Citation: *TH v Canada Employment Insurance Commission*, 2023 SST 63

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	T. H.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated June 16, 2022 (GE-22-942)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	October 20, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	January 24, 2023
File number:	AD-22-446

Decision

[1] The General Division misapprehended the evidence. The Appellant, T. H. (Claimant), had not left her employment. Her employer placed her on a leave of absence after she chose not to comply with its vaccination policy. Even so, this does not change the outcome of the General Division decision. For the purposes of the *Employment Insurance Act*, the Claimant was suspended from her employment for misconduct. This results in a disentitlement from receiving Employment Insurance benefits under section 31 of the *Employment Insurance Act.*

Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Claimant left her employment. The General Division also found that the Claimant did not have just cause for having left her employment. The General Division concluded that the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant says the General Division made a mistake in finding that she was disqualified from receiving Employment Insurance benefits. She says that she should not have been disqualified from getting benefits because there was no misconduct in her case.[1] As she says that there was no misconduct, she asks the Appeal Division to find that she was entitled to benefits.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), acknowledges that the General Division made legal and factual errors. The Commission says the General Division misapprehended the evidence altogether, in concluding that the Claimant left her employment and that she was disqualified from receiving benefits. The Commission says that, under the *Employment Insurance Act*, the Claimant was suspended from her employment for misconduct. The Commission

[1] The General Division found that there was no misconduct, but it found that the Claimant was disqualified from receiving Employment Insurance benefits for other reasons.

asks the Appeal Division to agree to this finding, which would result in a disentitlement to benefits.

[5] The parties agree that the General Division made legal and factual errors. The evidence does not support the General Division's findings. The focus of this appeal therefore is on finding the appropriate outcome to fix the General Division's error. This will involve looking at the circumstances leading to the Claimant's separation from her employment and looking at whether that qualifies as misconduct.

Preliminary matters

[6] The Claimant has an active appeal of an arbitrator's decision, relating to a grievance that she filed against her employer. The grievance stems out of her employer's mandatory vaccination policy. It may be that the outcome of her appeal could affect the outcome of this matter. However, the Claimant does not want to wait for the outcome of that appeal. She wants to have her appeal at the Appeal Division go ahead.

Issues

[7] 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? Was the Claimant on an involuntary leave of absence or was she suspended from her employment for misconduct?

Analysis

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

[2] Section 58(1) of the *Department of Employment and Social Development Act*.

General background facts

[9] The Claimant was employed as a letter carrier. Her employer introduced a vaccination policy in response to the COVID-19 pandemic. All employees had to undergo vaccination and to had disclose their vaccination status.

[10] The employer gave notice of the vaccination policy. The employer also informed employees that, if they did not comply with the vaccination policy, the employer would place them on an unpaid leave of absence and possibly, would dismiss them.

[11] The Claimant says that she relied on the terms of her collective agreement ("Agreement"). The Agreement did not state that she had to undergo vaccination.

[12] The Agreement provided progressive disciplinary measures for misconduct, starting with verbal, and then written warnings, before moving to one, three, and then five-day suspensions. The Claimant did not receive any of the progressive disciplinary measures under the collective agreement.

[13] When the deadline for complying with the vaccination policy passed, the Claimant remained unvaccinated. Her employer placed her on an unpaid leave of absence in late November 2021.

[14] The Claimant denies that there was any misconduct, even if she did not comply with her employer's vaccination policy. She says she did not have to comply because her employer's vaccination policy is unlawful. She says it is unlawful because (1) it falls outside the terms of her Agreement and (2) it breaches what she says is her inalienable and fundamental right to a job.

General Division decision

[15] The General Division found that the Claimant voluntarily left her job.[3] At the same time, the General Division found that the Claimant went on a leave of absence from her

[3] See, for instance, the General Division's conclusions at para 10.

employment as a letter carrier.[4] The General Division also found that the Claimant did not have just cause for going on a leave of absence because she had "reasonable alternatives to being placed on leave".[5]

[16] The General Division found that, as the Claimant did not have just cause for leaving her employment, she was both disqualified[6] and disentitled[7] from receiving Employment Insurance benefits.

[17] The General Division then found that there was no misconduct in the Claimant's case. This was because her employer had not dismissed her but had placed her on an indefinite leave of absence. The General Division also found that there was no misconduct because the Claimant could return to work if she were to get vaccinated.[8]

Did the General Division make any legal or factual errors?

[18] The Claimant argues that the General Division made legal and factual errors. She says the evidence shows that her employer placed her on an unpaid leave of absence. She denies that she ever left her employment.

[19] The Commission acknowledges that the General Division made legal and factual errors. The Claimant was consistent in her evidence at the General Division that she did not leave her employment but, rather, was placed on an involuntary leave of absence by her employer for failing to comply with its vaccination policy.

[20] The Commission argues that the General Division made a factual error when it found that the Claimant left her employment. The Commission also argues that the General Division made a legal error when it concluded that the Claimant was both

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[4] The General Division member blurred her findings as to whether the Claimant went on a leave of absence or voluntarily left her job. For instance, at paragraph 2, the General Division found that the Claimant had not shown just cause for leaving her job, but then it explained that she did not have just cause because she had reasonable alternatives to being placed on leave.
[5] See General Division decision, at para 2.
[6] See General Division decision, at paras 2 and 32.
[7] See General Division decision, at para 31.
[8] See General Division decision, at para 30.

disqualified and disentitled from receiving Employment Insurance benefits at the same time.

[21] The General Division found that the Claimant simultaneously went on a leave of absence and voluntarily left her employment. The evidence simply did not support the General Division's findings that the Claimant voluntarily left her employment. And, because the General Division failed to appreciate this, it applied the wrong section of the *Employment Insurance Act* in finding that she was disqualified from receiving benefits.

[22] The General Division cited section 30 of the *Employment Insurance Act*. But the section applies only if a claimant loses their employment because of misconduct or if a claimant has voluntarily left their employment. The Claimant neither lost her employment nor voluntarily left her employment. Section 30 of the *Employment Insurance Act* was irrelevant to the Claimant's circumstances.

[23] The General Division made both legal and factual errors.

Fixing the General Division's error

[24] 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.

[25] Generally, I tend to substitute my own decision if the underlying facts are not in dispute, the evidentiary record is complete, and if the parties received a full and fair hearing and opportunity to present their case at the General Division.

[26] There were no procedural issues or irregularities at the General Division. The evidentiary record is complete, and the parties agree on the basic underlying facts. This allows me to give the decision that the General Division should have given.

– **Agreed Facts**

[27] The parties agree on the following facts:

- The Claimant did not comply with her employer's mandatory vaccination policy.
- The Claimant's employer placed her on an unpaid leave of absence.
- The terms and conditions of the Claimant's Agreement did not mention anything about vaccination.
- 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**

[28] The Claimant denies that her employer suspended her. She says the vaccination policy refers to a leave of absence, not a suspension. The Claimant says that her employer placed her on an unpaid leave of absence. So, she says that if there was no suspension, then there could have been no misconduct. She also says that there was no justification to be placed on an unpaid leave as she denies that there was any misconduct on her part.

[29] The Claimant agrees that she remained unvaccinated and did not comply with her employer's vaccination policy. However, she says that her employer could not force her to get vaccinated because her Agreement did not include nor require vaccination. The Claimant argues that the Agreement covered the entire employer-employee relationship, so if the Agreement did not say anything about having to get vaccinated, then she did not have to get vaccinated.

[30] The Claimant also argues that, had there been any misconduct, her employer would have taken disciplinary measures against her. The Agreement set out the disciplinary measures. This would have included issuing verbal warnings, written warnings, and suspension, ranging from one to up to five days. As her employer did not

discipline her by firstly issuing warnings, she says that this is proof that there was no misconduct.

[31] The Claimant also argues that her employer could not impose its vaccination policy because it violated her rights. She explains that, under the *Canadian Charter of Rights and Freedoms*, everyone has the right to life, liberty, and security of the person. She defines security as the right to "feed herself, put a roof over her head" and job security.

[32] The Claimant asks the Appeal Division to allow her appeal and find that she was entitled to receive Employment Insurance benefits.

– **The Commission's arguments**

[33] The Commission acknowledges that the Claimant's employer said that it was placing the Claimant on an unpaid involuntary leave of absence.[9]

[34] However, the Commission argues that, even though the employer called the Claimant's separation from her work a leave of absence, the Claimant's circumstances was more like a suspension. The Commission says there was a suspension because it was the Claimant's decision not to comply with the vaccination policy that led her employer to remove her from her employment.

[35] The Commission argues that the employer suspended the Claimant for misconduct under the *Employment Insurance Act*. The Commission argues that, while the Claimant might not have committed misconduct under the terms of her collective agreement, there was misconduct for the purposes of the *Employment Insurance* Act. The Commission says there was misconduct for the following reasons:

[9] See Record of Employment, at GD3-15. The employer explained why it issued the Record. The employer explained that the Claimant was on a leave of absence.

- The Claimant did not have to have wrongful intent. But the Claimant's conduct had to have been and was wilful, meaning that it was conscious, deliberate, or intentional.[10]

- The Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer, and

- The Claimant knew that there was a real possibility of being suspended (put on an unpaid leave).

[36] The Commission argues that, because the employer suspended the Claimant for misconduct, section 31 of the *Employment Insurance Act* applies. This results in a disentitlement to benefits, instead of a disqualification.

[37] The Commission asks the Appeal Division to find that the Claimant was suspended from her employment because of misconduct and to find that she is not entitled to receive benefits under section 31 of the *Employment Insurance Act*.[11].

– **The unpaid leave of absence**

[38] The Claimant denies that her employer suspended her. She says that her employed placed her on an unpaid leave of absence. The Commission argues that, while the employer may have described putting the Claimant on a leave of absence, the circumstances are in fact a suspension.

[39] The courts have said that one has to look at the real cause of a claimant's separation from employment, to be able to properly characterize what happened.[12] This involves looking at whether:

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[10] See Commission's Representations to the Social Security Tribunal Appeal Division, at AD2-4, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, paras 10 to 14.
[11] As an aside, the Commission says that a voluntary leave of absence without just cause also results in a disentitlement, under section 32 of the *Employment Insurance Act*.
[12] See *MacDonald*, A-152-96.

- There were external factors unrelated to the employee that caused the employer to place that employee on leave, or

- The employee's conduct or omission caused the employer to place the employee on leave.

[40] Both scenarios result in involuntary leave. The difference between the two scenarios lies in whether the employee's conduct triggered the employer to place the employee on leave, or whether it was due to external factors. If the employee's conduct led the employer to place the employee on leave, then this is effectively a suspension.

[41] So, the question is: What was the real cause of the Claimant's separation from employment, or who initiated the act of severing the employment?

[42] Here, the evidence shows that the Claimant's non-compliance with her employer's vaccination policy triggered the separation from her employment. Although the employer called the separation a "leave of absence," for the purposes of the *Employment Insurance Act*, the employer effectively suspended the Claimant in response to her non-compliance with its vaccination policy.

[43] Even so, the Claimant denies any misconduct.

– **Did the Claimant's conduct amount to misconduct for the purposes of the *Employment Insurance Act*?**

  - **The collective agreement**

[44] The Claimant was fully compliant with the terms and conditions of her collective agreement. She says her employer is not allowed to introduce new terms. She says her employer's vaccination policy represented a new term or condition of her employment. So, she says that she did not have to comply with it. And, if she did not have to comply with it, she says that there was no misconduct.

[45] But in what is generally known as the "*KVP* test," any rule or policy can be unilaterally introduced by an employer, even if the union disagrees with it. The test

arises out of Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[13]

[46] The rule or policy has to satisfy the following requirements:

i. It must not be inconsistent with the collective agreement.

ii. It must not be unreasonable.

iii. It must be clear and unequivocal.

iv. It must be brought to the attention of the employee before the company can act on it.

v. The employee must have been notified that a breach of such rule could result in discharge if the rule is used as a foundation for discharge.

vi. Such rule should have been consistently enforced by the company from the time it was introduced.

[47] For the most part, the Claimant does not argue any of these points. She does not say that the vaccination policy was inconsistent with the Agreement, that it was unclear or vague, that her employer did not bring the policy to her attention before acting on it, or that it did not consistently enforce the policy. She also does not say that she did not receive notice or that she was unaware of the consequences for not following the policy.

[48] At most, the Claimant suggests that her employer's vaccination policy was unreasonable because it did not respect her basic rights. However, a review of some of the court cases suggest that, in the context of misconduct cases, these are irrelevant considerations.

[49] In a case called *Paradis*, Mr. Paradis had been dismissed when he failed a drug test. He argued that his employer should have accommodated him because his drug

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[13] *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (O.N.L.A.).

dependency was protected under provincial human rights legislation and company policy. The Court found that, “The question of whether the employer should have provided reasonable accommodation to assist [Mr. Paradis] to deal with his drug dependency is a matter for another forum.”[14] In other words, Mr. Paradis’s rights were irrelevant to the misconduct question.

[50] In another case,[15] Mr. Mishibinijima argued that the *Canadian Human Rights Act* applied. He was often away or late for work because of his alcoholism. He argued that he had disability rights that his employer should have accommodated. The Court of Appeal agreed with the Umpire (the predecessor to the Appeal Division) that the issue of Mr. Mishibinijima’s rights or whether his employer should have accommodated him were irrelevant. The Court of Appeal determined that the focus was had to be on whether Mr. Mishibinijima lost his employment because of his misconduct.

[51] It is clear from the court cases that the issue of a claimant’s rights are irrelevant considerations. The courts have said that the question and the focus must be on whether an employee’s conduct amounts to misconduct within the meaning of the *Employment Insurance Act*.

[52] Even if these issues are irrelevant to the misconduct issue, that may not entirely answer the question about whether the employer’s policy is reasonable.

[53] In a case called *Parmar*,[16] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.[17]

[54] The Court in that case recognized that it was “extraordinary to enact a workplace policy that impacts an employee’s bodily integrity” but ruled that the vaccination policy in

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[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[17] See *Parmar*, at para 65.

question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic."[18] The Court went on to say:

> [154] . . . **[Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income** …
>
> [155] I note that in *Maddock v British Columbia*, 2022 BCSC 1065, Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para 78, Hinkson C.J. wrote that such policies "[do] not compel or prohibit subjection to any form of medical treatment": para 78. **Rather, individuals remain free to make choices within the bounds of the policy. The MVP did not, in the words of *Maddock*, "[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment**": paras. 78–79. Ms. Parmar retained the choice to remain on unpaid leave.
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> (My emphasis)

[55] The Court found that the employer's policy in the *Parmar* case was reasonable, considering the extraordinary circumstances brought on by the pandemic.

[56] The *Parmar* case brings much needed guidance and clarity. Although the *Parmar* case was about whether the employer had constructively dismissed Ms. Parmar, there are similarities in the issues and in some of the facts to the case here.

[57] I adopt the analysis and reasoning used by the Court in *Parmar*. This leaves me to arrive at the same conclusion about the reasonableness of the vaccination policy.

[58] If the Claimant's only argument about the vaccination policy under the *KVP* test is about the policy's reasonableness, and I find that the policy was overall reasonable, then the Claimant's employer met the requirements of the *KV*P test. So, even if the vaccination policy did not form part of the original collective agreement, the Claimant's employer was still allowed to introduce the policy and the Claimant still had to comply with it.

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[18] See *Parmar*, at para 65.

- **Progressive disciplinary measures**

[59] The Claimant argues that, had there been any misconduct, her employer would have taken progressive disciplinary steps against her, under the terms of the Agreement. She did not receive any warnings or shorter suspensions. So, she says that if her employer did not adopt these measures, then clearly it did not consider her to have committed any misconduct.

[60] 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*.[19]

[61] Similarly, a claimant's expectations do not define misconduct. In a case called *Jolin*, the Federal Court of Appeal said that the fact that the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct.[20]

[62] It is clear from these authorities that I have to conduct my own objective analysis. My analysis must be independent of an employer's or employee's assessment. I cannot rely on their determination as to whether misconduct occurred of the purposes of the *Employment Insurance Act*.

- **The Claimant's "security rights"**

[63] The Claimant argues that her employer violated her human rights. In particular, she says that she has the right to security under the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, which she defines as the right to a job.

[64] As the General Division noted, the Claimant decided against proceeding with any *Charter*-based arguments. It is not appropriate for me to address *Charter*-based issues for the first time.

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[19] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[20] See *Canada (Attorney General) v Jolin*, 2009 FCA 303.

Did the Claimant's conduct amount to misconduct?

[65] As the courts have determined, misconduct arises if a claimant does something (or omits to do something) that they know or should have known could get in the way of carrying out their duties toward their employer, and they were aware or should have been aware that that could be consequences for that, including suspension or dismissal.[21] The conduct or omission does not have to be wilful. It is enough if the misconduct is conscious, deliberate, or intentional.[22] The burden falls on the Commission to prove misconduct.

[66] The Commission proved that there was misconduct because the Claimant knew or should have known that she was required to be vaccinated, and that if she did not comply with her employer's vaccination policy that she faced being placed on an unpaid leave of absence. The Claimant does not deny that she received sufficient notice. She was aware that her employer could place her on an unpaid leave of absence.

[67] The Claimant's employer required vaccination of its employees, which was a fundamental condition of employment. So, if the Claimant decided against vaccination, from her employer's perspective, she did not fulfil all of the conditions of her employment.

[68] The Claimant decided against getting vaccinated. She did not agree with her employer's policy. She had offered alternatives, such as getting regularly tested, but her employer did not allow for this type of accommodation.

[69] The fact that the Claimant's employer could have given the Claimant alternatives to getting vaccinated is irrelevant to the misconduct issue. The issue and the focus must be on whether an employee's conduct amounts to misconduct within the meaning of the *Employment Insurance Act.*

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[21] See, for instance, *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[22] See *Guerrier v Canada (Attorney General)*, 2020 FCA 178.

[70] As the Claimant chose not to get vaccinated, her employer placed her on a leave of absence. Under the *Employment Insurance Act*, this qualifies as a suspension due to misconduct.

Conclusion

[71] The General Division made both legal and factual errors, but this does not change the outcome. The Commission proved that the Claimant was suspended from her employment, resulting in a disentitlement from Employment Insurance benefits under section 31 of the *Employment Insurance Act*. The appeal is dismissed.

Janet Lew
Member, Appeal Division