



Citation: *Canada Employment Insurance Commission v KP*, 2023 SST 877

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Josée Lachance

**Respondent:** K. P.

---

**Decision under appeal:** General Division decision dated February 1, 2023  
(GE-22-2782)

---

**Tribunal member:** Stephen Bergen

**Type of hearing:** Teleconference

**Hearing date:** June 5, 2023

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** **July 3, 2023**

**File number:** AD-23-190

## Decision

[1] I am allowing the appeal in part. The General Division made an important error of fact. I am making the decision the General Division should have made. The Claimant's disentitlement shall be effective as of December 7, 2021.

## Overview

[2] The Respondent, K. P., (who I will refer to as the "Claimant") was suspended from her employment as of December 7, 2021, for failing to disclose her vaccine status to her employer. Three months later, the employer dismissed her because she would not confirm that she had been vaccinated.

[3] The Claimant applied for Employment Insurance benefits (EI benefits) on March 21, 2022, stating that she was on a leave of absence. The Appellant, the Canada Employment Insurance Commission (Commission) denied her claim. It stated that it could not pay her EI benefits from March 20, 2022, because she had stopped working by voluntarily taking a leave of absence on December 6, 2021, without just cause.

[4] The Claimant asked the Commission to reconsider its decision, arguing that she did not leave voluntarily. In her reconsideration request, she also asked the Commission to backdate her claim to December 7, 2021, which is the date the employer placed her on leave.

[5] In response to the Claimant's request, the Commission made a new decision that was different from its original decision. However, its new decision did not allow her claim. The original decision had relied on a finding that the Claimant voluntarily left without just cause. In its reconsideration, the Commission said it could not pay benefits because she had been suspended due to misconduct. It also said that it could not pay her EI benefits from December 6, 2021, instead of from March 20, 2022.<sup>1</sup>

---

<sup>1</sup> As the Commission noted in the appeal hearing, December 6, 2022, was used and not December 7, 2022, because December 6 was the first working day of her benefit period. See section 10(1) of the *Employment Insurance Act* (EI Act).

[6] The Claimant appealed the reconsideration decision to the General Division, but the General Division dismissed her appeal, with modification. The General Division found that the Claimant was disqualified from receiving benefits on May 22, 2022. This date was based on her May 24, 2022, termination from employment. It also found that she should have been disentitled to benefits at an earlier date because the employer had suspended her some time before it terminated her. The Claimant first filed her application for benefits on March 21, 2022. The General Division disentitled her to benefits effective March 21, 2022.<sup>2</sup>

[7] Even though the General Division dismissed the Claimant's appeal, the Commission appealed the General Division decision to the Appeal Division on narrow grounds. It stated that it had antedated the claim to December 7, 2021. Therefore, the General Division should have made the Claimant's disentitlement effective December 7, 2021,<sup>3</sup> which is the first day she experienced an interruption of earnings.

[8] The Appeal Division gave the Commission permission to appeal, and the Commission appealed to the Appeal Division.

[9] I am allowing the appeal. The General Division made an error in how it determined the effective date of the Claimant's disentitlement. I have made the decision that the General Division should have made. The Claimant is disentitled from benefits effective December 7, 2021.

## Issues

[10] The issues in this appeal are:

---

<sup>2</sup> The Claimant applied March 21, 2022, but March 20, 2022, was the Sunday of the first week of her benefit period, assuming her claim was established using the initial application. March 21, 2022, was the first working day within that week. See section 10(1) of the EI Act.

<sup>3</sup> Not December 6, 2021, as stated in the reconsideration decision. The Claimant's last working day was December 6, 2021, so her disentitlement should have started December 7, 2021.

- a) Did the General Division ignore or misunderstand evidence of the Claimant's antedate when it decided on the effective date for the Claimant's disentitlement.
- b) Did the General Division make an error of law by failing to explain why it chose March 20, 2021, as the date of disentitlement?
- c) If the General Division made any error, how should the error be fixed?

## Analysis

[11] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division made an error of law when making its decision
- d) The General Division based its decision on an important error of fact.<sup>4</sup>

## Important Error of Fact or Error of Law

[12] The *Employment Insurance Act* (EI Act) says that a claimant is disqualified from receiving benefits if they voluntarily leave their employment without just cause or they are dismissed for their misconduct.<sup>5</sup> The EI Act also says a claimant is disentitled to receive benefits if they are suspended for misconduct.<sup>6</sup>

[13] The General Division could only "disentitle" the Claimant to benefits to which she would otherwise have been entitled. A claimant is only entitled to benefits within their benefit period. The EI Act states that a claimant's benefit period begins on the later of

---

<sup>4</sup> This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

<sup>5</sup> See sections 29 and 30 of the EI Act.

<sup>6</sup> See section 31 of the EI Act.

the Sunday of the week in which the interruption of earnings occurs, and the Sunday of the week in which the initial claim for benefits is made.<sup>7</sup>

[14] The General Division understood that the Claimant had an interruption of earnings on December 7, 2021, but it also understood that she filed her initial claim for benefits on March 21, 2022. It used March 20, 2022, as the first day of the Claimant's benefit period, because it was later than December 7, 2021.

[15] The Commission stated that the General Division began the benefit period on the wrong date. According to the Commission, it had antedated the claimant's application to December 7, 2021, at her request. This had the effect of pushing back the date of the "initial application for benefits" to December 7, 2021, which meant that the Commission established her benefit period on Sunday, December 5, 2021. The Claimant was suspended effective December 7, 2021, and should have been disentitled to benefits immediately.

[16] The Commission argued that the General Division made an important error of fact because it ignored the evidence of the antedate. It also argued that the General Division made an error of law by failing to explain why it concluded that the claim had been established on March 20, 2022.

[17] It is true that there is nothing in the General Division decision to suggest that it considered whether the Commission had antedated the Claimant's claim, or how this would affect the benefit period or the date of disentitlement.

[18] It is not patently obvious that the Commission antedated the claim,<sup>8</sup> but there were some indications on the file. The Commission's submission to the General Division stated that "the claim was established effective December 5, 2021."<sup>9</sup> There was also evidence on the file that could have supported an inference that the Claim had been antedated: The Claimant's request for reconsideration included an express request to antedate her claim to December 7, 2021, which is the date her involuntary leave of

---

<sup>7</sup> See section 10(1) of the EI Act.

<sup>8</sup> The actual antedate decision is not on the file. Nor is the Commission's justification for antedating.

<sup>9</sup> See GD4-1.

absence/suspension began. When the Commission reconsidered, it stated that the Commission could not pay her EI benefits, starting on December 6, 2021.

[19] I find that the General Division made an important error of fact when it failed to address the Commission's representations or consider the significance of this evidence and its relevance to the date of disentitlement.

## **Remedy**

[20] I have found an error in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.<sup>10</sup>

[21] The Claimant and the Commission agreed that I should go ahead and make the decision. I agree. The record is sufficiently complete that I can decide the issue on which the Commission has brought the appeal.

[22] The Commission told me that it did not include the antedate decision or information justifying the decision in the file it gave to the General Division, because it did not consider it to be relevant to the decision under appeal.<sup>11</sup>

[23] However, the Commission's representative assured me that the claim was in fact antedated.

[24] This assurance is not a mere representation: It is new evidence. The Appeal Division does not normally entertain new evidence. Nor can I consider this new evidence within the "general background" exception.<sup>12</sup> The Commission is trying to show that the General Division ignored evidence of antedate, and thereby misapplied the law. The Commission is offering its assurance that it antedated the claim to support its argument on the very issue it has brought to the Appeal Division.

---

<sup>10</sup> See section 59(1) of the DESDA.

<sup>11</sup> See also AD2-4.

<sup>12</sup> See the use of the "general background" exception in *Paradis v Canada (Attorney General)*, 2016 FC 1282; see also *Chopra v Canada (Treasury Board)*, [1999] FCJ No 835

[25] However, this is an unusual case. At the Appeal Division hearing, the Claimant confirmed what the Commission said about the antedate. She said that she did in fact receive a decision from the Commission allowing her antedate request.

[26] I do not think it would serve anyone's interest if I were to dismiss the appeal. Both the Commission and the Claimant agree that the Commission had agreed to antedate the claim. The antedate necessarily changes the beginning of the benefit period. This means that the effective date of the disentitlement must also change. The fact of the antedate is an unavoidable part of the legal context for the Commission's reconsideration decision.

[27] As the Federal Court of Appeal noted in *Sibbald*,

There may be circumstances when the Appeal Division would allow fresh evidence, if it assists in providing background information or, perhaps exceptionally, in cases where both parties have agreed that an important document should be considered. Determinations of this nature are case-specific and should be left to the Appeal Division.<sup>13</sup>

[28] This is an exceptional case. I am taking into consideration the new evidence confirming that the Commission antedated the claim.

[29] I am also considering the Commission's representations to the General Division, and the other evidence suggestive of an antedate which was ignored by the General Division.

[30] I find that the Commission antedated the claim to December 7, 2022, and that the Claimant is disentitled from receiving benefits effective December 7, 2021. The Claimant's last paid day was December 6, 2021.<sup>14</sup> If she had not been suspended for misconduct, she would have been entitled to be paid benefits (within her antedated benefit period) starting on December 7, 2022.

---

<sup>13</sup> *Sibbald v. Canada (Attorney General)*, 2022 FCA 157.

<sup>14</sup> See GD3-18.

## **Conclusion**

[31] I am allowing the appeal in part. The General Division ignored or misunderstood evidence that the claim had been antedated. In consequence it miscalculated the effective date of the Claimant's disentitlement.

[32] The Claimant is disentitled to benefits as of December 7, 2021.

[33] In all other respects, I am confirming the General Division decision. The Commission did not put any other aspect of the General Division at issue.

Stephen Bergen  
Member, Appeal Division