduct test correctly. He says the General Division only wanted to look at the employee conduct without looking at the validity of the employment contract or implied and express duties. He argues *Lemire* requires looking at a totality of the circumstances.

[30] But this isn't so. The Federal Court of Appeal has clarified that, within the EI context, only the conduct of the employee is considered.[22] Specifically, the reasonableness of the employer's policy is not what the Tribunal has to focus on.

[31] The Claimant's Legal Representative argues there was no clause in any employment contract or collective agreement that required vaccination.[23] It is argued this means the employer's policy wasn't legal. But, again, the General Division turned its mind to this argument.[24] So, there isn't a reviewable error here.

[32] The General Division considered the arguments.[25] The General Division decided the employer's vaccination policy **was** a condition of employment. It specifically stated, "When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment."[26]

[33] The Federal Court and Federal Court of Appeal have also provided guidance on this issue. *Cecchetto* makes it clear than an employer may unilaterally introduce a

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[20] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 32 and 46.
[21] Listen to the General Division hearing recording at 00:53:07.
[22] See *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at paragraphs 3 to 6.
[23] See the General Division decision at paragraph 23.
[24] See the General Division decision at paragraph 33.
[25] See the General Division decision at paragraphs 46 and 54.
[26] See the General Division decision at paragraph 47.

vaccination policy without an employee's consent.[27] It is not within the Tribunal's authority to decide if the employer breached a term in the collective agreement.[28]

[34] This means the General Division didn't make a reviewable error in this regard.

– **The Claimant knew, or should have known, there was a real possibility he could be suspended**

[35] The Claimant's Legal Representative argues the Claimant didn't believe his employer would suspend him. The General Division considered this and decided the Claimant knew the consequence of not following the employer's policy. I don't have the authority to reweigh that evidence. That means there is no reviewable error here.

[36] It wasn't disputed that the Claimant didn't follow his employer's mandatory vaccination policy. The Claimant said he didn't believe that the employer would follow through on suspending him. Yet, the Claimant testified that he understood that the consequence of not attesting his status was a suspension.[29]

[37] The General Division weighed this evidence. It also considered whether there was a real possibility he would be suspended.[30]

[38] Additionally, the Claimant had a conversation with his manager which was followed up by an email that said the Claimant would be suspended.[31] From the evidence, the General Division concluded the Claimant knew what the consequence of

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[27] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102. Note that this decision was appealed to the Federal Court of Appeal. The decision was upheld and the Court noted at paragraph 10, "The reasons refer to the well-established test for misconduct and explain why the appellant had not identified a reviewable error in the General Division's application of that test to the facts. The Appeal Division's decision is also consistent with many recent decisions of this Court in similar circumstances: *Kuk* at paragraph 9, and the decisions referred to therein; see also *Palozzi v Canada (Attorney General)*, 2024 FCA 81."

[28] The Federal Court of Canada in *Cecchetto v Canada (Attorney General)*, 2023 FC 102, has upheld the principle that the Tribunal must look at why an appellant has been dismissed and if it is "misconduct" under the EI Act. The Federal Court of Appeal has upheld this decision. See *Cecchetto v Canada (Attorney General)*, 2024 FCA 102 at paragraph 10.

[29] Listen to the General Division hearing recording at 00:21:56 and paragraph 18 of the General Division's decision where the Claimant affirmed he knew the policy and knew it applied to him. Listen also to General Division hearing recording at 00:22:13 and paragraph 19 of the General Division's decision which says the Claimant knew if he didn't attest he would be suspended from his job.

[30] See the General Division decision at paragraphs 55 to 57,

[31] See GD13-2 and the General Division decision at paragraph 26

not following his employer's policy would be.[32] So, the General Division considered the evidence. I can't reweigh it to come to a different conclusion.

– **It was clear the Claimant could not carry out his duties owed to his employer**

[39] The Claimant's Legal Representative argues that the General Division's decision is not complete. He says the General Division had to specifically say the Claimant's conduct impaired a duty owed to the employer.[33] I disagree. The General Division didn't make a reviewable error with respect to this issue.

[40] The performance of duties owed to an employer was set out in *Mishibinijima* by the Federal Court of Appeal.[34] The Federal Court of Appeal in *Nelson* affirms, "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."[35]

[41] But the Federal Court recently clarified, "this does not mean only the ability to perform the tasks of the particular job, but is the broader duty owed to the employer to be able to report for work by complying with the policies and rules in the workplace."[36]

[42] In previous cases like *Lemire*, *Mishibinijima*, or *Nelson*, the actual conduct of the employee was in question and whether it was considered misconduct. So, for example, in *Nelson*, the question was whether an employee being intoxicated when not working on a dry reserve was misconduct. This meant there had to be an analysis of whether the conduct in question was misconduct under the EI Act.

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[32] See the General Division decision at paragraph 55.
[33] Listen to the Appeal Division hearing recording at 01:01:57. It is also argued that because the Claimant worked from home that his refusal to be vaccinated had nothing to do with his job performance. But the employer's policy specifically stated their policy applied to all employees, "whether they are on some form of virtual work arrangement or not". See GD10 at 6.1.1 and see the General Division decision at paragraph 22.
[34] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[35] See *Nelson v Canada (Attorney General)*, 2019 FCA 22 at paragraph 21.
[36] *Butu v Canada (Attorney General)*, 2024 FC 321 at paragraph 83. See also *Canada (Attorney General) v Wasylka*, 2004 FCA 219 at paragraph 3.

[43] But this case isn't the same. The consequences of failing to attest were set out in the employer's policy.[37] The policy states that an employee's failure to attest will result in a leave without pay and their removal to access systems. This means an employee who fails to attest won't be permitted to work.

[44] The General Division decided the Claimant's action of not disclosing his vaccination status was wilful and deliberate. The General Division decided the Claimant knew the consequence of not disclosing. The very consequence was that he wouldn't be allowed to work. This necessarily means the Claimant wasn't able to carry out his duties to his employer.

[45] It isn't my role to reweigh the evidence. The General Division correctly stated the test for misconduct that has been well accepted by the Federal Court and Federal Court of Appeal.

## Conclusion

[46] The General Division didn't make any reviewable errors.

[47] The appeal is dismissed.

Elizabeth Usprich
Member, Appeal Division

[37] See GD10-4 at 6.7.1.