Citation: *NL v Canada Employment Insurance Commission*, 2022 SST 1139

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	N. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated March 3, 2022 (GE-22-140)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	September 2, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	November 1, 2022
File number:	AD-22-156

Decision

[1] The appeal is allowed in part. The General Division made a factual error when it found that the Appellant, N. L. (Claimant), left his employment.

[2] I am giving the decision that the General Division should have given. Although the Claimant's employer said it placed the Claimant on an involuntary leave of absence, I find that this was a suspension for the purposes of the *Employment Insurance Act*.

[3] The Claimant did not comply with his employer's vaccination policy. This amounted to misconduct. He is disentitled from receiving Employment Insurance benefits under section 31 of the *Employment Insurance Act*.

Overview

[4] The Claimant is appealing the General Division decision. The General Division found that the Claimant left his employment. The General Division also found that the Claimant did not have just cause for leaving his job because he had reasonable alternatives to leaving. As a result, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made both legal and factual errors. In particular, he denies that he left his employment. And, because the General Division failed to appreciate this, he says that it applied the wrong section of the *Employment Insurance Act* when it disqualified him from receiving benefits.

[6] The Claimant says that his employer placed him on an involuntary leave of absence. He says this qualifies as a lay-off, and that he should therefore be entitled to benefits under section 32 of the *Employment Insurance Act*. He asks the Appeal Division to allow his appeal and to give a decision along these lines.

[7] The Respondent, the Canada Employment Insurance Commission (Commission) agrees that the General Division made both legal and factual errors. The Commission

also agrees that the Appeal Division has all of the relevant facts so that it can give the decision that the General Division should have given.[1]

[8] However, the Commission argues that, although the employer placed the Claimant on an involuntary leave of absence, there was misconduct as defined by the *Employment Insurance Act*. The Commission says the involuntary leave met the definition of a suspension under the *Employment Insurance* Act.

[9] The Commission asks the Appeal Division to find that the Claimant was suspended from his employment because of misconduct and to find that he was disentitled to receive benefits under section 31 of the *Employment Insurance Act*.

Issues

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

a) Did the General Division make any legal or factual errors?

b) If so, how should the error be fixed?

Analysis

[11] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal or certain types of factual errors.[2]

Did the General Division make any legal or factual errors?

[12] The parties agree that the General Division made both legal and factual errors.

[13] The General Division found that the Claimant left his employment. Although the audio recording of the General Division hearing is incomplete, nothing in the documentary suggests that the Claimant left his employment. The parties agree that the

[1] The audio recording of the General Division hearing is incomplete but the parties do not need to rely on it as they agree on the general facts.
[2] Section 58(1) of the *Department of Employment and Social Development Act*.

Claimant's employer placed him on an unpaid involuntary leave of absence because he refused to comply with the employer's vaccination policy.

[14] Because the General Division found that the Claimant left his employment, it found that section 30 of the *Employment Insurance Act* applied. Under that section, a claimant is disqualified from receiving benefits if they lost their employment because of misconduct or if they voluntarily left their employment without just cause. As the Claimant neither lost nor left his employment, the section does not apply to him.

[15] The General Division made a factual error when it found that the Claimant left his employment. The General Division then compounded its error by applying section 30 of the *Employment Insurance Act* when it was not relevant to the Claimant's circumstances.

Fixing the error

[16] Unless the outcome remains the same, the Appeal Division has two options to fix errors: It can return the matter to the General Division for a redetermination, or it can give the decision that the General Division should have given in the first place.

[17] Generally, it would be appropriate to substitute one's own decision for the General Division decision if the underlying facts are not in dispute, the evidentiary record is complete, and the parties received a fair hearing at the General Division and had a full and fair opportunity to present their case at the General Division.

[18] The audio recording from the General Division hearing is incomplete. In fact, the audio recording does not go beyond the General Division member's introductory remarks. Even so, the parties agree on the basic underlying facts. There were no procedural issues at the General Division. For this reason, I find it appropriate in this case to give the decision that the General Division should have given.

– Agreed Facts

[19] The parties agree on the following facts:

- The Claimant's employer introduced a COVID-19 vaccination policy under the order of Directive #6 issued by the province's Chief Medical Officer of Health.
- For various reasons, the Claimant was aware of but chose not comply with his employer's vaccination policy.[3]
- As the Claimant did not comply with the policy, the Claimant's employer placed him on an involuntary unpaid leave of absence.[4]
- The terms and conditions in the Claimant's employment contract did not mention anything about vaccination.[5]
- The Claimant's employer had progressive performance improvement measures to deal with misconduct. The employer did not implement or pursue any of these measures against the Claimant.

– The Claimant's arguments

[20] The Claimant argues that the evidence clearly shows that his employer placed him on an involuntary leave of absence, and that his circumstances should be treated as a leave of absence or lay-off. He denies that there was any misconduct on his part.

[21] The Claimant also suggests that he could not have known that his non-compliance would be treated as misconduct or that he would be considered as having been suspended, because (1) nothing in his employment contract required vaccination and (2) he would have faced the disciplinary measures that preceded a suspension.

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[3] A copy of the employer's vaccination policy is at GD2-27 to GD2-31 and at GD3-29 to GD3-33.
[4] Employer's letter dated September 23, 2021, placing the Claimant
[5] Claimant's employment contract is at GD2-19 to GD2-24.

- **The Claimant denies any misconduct**

[22] The Claimant argues misconduct occurs only when there is a breach of the employer-employee relationship. He denies that any breach occurred. He points to his employment contract. It did not include anything about getting vaccinated. So, he says that his non-compliance with his employer's vaccination policy should not be considered a breach.

[23] The Claimant also argues that, had there been any misconduct, his employer would have taken disciplinary measures against him. This would have included issuing him a letter(s) of warning, followed by suspension, ranging from one to up to five days, and then finally, termination. He did not receive any warnings, or go through any of the progressive disciplinary steps, so says that his separation from work was not due to misconduct.

- **The Claimant argues that section 32 of the *Employment Insurance Act* applies**

[24] The Claimant argues that section 32 of the *Employment Insurance Act* applies. The section deals with disentitlement arising from a voluntary leave without just cause. He claims that because his employer imposed the leave of absence or layoff on him, he is entitled to benefits under the section.

[25] Section 32 of the *Employment Insurance Act* reads:

> **32. (1) Disentitlement – period of leave without just cause –** A claimant who voluntarily takes a period of leave from their employment without just cause is not entitled to receive benefits if, before or after the beginning of the period of leave,
>
> (a) the period of leave was authorized by the employer; and
>
> (b) the claimant and employer agreed as to the day on which the claimant would resume employment.

[26] The section does not directly address the Claimant's factual circumstances, as the Claimant did not voluntarily take a period of leave from his employment.

- **The Claimant argues that the Digest of Benefit Entitlement Principles applies**

[27] Finally, the Claimant argues that Chapter 6 of the Digest of Benefit Entitlement Principles (Digest) squarely addresses his circumstances. For that reason, he argues that the Digest should therefore apply.

[28] The Claimant notes that the Digest states that, in cases where an employer places an employee on a leave of absence or lays off that employee, a disentitlement will not be imposed.[6] The Claimant argues that this aptly describes his own case. He says that he did not take a leave of absence voluntarily. So, he argues that, according to the Digest, he is entitled to receive Employment Insurance benefits.

[29] Section 6.6.2 of the Digest reads, in part, as follows:

> **6.6.2 Authorized period of leave – section 32**
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> . . . If imposed by the employer or set out in the employee's contract that the claimant must take leave (without pay or with reduced pay), then this is considered to be a lay-off. Even if the claimant was able to choose the period in which such imposed leave could be taken, this would not change the fact that the leave was not taken voluntarily. In such circumstances, a disentitlement will not be imposed.[7]

[30] The Claimant says the Digest acts as a guide for interpreting the *Employment Insurance Act* and the *Employment Insurance Regulations*. He cites the introduction to the Digest, which says that it contains the principles that the Commission uses when providing information and guidance on legislative and regulatory requirements. The Claimant notes that the Digest also states that these same principles also apply when making decisions on claims for Employment Insurance benefits.

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[6] Found online at Digest of Benefit Entitlement Principles - Canada.ca. See section 6.6.2 Authorized period of leave – section 32, at GD2-16, GD3-26, and AD1-11.
[7] Section 6.6.2 of the Digest appears at GD2-16 and at AD1-11.

[31] The Claimant submits that I should follow section 6.6.2 of the Digest and find that he was on an involuntary leave of absence, rather than suspended from work, and that he was not disentitled from receiving Employment Insurance benefits.

- **The Commission's arguments**

[32] The Commission argues that the Digest is merely a reference tool and does not replace the law. The Commission argues that section 32 of the *Employment Insurance Act* is not relevant. The Commission argues that section 31 applies instead.

  - **The Commission argues section 31 of the *Employment Insurance Act* applies**

[33] The Commission acknowledges that the Claimant's employer said that it was placing the Claimant on an unpaid involuntary leave of absence. But, the Commission argues that the Claimant's circumstances were more akin to a suspension.

[34] The Commission says that the scenario that the Claimant describes—the involuntary leave of absence—typically applies when there is no work available. Such would be the case, for instance, when there is a general two-week shutdown in the construction field.

[35] But, when a leave of absence arises because of a claimant's conduct, the Commission says that that is in effect a suspension, in which case section 31 of the *Employment Insurance Act* then applies.

[36] Section 31 of the *Employment Insurance Act* reads:

> **31. Disentitlement—suspension for misconduct—**A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until
>
> (a) the period of suspension expires;
>
> (b) the claimant loses or voluntarily leaves the employment; or
>
> (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to quality to receive benefits.

[37] The Commission argues that because section 31 of the *Employment Insurance Act* applies, the Claimant is not entitled to receive Employment Insurance benefits.

– **The Digest is an interpretive guide but it does not replace the law**

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

[39] The Federal Court recently revisited the question as to the extent to which the Appeal Division should rely on the Digest. In *Sennikova*,[10] the Court agreed that that the Appeal Division in that case could have referred to the Digest in its decision. But, ultimately, the Court was unpersuaded that the Appeal Division acted unreasonably in not doing that. The Court wrote:

> The Digest is a non-binding guidance document [reference to *Greey*], and it cannot have the effect of overriding the wording of the [*Employment Insurance*] *Act* or the [*Employment Insurance*] *Regulations* as interpreted by binding case law.

[40] It is clear that I may use the Digest as a guide to interpret the *Employment Insurance Act* and the *Employment Insurance Regulations*. But, it is also clear from the case law that the Digest is not binding and does not replace the law itself.

[41] The Claimant focused on section 6.6.2 of Chapter 6 of the Digest, which deals with voluntarily leaving employment. Neither the Claimant nor the Commission relied on or referred me to section 7 of the Digest, which deals with misconduct.

[42] Section 6.3.0 defines voluntarily leaving. It defines it as an employee-initiated termination of the employer-employee relationship.

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[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 260, [2003] 1 F.C. 447.
[10] *Sennikova v Canada (Attorney General)*, 2021 FC 982.

[43] Section 6.3.1 compares voluntary leaving to misconduct. The section states that, in both cases, the claimant has "acted in such a manner that loss of employment resulted. These two notions are rationally linked together because they both refer to situations where loss of employment results from a deliberate action of the employee".[11]

[44] The section cautions that any final decision has to reflect the facts and be able to justify which is more valid: misconduct or voluntary separation without just cause. The section states that this would involve examining who initiated the act of severing the employment or causing the separation.

[45] This section does not directly deal with involuntary separation. But, it is clear from the section and in applying these principles that it is appropriate to examine who initiated the act of severing the employment. This involves looking at whether:

- there were external factors unrelated to the employee that caused the employer to place that employee on leave, or
- there was any conduct or omission by the employee that caused the employer to place the employee on leave.

[46] This approach is consistent with the case law. In *Macdonald*,[12] for instance, the Federal Court of Appeal stated that one has to determine the real cause of a claimant's separation from employment. That way, one can properly characterize what happened.

[47] Both scenarios result in involuntary leave. The difference between the two scenarios lies in whether the employee's conduct triggers the employer to place the employee on leave. If the employee's conduct leads the employer to place the employee on leave, then this is effectively a suspension.

[11] See section 6.3.1 Voluntary leaving versus misconduct of the Digest of Benefit Entitlement Principles.
[12] *MacDonald*, A-152-96.

– **Who initiated the act of severing the employment?**

[48] What was the real cause of the Claimant's separation from employment, or who initiated the act of severing the employment?

[49] Here, there can be no doubt that the Claimant's non-compliance with his employer's vaccination policy triggered the separation from his employment. Although the employer called the separation a "leave of absence," the employer effectively suspended the Claimant in response to his non-compliance with its vaccination policy.

– **Did the Claimant's conduct amount to misconduct?**

  - **The Claimant's employment contract**

[50] The Claimant argues misconduct occurs only when there is a breach of the employer-employee relationship. He denies that any breach occurred. He points to his employment contract. It did not include anything about getting vaccinated. So, he says that his non-compliance with his employer's vaccination policy should not be considered a breach.

[51] Under the heading "Health Assessment and Workplace Safety," the Claimant's employment contract does not say anything about getting vaccinated. However, under the "General Terms," the contract stipulates that the Claimant is "to abide by all Company policies, rules and procedures".[13]

[52] While the employer's employment contract did not specifically address vaccination, it provided a blanket requirement that the Claimant would abide by all company policies, rules, and procedures. So, this blanket requirement necessary had to extend to the employer's COVID-19 policy that it introduced for its entire workforce.

[53] The Claimant did not abide by his employer's vaccination policy. So, there was a breach of the employer-employee relationship.

[13] See employment contract dated February 19, 2020, at GD2-23.

- **Progressive disciplinary measures**

[54] The Claimant also argues that, had there been any misconduct, his employer would have taken progressive disciplinary steps against him under its Progressive Performance Improvement Measures.[14] This would have included issuing him a letter(s) of warning, followed by suspension, ranging from one to up to five days, and then finally, termination.

[55] But, none of those preliminary steps took place. So, he argues that clearly this shows that his employer felt that there was no misconduct. He says the lack of any progressive disciplinary measures preceding his separation from his employment is proof that there was no misconduct. He also says that it shows that when his employer placed him on leave, it was not treating it as a suspension.

[56] However, an employer's determination or subjective assessment of whether a claimant engaged in misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.[15]

[57] Instead of relying on an employer's determination as to whether misconduct occurred for the purposes of the *Employment Insurance Act*, I have to conduct my own objective analysis under section 30 of the *Employment Insurance Act*.[16]

- **Misconduct under the Employment Insurance Act**

[58] The *Employment Insurance Act* does not define what misconduct is, but the courts have defined misconduct. The courts have consistently held that "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 [or suspension] was a real possibility".[17]

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[14] See Progressive Performance Improvement Measures, at GD2-24 to GD2-26.
[15] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[16] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[17] See *Mitshibinijima v Canada (Attorney General)*, 2007 FCA 36. See also, for instance, *Guerrier v Canada (Attorney General)*, 2020 FCA 178, citing *Canada (Attorney General) v Maher*, 2014 FCA 22; *Canada (Attorney General) v Lemire*, 2010 FCA 314; *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA).

[59] As the courts have also said, the breach must have been performed or the omission made wilfully, that is to say consciously, deliberately or intentionally.[18]

[60] It has become well-established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.[19] In *Gagnon*, the claimant decided against reporting her work colleague for fraud to her employer. The employer's code of conduct required her to report workplace fraud. Ms. Gagnon's failure to report her colleague infringed the employer's code of conduct. The Federal Court of Appeal found this was a clear breach and "quite certainly misconduct" within the meaning of the *Employment Insurance Act*.[20]

[61] Here, the Claimant deliberately violated his employer's vaccination policy. But, the Claimant denies that his non-compliance fell into the definition of misconduct because one, he says he fulfilled all of his duties and two, he could not have known that his employer could place him on leave or suspend him without having to go through the progressive disciplinary process.

- **Whether the Claimant's non-compliance impaired the performance of his duties owed to his employer**

[62] As I have already indicated above, the employer set out a general set of duties that the Claimant was required to abide by "all Company policies, rules and procedures".[21] This necessarily extended to the employer's COVID-19 immunization policy. By failing to comply with his employer's policy, the Claimant did not fulfill all of the duties owing to his employer.

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[18] See, for instance, *Canada (Attorney General) v Secours*, [1995] FCJ No. 210, or *Canada (Attorney General) v Bellavance, 2005 FCA 87*.
[19] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[20] *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[21] See employment contract dated February 19, 2020, at GD2-23.

- **Whether the Claimant knew or should have known that his employer could place him on an unpaid leave**

[63] The Claimant suggests that, as he did not face any preliminary disciplinary measures, he did not know and could not have known that his employer would place him on an unpaid leave, in response to his non-compliance.

[64] However, the evidence shows that the Claimant knew or should have known that his employer could place him on an unpaid leave (effectively suspend him) if he did not comply with its COVID-19 policy:

- The employer' s COVID-19 policy specifically set out that employees who did not comply with the policy would be placed on a temporary unpaid leave of absence and/or would be laid off. Staff would remain on a temporary unpaid leave of absence and/or layoff until proof of COVID-19 immunization (first dose minimum) was provided or until the provincial government provided further direction on immunization requirements.[22]

- In the last sentence of the employer's email of September 17, 2020, the employer confirmed with the Claimant that employees who elected not to take the vaccination or undergo testing simply would not be able to work because it would violate the directive from the Chief Medical Officer of Health, "hence the [leave of absence]".[23]

- The Claimant confirmed that, although he did not accept nor agree with the employer's policy, his employer would still place him on a leave of absence.[24]

[22] See COVID-19 immunization policy, at GD2-25 to GD2-31 and also at GD3-29 to GD3-33.
[23] See employer's email response dated September 17, 2021, at GD2-18 and GD3-23.
[24] See Claimant's email of September 23, 2021, at GD2-17 and GD3-22.

Conclusion

[65] The appeal is allowed in part. The General Division made a factual error when it found that the Claimant left his employment.

[66] I am giving the decision that the General Division should have given.

[67] The Claimant's employer said that it placed the Claimant on an involuntary leave of absence. However, the Claimant's non-compliance with his employer's vaccination policy led to the separation from his employment. So, the separation was effectively a suspension.

[68] The Claimant's non-compliance with the employer's policy amounted to "misconduct" under the *Employment Insurance Act*. The Claimant knew or should have known that non-compliance with his employer's policy would place him in breach of the duties he owed to his employer and that suspension was a real possibility.

[69] Given the suspension for misconduct, the Claimant is disentitled from receiving Employment Insurance benefits under section 31 of the *Employment Insurance Act*.

Janet Lew
Member, Appeal Division