Citation: *Canada Employment Insurance Commission v JD*, 2024 SST 1065

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Julie Meilleur
Respondent:	J. D.

Decision under appeal:	General Division decision dated March 26, 2024 (GE-24-496)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	August 6, 2024
Hearing participants:	Appellant's Representative Respondent
Decision date:	September 5, 2024
File number:	AD-24-274

Decision

[1] The appeal is allowed in part. The Claimant was suspended because of her misconduct from December 17, 2021, to April 1st, 2023.

Overview

[2] The Respondent (Claimant) was suspended from her job. The employer said that she was suspended because she did not comply with the employer's COVID-19 vaccination policy (Policy). She was not granted an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits. The Respondent (Commission) determined that the Claimant was suspended from her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[3] The General Division found that the Claimant was suspended from her job following her refusal to follow the employer's Policy. She was not granted an exemption. It found that the evidence did not show that the Claimant was subject to a mandatory vaccine requirement in October 2021. The only mandatory vaccine requirement proven by the Commission was the one in the revised Policy of October 2022.

[4] The General Division found that even if there had been a mandatory vaccination requirement in October 2021, there is no evidence of any consequences being set out for remaining unvaccinated. Therefore, the General Division determined that the Claimant did not know or ought to have known of the possibility of her suspension. The General Division concluded that the Claimant wasn't suspended from her job because of misconduct.

[5] The Appeal Division granted the Commission leave to appeal. The Commission submits that the General Division based its decision on an erroneous finding of fact without regard for the material before it and made an error in law when deciding the Claimant wasn't suspended for misconduct.

[6] I must decide whether the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it and whether it made an error of law when making its decision.

[7] I am allowing the Commission's appeal in part.

Issue

[8] Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it and did it make an error in law when it concluded that the Claimant wasn't suspended because of misconduct?

Preliminary matters

[9] It is well-established that I must decide the present appeal based on the evidence presented to the General Division. The powers of the Appeal Division are limited.[1] I therefore listened to the recording of the General Division hearing held on March 12, 2024.

Analysis

Appeal Division's mandate

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[2]

[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division decision base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it and did it make an error in law when it concluded that the Claimant wasn't suspended because of misconduct?

[13] The General Division found that the Claimant was suspended from her job following her refusal to follow the employer's Policy. She was not granted an exemption. It found that the evidence did not show that the Claimant was subject to a mandatory vaccine requirement in October 2021. The only mandatory vaccine requirement proven by the Commission was the one in the revised Policy of October 2022.

[14] The General Division found that even if there had been a mandatory vaccination requirement in October 2021, there is no evidence of any consequences being set out for remaining unvaccinated. Therefore, the General Division determined that the Claimant did not know or ought to have known of the possibility of her suspension.

[15] The General Division concluded that the Claimant wasn't suspended from her job because of misconduct.

[16] The Commission submits that the General Division based its decision on an erroneous finding of fact without regard for the material before it and made an error in law when deciding as it did. More particularly, the Commission submits that General Division did not consider the Claimant's statement that all staff was notified of mandated COVID-19 vaccination with several weeks of notice. Furthermore, the employer's letter dated October 18, 2021, confirmed that all employees had to be fully vaccinated by

October 24, 2021. Failure to comply with the policy, would result to be placed on an unpaid leave of absence.

[17] Before the General Division, the Claimant testified that up to her suspension in October 2021, there had been no information from the employer about a mandatory vaccination policy. There had been no posting of information about a mandatory vaccination policy in the facility. Nor was there verbal communication about such a policy. The employer had required that staff regularly test for COVID-19 and report the results. The employer also required the use of PPE. She complied with these measures. The employer also provided information about vaccinations being available in the facility for staff and residents. The employer recommended the vaccine but did not require staff to take it.

[18] The Claimant also testified that in 2021 there was talk among the staff about a COVID-19 policy to come, but no firm information. The employer held information sessions that dealt with safety measures such as PPE and isolation of infected residents. The sessions also recommended the vaccine to staff, but nothing beyond that. The employer gave the Claimant no warnings that she had to take the vaccine to continue working.

[19] However, during an interview held by the Commission on November 24, 2021, the Claimant reportedly stated that all staff had been informed of a mandatory covid vaccination policy with several weeks' notice.[3]

[20] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[21] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it; it must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain

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[3] GD3-22.

the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.[4]

[22] After reading the General Division decision, I find that it did not consider the contradictory evidence before it. The General Division disregarded it. It did not explain why the Claimant's contradictory statement should be dismissed or assigned little or no weight at all. This is an error of law.

[23] I am therefore justified to intervene.

There are two ways to fix the General Division's error

[24] When the General Division makes an error, the Appeal Division can fix it in one of two ways:

1) It can send the matter back to the General Division for a new hearing;

2) It can give the decision that the General Division should have given.

The record is complete, and I can decide this case on its merits

[25] I find the record is complete. The parties had the opportunity to fully present their case before the General Division. I can give the decision that the General Division should have given.

Misconduct

[26] I must decide whether the Claimant was suspended from her job because of misconduct under the *Employment Insurance Act* (EI Act).

[27] I must apply the narrow test of misconduct under EI law. To do so, I must determine the following:

- whether she was aware of her employer's Policy.

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[4] *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

- whether she willfully ignored her employer's Policy.

- whether she knew or ought to have known the consequences of ignoring his employer's Policy.

[28] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, to constitute misconduct, the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects their actions would have on their performance.

[29] It is not my role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending the Claimant in such a way that her suspension was unjustified, but rather of deciding whether the Claimant was guilty of misconduct under EI law and whether this misconduct led to her suspension.

[30] The Claimant testified that she did not receive a copy of the employer's Policy prior to her suspension in October 2021, and that she was not warned that she had to take the vaccine to continue working.

[31] The Claimant testified that the employer had required that staff regularly test for COVID-19 and report the results. The employer also required the use of PPE. She complied with all these measures. The employer also provided information about vaccinations being available in the facility for staff and residents. The employer recommended the vaccine but did not require staff to take it.

[32] I believe the Claimant's testimony that she was not warned by her employer prior to October 18, 2021, that she had to receive the vaccine to continue working.

[33] The employer only communicated to the Commission an updated version of its vaccination Policy dated October 2022, one year after her suspension.[5] The employer was not interviewed in depth by the Commission on the events that led to the Claimant's suspension in October 2021. Her union filed a grievance October 28, 2021, on the basis that the employer did not provide her with a copy of its Policy and/or written reasons for its decision to remove her from the nursing schedule as of October 23, 2021.[6]

[34] The Claimant testified she never received communication from the employer informing her of a mandatory vaccination policy prior to her suspension. There is no evidence that the Claimant did in fact receive the employer's letter dated October 18, 2021. The Claimant also did not receive the letter offering her to possibility to return to work in April 2023.

[35] Regarding the contradictory statement, the Claimant testified that she did not believe she made this statement. She explained throughout the hearing that her position always was that she complied with all her employer's requirements and that there were rumors of an upcoming policy but that she was never warned that she had to take the vaccine to continue working.

[36] Her testimony is supported by the fact that the union filed a grievance October 28, 2021, on the basis that the employer did not provide her with a copy of its Policy and/or written reasons for its decision to remove her from the nursing schedule as of October 23, 2021.

[37] However, the evidence shows that the Claimant became aware of the employer's new vaccination Policy at least from December 17, 2021. She knew from that date that she was suspended by her employer for non-compliance with the Policy and that she risked losing her job for non-compliance with the Policy.[7]

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[5] See GD3-27 to GD3-30.
[6] See GD2-17.
[7] See letter written by Claimant to her employer dated December 17, 2021, GD-2-14 to GD2-16.

[38] On December 17, 2021, the Claimant wrote a letter to her employer that says the following:

> *"I am writing regarding the COVID-19 vaccine, I have recently been advised is a new, additional condition of my employment…*
>
> *[…]*
>
> *Harm is being threatened against me through loss of livelihood in the form of unpaid leave and termination of employment. In order to provide you with the informed consent you require, I need the following information, in writing…"*

[39] Based on this evidence, I find that the Claimant was suspended for misconduct from December 17, 2021, because she did not follow the employer's Policy. By that time, she had been informed of the employer's Policy and was given time to comply. The Claimant refused intentionally; this refusal was willful. This was the direct cause of her suspension.

[40] I find that from December 17, 2021, the Claimant knew or ought to have known that her refusal to comply with the Policy would result in her suspension.

[41] I find that the Claimant's behavior constituted misconduct.

[42] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.

[43] It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace. In the present case, the employer implemented a Policy to protect the health and safety of all its employees and senior population during the pandemic. The Policy was in effect when the Claimant was suspended.

[44] I must reiterate that I cannot focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. I must focus on the Claimant's conduct.

[45] During the term of employment, the employer may try to impose policies that encroach on their employees' rights. If they believe that a new policy violates their employment contract or collective agreement, they can sue their employer for wrongful dismissal or file a grievance. If they believe that a new policy violates their bodily integrity or freedom of speech, they can take their employer to court or to a human rights tribunal. However, the EI claims process is not the way to litigate such disputes.

[46] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."

[47] The question of whether the employer violated the law and/or her collective agreement, or whether the employer's Policy violated her human and constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.

[48] The Federal Court has rendered a decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.[8]

[49] In that case, the claimant submitted that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct. He put forward that it was not proven that the vaccine was safe and efficient. The claimant felt discriminated against because of his personal medical choice. The claimant submitted that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[50] The Federal Court confirmed the Appeal Division's decision that by making a personal and deliberate choice not to follow the employer's vaccination Policy, the claimant had breached his duties owed to his employer and had lost his job because of misconduct under the EI Act.[9] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

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[8] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[9] The Federal Court refers to *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

[51] The Court's reasoning in the *Cecchetto* case has since then been followed by a string of Federal Court and Federal Court of Appeal decisions regarding vaccination cases, *Kuk*, *Milovac*, *Francis*, *Matti*, *Davidson*, *Sullivan*, *Abdo*, *Spears*, *Wong*, *Boskovic, Hazaparu, Murphy, and Cecchetto (FCA)*.[10]

[52] These decisions all say that by making a personal and deliberate choice not to follow their employer's vaccination policy, the claimants had breached their duties owed to their employer and had lost their job because of misconduct under the EI Act. The Courts reiterated several times that this Tribunal does not have the authority to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

[53] The preponderant evidence before the General Division shows that the Claimant made a personal and deliberate choice not to follow the employer's Policy and this resulted in her being suspended from work, in accordance with the Policy.

[54] I have no choice but to decide the issue of misconduct within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.

[55] I note that the Claimant's employer did eventually call her back to work. This fact does not change the nature of the misconduct, which initially led to her suspension.

[56] I am fully aware that the Claimant may seek relief before another forum if a violation is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was suspended because of her misconduct from December 17, 2021, to April 1st, 2023.

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[10] *Cecchetto v Canada (Attorney General)*, 2024 FCA 102, *Hazaparu v Canada (Attorney General)*, 2024 FC 928, *Boskovic v Canada (Attorney General)*, 2024 FC 841, *Wong v Canada (Attorney General)*, 2024 FC 686, *Spears v Canada (Attorney General)*, 2024 FC 329 *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; *Abdo v Canada (Attorney General)*, 2023 FC 1764.

Conclusion

[57] The appeal is allowed in part. The Claimant was suspended because of her misconduct from December 17, 2021, to April 1st, 2023.

Pierre Lafontaine
Member, Appeal Division