



Citation: *SS v Canada Employment Insurance Commission*, 2023 SST 188

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** S. S.  
**Representative:** P. M.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** J. Villeneuve

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**Decision under appeal:** General Division decision dated September 16, 2022  
(GE-22-1569)

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference  
**Hearing date:** February 7, 2023  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** February 21, 2023  
**File number:** AD-22-741

## Decision

[1] The appeal is dismissed. The Appellant, S. S. (Claimant), is disqualified from receiving Employment Insurance benefits after January 1, 2022.

## Overview

[2] The Claimant is appealing part of the General Division's decision.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant was dismissed from his employment on January 2, 2022, because of misconduct. In other words, it found that he did something that caused him to be dismissed. The Claimant had not complied with his employer's mandatory vaccination policy and his employer had rejected his request for a religious exemption.

[4] As the Claimant had not complied with the policy, the General Division determined that he was disqualified from receiving Employment Insurance benefits from January 2, 2022, when he was dismissed. The Claimant is appealing this part of the General Division decision.

[5] The General Division also found that the Commission did not prove that the Claimant was suspended from his employment between November 14, 2021 and January 1, 2022, because of misconduct. So, the Claimant was not disentitled from receiving Employment Insurance benefits during this timeframe. The Claimant is not appealing this part of the General Division decision.<sup>1</sup>

[6] The Claimant argues that the General Division made jurisdictional, legal, and factual errors when it determined that he had been dismissed from his employment. He denies that his employer dismissed him. He claims that he voluntarily left his employment after November 15, 2021. So, he says his employer could not possibly

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<sup>1</sup> The Commission has in fact already paid Employment Insurance benefits to the Claimant for this timeframe. The Claimant filed biweekly reports with the Commission in which he declared that he was ready, willing, and able to work.

dismiss him if he was not even working. The Claimant also says that he left his employment because his employer discriminated against him. He claims that, because he faced discrimination, he had just cause to leave his employment.

[7] The Claimant argues that the General Division overlooked this evidence that he left his employment. He also argues that, because it overlooked this evidence, it then failed to apply section 29(c)(iii) of the *Employment Insurance Act* and determine whether he had just cause for having left his employment. If he had just cause, then he would not have been disqualified from receiving Employment Insurance benefits.

[8] The Claimant also argues that the General Division made a legal error when it concluded that there was misconduct, despite his human rights and religious rights.

[9] The Claimant argues that the General Division also failed to apply section 49(2) of the *Employment Insurance Act*. He argues that, under that section, the General Division had to give him the benefit of the doubt and accept that he did not have any alternatives but to leave his employment because of discrimination.

[10] The Claimant asks the Appeal Division to give the decision he says the General Division should have given. He says the General Division should have found that he left his employment, that he had just cause in leaving his employment, that there was no misconduct, and that he is neither disqualified nor disentitled from receiving Employment Insurance benefits.

[11] The Commission argues that the General Division did not make any errors over the misconduct issue. The Commission asks the Appeal Division to dismiss the appeal.

## **Issues**

[12] The issues in this appeal are:

- a) Did the General Division overlook the fact that the Claimant quit his employment?

- b) Did the General Division fail to apply subsection 29(c)(iii) of the *Employment Insurance Act*?
- c) Did the General Division fail to apply section 49(2) of the *Employment Insurance Act*?
- d) Did the General Division misinterpret the meaning of misconduct?
- e) Did the General Division mischaracterize the Claimant's separation from his employment in November 2021?

## **Analysis**

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

[14] For factual errors, the General Division had to have 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.

### **Did the General Division overlook whether the Claimant voluntarily left his employment?**

[15] The Claimant argues that the General Division overlooked the fact that he had voluntarily left his employment. If he voluntarily left his employment, then his employer could not possibly have dismissed him for misconduct. If the Claimant voluntarily left his employment, then different sections of the *Employment Insurance Act* might apply. And if so, then the Claimant might not be disqualified from receiving Employment Insurance benefits.

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<sup>2</sup> Section 58(1) of the *Department of Employment and Social Development Act*.

– **The Claimant states that he left his employment**

[16] The Claimant states that the evidence shows that he left his employment. He refers to his employer's letter of November 15, 2021, that responded that responded to his request for accommodation.

[17] His employer's letter reads as follows:

As your accommodation request has been denied, you are expected to immediately comply with the Mandatory Vaccination Policy. In order to support your ability to be vaccinated, you will be provided with a **five (5) working day** unpaid grace period from the date of this letter to obtain your first dose. If you do not obtain a vaccine and provide proof of vaccination within this period you will not be in compliance with the policy.<sup>3</sup>

[18] The Claimant notes that he did not get vaccinated, either within the grace period or at any other time. He argues that, as he was unprepared to get vaccinated, it should have been evident to his employer that, effectively, he was quitting or leaving his employment. He says that there he did not have to give any notice to his employer that he was leaving his employment. He says it is for the Commission to disprove that he remained employed after November 14, 2021.

– **The Commission denies that the Claimant left his employment**

[19] The Commission argues that the evidence shows that the Claimant's employer placed him on an unpaid leave of absence beginning November 16, 2021, and that he remained employed up to January 1, 2022.

[20] The Commission notes that the Claimant never told his employer that he quit or left his employment.

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<sup>3</sup> See Employer's letter dated November 15, 2021, at GD 2-15 and GD 3-24 and 3-32.

– **Review of the evidence regarding the Claimant's circumstances after November 15, 2021**

[21] I will review the evidence to determine whether there was any indication from the Claimant that he left his employment after November 15, 2021:

- The Claimant's employer sent the Claimant a second letter, also dated November 15, 2021. The employer wrote, in part, "you are hereby suspended without pay, beginning November 16, 2021 and you will remain suspended without pay until you achieve compliance with the Policy by uploading proof of full vaccination through the Staff Vaccination Disclosure Form ... By no later than 11:59 p.m. on December 12, 2021, failing which you will be terminated for cause effective December 13, 2021."<sup>4</sup>
- When the Claimant applied for Employment Insurance benefits on November 16, 2021, he stated that he lost his job and that he was on a leave of absence because of discrimination under the *Canadian Human Rights Act*.<sup>5</sup>
- The application form asked, "Why are you no longer working?" One of the options was "I quit (includes retirement, health reasons, moving to accompany a spouse or dependent)." The Claimant did not check this box to indicate that he quit his employment.<sup>6</sup>
- The application form asked whether he was returning to work with this employer. He responded "unknown."<sup>7</sup>

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<sup>4</sup> See Employer's (second) letter dated November 15, 2021, at GD 2-16 and GD 3-33. As the General Division pointed out in its decision, the employer extended the deadline for compliance, from December 12, 2021 to January 2, 2022. The Claimant gave evidence of this at approximately 59:12 of the audio recording of the General Division hearing.

<sup>5</sup> See application for Employment Insurance benefits, at GD 3-8.

<sup>6</sup> See application for Employment Insurance benefits, at GD 3-3.

<sup>7</sup> See application for Employment Insurance benefits, at GD 3-7.

- The employer produced a Record of Employment dated November 30, 2021.<sup>8</sup> It stated that the Claimant had been suspended without pay at that point. The employer did not provide another record of employment.
- The Claimant spoke with the Commission on January 19, 2022. He reportedly stated that his employer had dismissed him. He reportedly stated, "I am now terminated."<sup>9</sup>
- The Claimant spoke with the Commission weeks later on February 11, 2022. He reportedly stated that he was dismissed. He also reportedly stated that he followed the rules and could not have known that he would have been dismissed.<sup>10</sup>
- The Claimant spoke with the Commission on April 5, 2022. He reportedly stated that he "[was] not sure when exactly he was terminated (possibly in December 2021 or early January 2022.)"<sup>11</sup>
- When the Claimant responded to the Social Security Tribunal's notice of intention to summarily dismiss his appeal, he referred to section 29 of the *Employment Insurance Act*. The Claimant wrote that the General Division's role was not to decide whether his dismissal was justified. He did not say that he had voluntarily left his employment.<sup>12</sup>
- At the General Division hearing, the member asked what happened after November 15, 2021. The Claimant's representative stated that nothing happened.<sup>13</sup> He stated, "[The Claimant] basically left, that was the last contact that he had with his employer. They produced his record of employment for him and he applied for Employment Insurance benefits." The representative

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<sup>8</sup> See Record of Employment, dated November 30, 2021, at GD 3-17.

<sup>9</sup> See Supplementary Record of Claim dated January 19, 2022, at GD 3-19.

<sup>10</sup> See Supplementary Record of Claim dated February 11, 2022, at GD 3-20.

<sup>11</sup> See Supplementary Record of Claim dated April 5, 2022, at GD 3-34.

<sup>12</sup> See Claimant's letter dated August 17, 2022 addressed to the Social Security Tribunal, at GD 7-15 to GD 7-17.

<sup>13</sup> At approximately 54:06 to 54:45 of the audio recording of the General Division decision.

explained that the Claimant was caught in a difficult position: either he would lose his job or contravene his beliefs.

- The member also asked whether the Claimant had been dismissed from his employment on December 13, 2021. The representative responded that the circumstances were murky because the employer did not provide a further Record of Employment after that date.<sup>14</sup>
  - The Claimant's representative stated that his client's understanding was that "when he walked out that door was that he's not coming back, and this was conveyed by his supervisor basically."<sup>15</sup>
  - The Claimant testified that he received a termination letter from his employer extending the deadline, confirming dismissal on January 3, 2022 <sup>16</sup>
  - In his Application for Leave to Appeal/Notice of Appeal to the Appeal Division, the Claimant referred to January 2, 2022 as "being well after what was effectively his termination on November 15, 2022 [sic]."<sup>17</sup>
- **My findings: the General Division did not fail to consider whether the Claimant voluntarily left his employment**

[22] The General Division did not review all of this evidence regarding the circumstances surrounding the Claimant's departure from his employment. But the General Division did not have to undertake a comprehensive review of the evidence in this case because it was evident that the Claimant did not quit his job.

[23] When the Claimant applied for Employment Insurance benefits on November 16, 2021, he stated that he was on an unpaid leave of absence from his employment. He also stated that he did not know when he would be returning to work. It

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<sup>14</sup> At approximately 57:15 of the audio recording of the General Division decision.

<sup>15</sup> At approximately 57:34 to 57:53 of the audio recording of the General Division decision.

<sup>16</sup> At approximately 58:59 to 59:20 of the audio recording of the General Division decision.

<sup>17</sup> See Claimant's letter dated October 13, 2022, at AD 1-10.



is unlikely that he would expect to return to work at some point if he quit his employment over what he perceived was discrimination against him.

[24] The Claimant's employer issued a record of employment at the end of November 2021. The employer indicated that it had suspended the Claimant without pay. The Claimant did not challenge this. He did not, for instance, ask his employer to amend the Record of Employment to reflect that he quit his employment. A record of employment may not be fully determinative of a claimant's circumstances, but the Claimant did not challenge it at any time.

[25] The Claimant spoke with the Commission in January, February, and April 2022. Each time he stated that his employer had dismissed him.

[26] When the Claimant appeared before the General Division, there was no indication that he quit his employment. The Claimant and his representative had an opportunity to clarify the circumstances surrounding his separation from his employment. But the confusion centered around when the employer dismissed the Claimant, not whether the Claimant quit or had been dismissed.

[27] Even as recently as the Claimant's application to the Appeal Division, the Claimant felt that he had been effectively dismissed from his employment on November 15, 2021. That coincides with the employer's notice of suspension. But if the Claimant considered his employer's letter to have effectively been a termination letter, arguably the Claimant could not possibly have then quit his employment. There is nothing to indicate that the Claimant ever communicated that he quit his employment—either before, on or after November 15, 2021.

[28] Overall, the Claimant's actions and his communications after November 15, 2021 show that he had not turned his mind to severing the employment relationship with his employer. In other words, he had yet to quit before his employer formally dismissed him in January 2022.

[29] Given the evidence before it, I find that the General Division did not overlook whether the Claimant voluntarily left his employment.

**Did the General Division fail to apply section 29(c)(iii) of the *Employment Insurance Act*?**

[30] The Claimant argues that the General Division failed to exercise its jurisdiction and apply subsection 29(c)(iii) of the *Employment Insurance Act*.<sup>18</sup>

[31] Under that section, just cause for voluntarily leaving an employment exists if a claimant had no reasonable alternative to leaving, if there is discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.

[32] I have already determined that the evidence shows that the Claimant did not voluntarily leave his employment. For that reason, section 29(c)(iii) of the *Employment Insurance Act* is irrelevant and does not apply in the Claimant's circumstances.

[33] The General Division did not fail to consider whether the Claimant had just cause or any reasonable alternatives for leaving his employment, for the simple reason that he did not leave his employment. The General Division did not fail to apply section 29(c)(iii) of the *Employment Insurance Act*.

**Did the General Division fail to apply section 49(2) of the *Employment Insurance Act*?**

[34] The Claimant argues that the General Division failed to apply section 49(2) of the *Employment Insurance Act*. Under that section, the Commission has to give the benefit of the doubt to the Claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying or disentiitling him, if the evidence on each side of the issue is equally balanced.

[35] The Claimant states that the evidence is clear that he left his employment. But he says that if there was any doubt about this evidence and if it was unclear either that he

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<sup>18</sup> Under this section, just cause for voluntarily leaving an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including whether there is discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.

left his job or was dismissed, then the General Division should have given him the benefit of the doubt.

[36] The evidence is clearcut that the Claimant was dismissed from his employment, so there was no need for the General Division to have considered applying section 49(2) of the *Employment Insurance Act*.

[37] In any event, in misconduct cases, typically, the section applies when the evidence is equally balanced about whether a claimant engaged in any misconduct. Then, the benefit of the doubt would be given to that claimant.

[38] Here, the parties do not dispute the circumstances that led to the Claimant's separation from his employment. The parties agree that the Claimant did not comply with his employer's vaccination policy. The facts of this case simply did not trigger section 49(2) of the *Employment Insurance Act*.

### **Did the General Division misinterpret misconduct?**

[39] The Claimant argues that the General Division misinterpreted misconduct. He argues that an employer's "unlawful or unconscionable denial of an employee's religious exemption request ... thwarts a claim of misconduct against that employee."<sup>19</sup>

[40] In *Mishibinijima*,<sup>20</sup> the Federal Court of Appeal found that the fact that the employer failed in its duty to accommodate its employee under the *Canadian Human Rights Act* was an irrelevant consideration. The failure to accommodate simply did not form part of the calculation as to whether misconduct occurred. The General Division did not misinterpret misconduct by not taking the lack of accommodation into account.

[41] The question of whether the employer should have accommodated the Claimant, is a matter for another forum. The Social Security Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that he is seeking.<sup>21</sup>

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<sup>19</sup> See Claimant's letter dated October 13, 2022, at AD1-10.

<sup>20</sup> See *Mishibinijima v Canada (Attorney General)* 2007 FCA 36.

<sup>21</sup> In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another

## **Did the General Division mischaracterize the Claimant's separation from his employment in November 2021?**

[42] Setting aside the fact that the Claimant states that he quit his employment, he argues that he is entitled to Employment Insurance benefits after January 1, 2022 because he says that his employer had already effectively dismissed him from his employment. He says that he was no longer working and there were no communications or any relationship with his employer after November 15, 2021.

[43] The General Division found that the Claimant was not disentitled from receiving benefits between November 14, 2021 and January 1, 2022. The General Division found that the Commission had not proven that he had been suspended because of misconduct. The Claimant received Employment Insurance benefits during this timeframe.

[44] The General Division found that the Commission had not established or proven that the Claimant's employer had suspended him due to misconduct. However, the General Division still found that the Claimant's employer had suspended or placed him on an unpaid leave of absence, even if it found that there had been no misconduct as defined by the *Employment Insurance Act*.

[45] While the Claimant may not have received any communications from his employer for several weeks until January 2022, this did not somehow turn his suspension or leave of absence into a dismissal. His employer made it clear that the Claimant would continue to remain on suspension without pay either until he complied with its vaccination policy or until it terminated him from his employment.

[46] The General Division did not mischaracterize the Claimant's separation from his employment in November 2021. While the Commission may not have proven that the Claimant had been suspended because of misconduct under the *Employment*

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forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

*Insurance Act*, the General Division accepted that the Claimant's employer placed him on an unpaid leave of absence.

[47] The General Division determined that the Claimant's employer dismissed him on January 1, 2022 for misconduct. As a result, the Claimant was disqualified from receiving benefits.

## **Conclusion**

[48] The General Division did not make an error in finding that the Claimant was dismissed from his employment on January 1, 2022 due to misconduct. The evidence fails to support the Claimant's arguments that he voluntarily left his employment before then. The Claimant maintains that his employer discriminated against him, but that is beyond the Appeal Division's scope to address. The Claimant may have remedies elsewhere.

Janet Lew  
Member, Appeal Division