



Citation: *DR v Canada Employment Insurance Commission*, 2023 SST 60

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	D. R.
Respondent:	Canada Employment Insurance Commission
Representative:	Rachel Paquette
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Decision under appeal:	General Division decision dated August 22, 2022 (GE-22-1465)
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Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	December 5, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 23, 2023
File number:	AD-22-674

Decision

[1] The appeal is allowed. The General Division made an error of law.

[2] The Claimant was not suspended because of his misconduct. So, he is not disentitled to benefits for this reason.

Overview

[3] D. R. is the Claimant. His employer operated as a subcontractor to other companies, including a hydro company. The Claimant worked on a hydro company project. On October 4, 2021, the employer sent a letter advising that those employees who were working on hydro company projects had to be fully vaccinated by October 22, 2021. Employees working on other projects had to be fully vaccinated by October 31, 2021.

[4] The Claimant did not receive the October 4, 2021, letter until October 21, 2021. The next day the Claimant's employer told him he could not report to the hydro site as he had not provided proof of vaccination. On November 29, 2021, the employer issued a Record of Employment (ROE) saying the Claimant had quit and the last day paid was October 21, 2021. The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided the Claimant was disqualified from benefits from October 24, 2021, because he had voluntarily left his job without just cause on October 21, 2021.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. On appeal, the Commission revised its position. The Commission argued the Claimant was suspended due to his misconduct. The General Division agreed and dismissed the Claimant's appeal.

[6] The Claimant appealed the General Division's decision to the Appeal Division. He submits that the General Division based its decision on important errors of fact.

[7] Both the Claimant and the Commission agree that the General Division overlooked important evidence. They want me to substitute my decision for the General Division, but they don't agree on what that decision should be.

[8] I accept that the General Division made an error of law by not considering important evidence. I have substituted my decision for that of the General Division. I find the Commission has not proven the Claimant was suspended because of his misconduct.

I can't consider the Claimant's new evidence

[9] The Claimant submitted some new evidence in his appeal documentation that was not before the General Division. He submitted a text document dated October 22, 2021.¹ He also submitted a letter dated October 29, 2022.²

[10] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[11] There are a few limited exceptions to this rule, but the Claimant's new evidence doesn't meet those exceptions.³ So, I decided at the hearing I would not accept this new evidence.

The parties agree that the General Division did not address important evidence

[12] The parties agree that the General Division overlooked important evidence when it made its decision.

¹ AD2-5.

² AD2-6.

³ Generally, new evidence will only be accepted if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. See *Sharma v Canada (Attorney General)*, 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[13] The Claimant submits that the General Division did not consider his testimony that he was told by the hydro foreman at morning safety meetings that individuals who were not vaccinated could self-test for three months at the company's expense and thereafter it was to be at their own expense, which he agreed to do.

[14] The Claimant submits that the General Division also overlooked his spouse's testimony that the Claimant was suspended before the vaccination requirements for all non-hydro workers at his employer took effect on October 31, 2021.

[15] The Commission provided submissions agreeing that General Division overlooked both the Claimant's testimony about what he had been told at morning safety meetings and the testimony from the Claimant's spouse.⁴

I accept that the General Division made an error of law by not addressing important evidence

[16] I accept that the General Division did not address important evidence that could have had an impact on its decision. Respectfully, in not doing so, the General Division made an error of law.

[17] The law says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until the period of suspension expires, the claimant loses or voluntarily leaves the employment, or the claimant, after the beginning of the suspension, accumulates with another employer enough insurable hours to qualify to receive benefits.⁵

[18] The General Division had to decide whether the Claimant had been suspended because of his misconduct.

[19] "Misconduct" is not defined in the *Employment Insurance Act* (EI Act).

⁴ AD3-5.

⁵ See section 31 of the *Employment Insurance Act* (EI Act).

[20] However, the Federal Court of Appeal has come to a settled definition about what “misconduct” means.

[21] Misconduct means conduct that is wilful, meaning conscious, deliberate, or intentional.⁶ Misconduct also includes conduct which is so reckless to amount to wilfulness.⁷

[22] Put another way, there will be misconduct where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.⁸

[23] The Commission has to show that it is more likely than not that the Claimant was suspended from his employment because of his misconduct.

[24] The General Division decided the Claimant was suspended because of his misconduct because the Claimant made an intentional decision not to comply with the employer’s policy, knowing it would prevent him from working.⁹

[25] The Claimant testified before the General Division that, prior to October 21, 2021, he was told at morning safety meetings by the hydro company foreman that individuals who were not vaccinated could do testing for three months at the hydro’s expense and thereafter at their own expense, which he agreed to do. He said he did not hear anything from his own employer about vaccination.¹⁰

[26] The Claimant also testified that he was never told at the morning safety meetings that he had to be double vaccinated by October 21 or October 22, 2021, or he would be put on an unpaid leave.¹¹

[27] The General Division referred to the Claimant’s spouse as an observer in the General Division decision. The audio recording from the General Division hearing

⁶ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See paragraph 21 of the General Division decision.

¹⁰ I heard this from the audio tape of the General Division hearing at approximately 0:7:18 to 0:11:00.

¹¹ I heard this from the audio tape of the General Division hearing at approximately 0:51:00.

reveals that the Claimant's spouse initially stated her intention to be an observer but later asked during the hearing to make a statement. The General Division asked the Claimant's spouse to take an oath at that point and told her she was noted as a witness. The General Division then accepted evidence from her.¹²

[28] The Claimant's spouse offered testimony concerning her belief that the Claimant's situation should have been treated as a layoff, given the employer's vaccination requirements for those not working on hydro projects did not take effect until October 31, 2021.¹³

[29] There is no mention in the General Division decision of the Claimant's testimony regarding the morning safety meetings and no mention of the testimony from his spouse.

[30] The General Division doesn't have to refer to every piece of evidence before it. The General Division is presumed to have considered all evidence before it.¹⁴ However, the General Division must analyze the evidence in a meaningful way and must address key evidence that may have contradicted its conclusion. Not doing so is an error of law.¹⁵

[31] The General Division made a finding of fact that the Claimant made an intentional decision not to comply with the employer's policy knowing it would prevent him from working.

[32] The Claimant's testimony that he was told at morning safety meetings that individuals who were not vaccinated could do testing for three months at the company's expense and then at their own expense was contrary to the General Division's conclusion that the Claimant knew or ought to have known his conduct would prevent him from working.

¹² I heard this from the audio recording of the General Division hearing at approximately 0:56:10.

¹³ I heard this from the audio recording of the General Division hearing at approximately 0:59:00.

¹⁴ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

¹⁵ See *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 (CanLII); See also *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

[33] The testimony from the Claimant's spouse that the employer's policy, for employees not on the hydro projects, took effect on October 31, 2021, was also contrary to the General Division's conclusion that the Claimant knew or ought to have known his conduct would prevent him from working. Being barred from the hydro project wouldn't necessarily imply the Claimant could not work for his employer.

[34] By not addressing evidence that went contrary to its conclusion in its reasons, the General Division made an error of law.

[35] The Claimant submits that the General Division also made other reviewable errors.¹⁶ However, I don't need to consider whether the General Division made other errors.

[36] Since the General Division has made an error of law, I can intervene in the decision.¹⁷

Remedy

[37] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.¹⁸

[38] Both the Commission and the Claimant wants me to give the decision the General Division should have given. But they don't agree on what that decision should be.

[39] The Claimant asks that the appeal be allowed. He argues that he was not suspended due to his own misconduct.

¹⁶ See the Claimant's Application to the Appeal Division at AD1-2.

¹⁷ See section 58(1) of the Department of *Employment and Social Development Act* (DESD Act).

¹⁸ See section 59(1) of the DESD Act.

[40] The Commission wants me to dismiss the appeal. The Commission says the evidence supports a finding that the Claimant was suspended due to his own misconduct.

[41] The parties had a full and fair hearing before the General Division, so this is an appropriate case for me to substitute my decision.

The Claimant was not suspended due to his own misconduct

[42] There was no dispute before the General Division that the reason the Claimant was not permitted to work from October 22, 2021, was because he didn't comply with the employer's requirement that he be vaccinated by October 22, 2021.¹⁹

[43] The General Division found as a fact that the Claimant was advised of the vaccination policy on October 21, 2021.²⁰

[44] The Commission submits that even though the Claimant did not become aware of the employer's requirements until October 21, 2021, that the Claimant made a personal and intentional decision not to comply with the employer's vaccination policy when he told his employer he could not report to the hydro site on October 22, 2021.

[45] The Commission maintains that as a result of not complying with the new health and safety requirements, the Claimant lost his access to the hydro site, which was an essential requirement of his position.

[46] The Commission argues that there is misconduct because the Claimant knew on October 21, 2021, that for him to be allowed to enter the hydro site on October 22, 2021, he had to be vaccinated.

[47] The Commission says the Claimant chose not to comply with the health and safety requirements and, as a result, he was not able to carry out his employment duties. In refusing to comply with the employer's requirements by the date set out by his

¹⁹ See paragraph 11 of the General Division decision.

²⁰ See paragraph 22 of the General Division decision.

employer, he willfully and consciously chose not to have access to the hydro site, and this was the direct cause of his suspension.

[48] The Commission submits that hydro supervisor is not the Claimant's employer, and the Claimant was aware from his own employer on October 21, 2021, of the vaccination requirements.

[49] The Commission acknowledges the Claimant's spouse's testimony that he was suspended before his own employer's policy took effect on October 31, 2021. However, the Commission maintains that the employer's letter of October 4, 2021, required all employees working on hydro one projects to be vaccinated by October 22, 2021. So, even if his employer would have employed him if they had other work that didn't require vaccination, the Commission says that doesn't change the fact that the Claimant became unemployed on October 22, 2021, due to his own actions.

[50] The Commission says the law provides that misconduct may manifest itself in a violation of a law, regulation, or an ethical rule, and may mean that an express or implied requirement of the employment contract ceases to be met.²¹

[51] The Claimant submits that his actions are not misconduct. He says he didn't have time to comply with his employer's requirements. He also says he did not know that by failing to get vaccinated, he would be put on an unpaid leave as he had been told at morning safety meetings with the hydro foreman that he would be allowed to self-test.

[52] The Claimant testified that he worked in the bush, mostly alone, on the hydro site. He said that prior to October 21, 2021, at morning safety meetings with the crew and hydro foreman, they were told that hydro would allow them three months of testing at their expense and after that, they would have to pay for testing themselves. They would have to test every day if they did not have their shots. He agreed to this. The

²¹ The Commission refers to *Canada (Attorney General) v Lee*, 2007 FCA 406.

Claimant explained that he heard nothing from his own employer about a Covid policy. The first he heard about it was when he received the October 21, 2021, letter.²²

[53] The Claimant testified that he did not receive the employer's October 4, 2021, letter until October 21, 2022, when he picked up his mail and pay stubs. The letter had not been emailed to him. He was asked on October 22, 2021, by his own employer's supervisor to send in his proof of vaccination. He told the supervisor he could not do that as he was not vaccinated.

[54] His supervisor responded that the hydro company required that all contractors be double vaccinated so he could not go to the site on Monday.

[55] The Claimant said he asked his employer on November 5, 2021, if he was going to be laid off. The employer responded the payroll said it was against the law to do that.²³ The Claimant confirmed he never received any other documentation from the employer.

[56] The Claimant confirmed in his testimony that he was never told in the morning safety meetings that he was required to be double vaccinated.²⁴

[57] He also testified that he was never told if he was not double vaccinated by October 22, 2021, he would be put on an unpaid leave or terminated. He said he was surprised when he was told by his employer that he could not attend the hydro site as he thought testing would be allowed.²⁵

[58] The Claimant referred to the Commission's notes of a conversation with the employer's office manager which said that all staff were personally spoken to whether over the phone or in person about the new policy coming into effect. The notes also said that the office manager said that they had many discussions with the Claimant, and he

²² I heard this from the audio recording of the General Division hearing at approximately 0:7:18 to 0:12:15.

²³ I heard this from the audio recording of the General Division hearing at approximately 0:17:09 to 0:22:00.

²⁴ I heard this from the audio recording of the General Division hearing at approximately 0:22:15.

²⁵ I heard this from the audio recording of the General Division hearing at approximately 0:51:40 to 0:53:54.

was given plenty of time to comply with the policy. The office manager advised that they did discuss the possibility of other positions within the company but there were no other positions available for the Claimant at the time that did not need him to be fully vaccinated. The office manager told the Commission that she had just spoken with the Claimant yesterday about future positions, and he was told again, multiple times, that if he complied with the policy he would be working.²⁶

[59] The Commission spoke to the Claimant after this conversation and told him that the employer said they spoke to each employee about the policy coming not effect and that employees did not find out by mail about the policy. The Claimant told the Commission that he disagreed with this statement.²⁷

[60] The Claimant testified that he thinks the office manager was talking about another employee whom he travelled to the site with. He said he didn't know who the office manager is. The Claimant said he never had any conversations with the office manager about other positions. He checked his phone on the date that the office manager told the Commission she had spoken to him about other positions, and he had no conversations with her on that date.²⁸

[61] The Claimant confirmed in his testimony that he had no plans to get vaccinated at the time he was placed on an unpaid leave. He didn't think this impacted his ability to do his job and he didn't think he needed the vaccination.

[62] The Claimant testified that if he had known it would be a problem, he would have looked for some other work in the summer.²⁹

[63] The Claimant's spouse testified that the Claimant didn't work for hydro and even if hydro required vaccination by October 22, 2021, the letter from the Claimant's own employer did not require vaccination for its employees until October 31, 2021. She said

²⁶ GD3-24.

²⁷ GD3-25.

²⁸ I heard this from the audio recording of the General Division hearing at approximately 0:45:40.

²⁹ I heard this from the audio recording of the General Division hearing at approximately 1:06:45.

he could have done other work and if the employer didn't have any other work for him, he should have been laid off.³⁰

[64] I find the Commission has not shown that the Claimant's conduct was wilful. So, his conduct does not amount to misconduct.

[65] The parties agree that the Claimant did not receive the employer's letter of October 4, 2021, setting out the vaccination requirements until October 21, 2021.

[66] The office manager of the employer told the Commission that the Claimant had been advised earlier of the vaccination requirements.

[67] However, the Claimant denied in his testimony that he had any conversation with the office manager. He also denied both to the Commission and in his testimony having heard anything from the employer prior to his receipt of the October 4, 2021, letter, on October 22, 2021, about the employer's vaccination requirements.

[68] I accept the Claimant's credible sworn testimony and prefer it to the unsworn and untested information provided by the officer manager to the Commission. The Claimant's testimony is consistent with what he told the Commission. He told the Commission he disagreed with the office manager's statement that he had been spoken to about the policy coming into effect.³¹ He also said in his reconsideration request that he believed the employer had confused him with another employee.³²

[69] I find as a fact, therefore, that the Claimant was unaware until October 21, 2021, that he was required to be fully vaccinated by October 22, 2021, to attend at the hydro site.

[70] Respectfully, I cannot agree with the Commission that the Claimant's conduct prevented him from attending work on October 22, 2021.

³⁰ I heard this from the audio recording of the General Division hearing at approximately 0:56:47.

³¹ GD3-25.

³² GD3-31.

[71] I agree with the Commission that the employer's letter clearly required the Claimant, as a worker on the hydro site, to be vaccinated by October 22, 2021.³³

[72] However, even if the Claimant had wanted to comply with the employer's vaccination requirements, having only become aware of the requirements on October 21, 2021, he would not have time to comply by October 22, 2021. He was told on October 22, 2021, that he could not attend at the hydro site.

[73] Secondly, the Commission has not proven that the Claimant knew or ought to have known that his conduct in not becoming vaccinated would result in an unpaid leave.

[74] The Claimant's testimony was that he was told by the hydro foreman at the morning safety meetings that if he did not become vaccinated, he would be permitted to self-test for three months at the company's expense and then self-test thereafter at his own expense. I accept that testimony. It is consistent with what the Claimant said in his application for benefits.³⁴

[75] The Commission says the hydro foreman is not his employer. However, the only information the Claimant had prior to October 21, 2021, concerning Covid-19 requirements was from the hydro foreman. Considering the Claimant was working on that site, it was reasonable for him to rely on what he was told, absent any information otherwise from his employer.

[76] Even the employer's letter of October 4, 2021, does not make clear that the consequences of not becoming fully vaccinated by October 22, 2021, would be an unpaid leave.

[77] The letter advises that the employer's clients were requesting that any subcontractors entering their sites must be fully vaccinated and therefore all staff had to be vaccinated so they could continue to provide personnel to the clients.

³³ GD2-15.

³⁴ GD3-9.

[78] The letter advises that effective October 22, 2021, all employees working on the hydro projects had to be fully vaccinated. The letter states that effective October 31, 2021, all employees working for the employer for other companies had to be fully vaccinated. The letter noted that the only exemption from the vaccination requirements were for medical reasons.³⁵

[79] The employer's letter says nothing about the consequences of not becoming vaccinated. Given the employer had multiple work sites, I cannot conclude that the Claimant ought to have known that failing to become vaccinated by October 22, 2021, could result in an unpaid leave.

[80] I agree with the Commission that willfully failing to follow a safety policy which is either an express or implied condition of employment is misconduct. However, to be wilful, a claimant must know what is required of them and have time to comply. A claimant must also understand the consequences of their refusal to comply.

[81] That is not the case here. The Claimant did not deliberately breach the safety policy. He did not know about the employer's requirements in enough time to comply.

[82] Further, the Claimant did not know or ought to have known that failing to become fully vaccinated by October 22, 2021, would result in an unpaid leave.

[83] I recognize that the Claimant had no intention of becoming vaccinated. He told this to the Commission multiple times.³⁶ He also said this in his testimony.

[84] However, a finding of misconduct cannot rest on speculation as to what the Claimant would have done had he been informed of the requirements in time to comply or what he intended to do after his suspension. The focus must be on whether the Claimant's actions which led to the suspension amounted to misconduct.

³⁵ GD2-15.

³⁶ See, for example, GD3-23 and GD3-31.and GD3-32.

[85] The Commission has not shown that the Claimant was suspended for reasons of misconduct.

Conclusion

[86] The appeal is allowed.

[87] The General Division made an error of law. I have substituted my decision for that of the General Division to find the Claimant was not suspended due to his own misconduct.

Charlotte McQuade
Member, Appeal Division