



Citation: *Canada Employment Insurance Commission v CC*, 2023 SST 1005

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Respondent: C. C.
Representative: M. P.

Decision under appeal: General Division decision dated
February 14, 2023 (GE-22-3321)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: June 12, 2023

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

Decision date: July 28, 2023

File number: AD-23-226

Decision

[1] The appeal is allowed. The General Division made an error of law. I am giving the decision it should have given. The Claimant was suspended because of misconduct. This means that she isn't entitled to Employment Insurance (EI) regular benefits.

Overview

[2] C. C. is the Claimant in this case. She worked as a support worker for an organization that supports people with disabilities. When she stopped working, she applied for EI regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she wasn't entitled to EI benefits because she was suspended due to misconduct.¹

[4] The Claimant appealed to the Tribunal's General Division, and it allowed her appeal.² It decided that she was suspended but that it wasn't misconduct because her employer accommodated her.

[5] The Commission is now appealing to the Tribunal's Appeal Division. It says that the General Division made an error of law or based its decision on an erroneous finding of fact (important errors of fact).³ It argues that the Claimant was suspended due to misconduct because she deliberately violated the employer's COVID-19 vaccination policy.⁴

[6] The General Division made an error of law.⁵ Because of this, I am allowing the appeal and giving the decision the General Division should have given. The Claimant was suspended because of misconduct.

¹ See the Commission's initial decision at page GD3-34 and its reconsideration decision at page GD3-62.

² See General Division decision at pages AD1-7 to AD1-16.

³ See the Application to the Appeal Division at pages AD1-1 to AD1-6.

⁴ See the Commission's written arguments at pages AD4-1 to AD4-4.

⁵ See section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

Post-hearing arguments

[7] At the hearing, the Commission referred to a recent Federal Court decision called *Cecchetto*. It wasn't part of its written arguments.⁶ That decision involved a person who was suspended and then dismissed for failing to comply with the employer's COVID-19 vaccination policy.

[8] I wrote to the Claimant after the hearing and sent her a copy of *Cecchetto*.⁷ She replied that *Cecchetto* was irrelevant. She said that it was new evidence, so I should not accept it.⁸

[9] Case law isn't evidence, and the Appeal Division must consider and follow binding case law. *Cecchetto* is relevant because it deals with the same legal issue and has similar facts, so I will be considering it.

Issues

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

- a) Did the General Division make an error of law when it decided that the Claimant was suspended but that it wasn't misconduct because the employer chose not to dismiss her?
- b) If there was an error, how should I fix it?

Analysis

[11] The Commission argues that the General Division made an error of law or based its decision on important errors of fact.⁹ It didn't point to any specific errors of fact.

⁶ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

⁷ See pages AD5-1 to AD5-3.

⁸ See page AD6-27.

⁹ See the Application to the Appeal Division at pages AD1-1 to AD1-6. See also the Commission's written arguments at pages AD1-1 to AD1-4.

[12] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.¹⁰

[13] An error of fact happens when the General Division bases its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.¹¹ In other words, makes a finding of fact that is important to its decision, but gets the facts wrong.

[14] Any of these types of errors would allow me to intervene in the General Division decision.¹²

The General Division made an error of law

[15] Section 31 of the *Employment Insurance Act* (EI Act) says that a person isn't entitled to EI benefits if they are suspended from their job because of their misconduct.¹³ This is called a "disentitlement" to EI benefits.

[16] The disentitlement to EI benefits lasts until the suspension ends, until the person loses or voluntarily leaves their job, or until the person works enough hours with another employer.¹⁴

[17] In this case, the Commission decided that the Claimant wasn't entitled to EI benefits from January 16, 2022, since she was suspended because of misconduct.¹⁵ This means that the General Division had to decide whether the Claimant was suspended because of misconduct based on the EI Act.

[18] The EI Act doesn't define misconduct. However, the Federal Court of Appeal (Court) has described the legal test that the Tribunal applies in misconduct cases. The Court defines misconduct as conduct that is **wilful**, meaning that it was

¹⁰ See section 58(1)(b) of the DESD Act.

¹¹ See section 58(1)(c) of the DESD Act.

¹² See section 59(1) of the DESD Act.

¹³ See section 31 of the *Employment Insurance Act* (EI Act).

¹⁴ See section 31 of the EI Act.

¹⁵ See the Commission's initial decision at GD3-34 and its reconsideration decision at GD3-62.

conscious, deliberate, or intentional.¹⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁷

[19] The General Division referred to the legal test in its decision.¹⁸ It said that there is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.¹⁹

[20] The General Division found that the employer suspended the Claimant because she didn't get vaccinated against COVID-19 as required by its policy.²⁰

[21] The General Division set out case law saying that it doesn't have to consider how the employer behaved. Instead, it has to focus on what the claimant did or failed to do and whether that amounts to misconduct under the EI Act.²¹

[22] The General Division referred to the relevant case law but made an error by misapplying it and focusing on the employer's conduct instead of the employee's conduct.²²

[23] In its reasons, the General Division said that the Claimant knew her conduct (non-compliance with the policy) would lead to her suspension. But, the General Division said that it wasn't misconduct because, in response to her request for a religious exemption, the employer chose not to dismiss her.²³

[24] In doing so, the General Division focused on the employer's conduct, specifically its decision not to dismiss the Claimant.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁸ See paragraph 21 of the General Division decision.

¹⁹ See paragraph 22 of the General Division decision and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁰ See paragraph 18 of the General Division decision.

²¹ See paragraphs 23, 26, and 27 of the General Division decision.

²² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²³ See paragraph 43 of the General Division decision.

[25] The Court says that the employer's conduct doesn't need to be considered in misconduct cases under the EI Act.²⁴ Going with the less severe option of suspension doesn't change the nature of the misconduct. The Court has said that the Tribunal doesn't have to determine whether the severity of the penalty was justified. Instead, it has to determine whether the claimant's conduct amounted to misconduct based on the EI Act.²⁵

[26] The recent *Cecchetto* decision also involved a COVID-19 vaccination policy, misconduct, suspension, and EI benefits.²⁶ In that case, the claimant knew that going against the vaccination policy would get him suspended. He had an opportunity to remedy his behaviour when suspended but didn't do so. Because of that, his conduct was deemed misconduct, and he was denied EI benefits.

[27] Decisions from the Federal Court are binding on the Tribunal. The facts in *Cecchetto* are similar to the ones in this case. The General Division should have considered *Cecchetto* when it determined that the Claimant's conduct wasn't misconduct.

[28] So, I find that the General Division made an error of law by focusing on the employer's conduct and not considering *Cecchetto*. I now have to consider the options for fixing this error.²⁷

I will fix the error by giving the decision the General Division should have given

[29] There are two options for fixing an error by the General Division.²⁸ I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

²⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁵ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

²⁶ The decision in *Cecchetto* was issued on January 23, 2023, before the General Division decision, which is dated February 14, 2023.

²⁷ See section 59(1) of the DESD Act.

²⁸ See section 59(1) of the DESD Act.

[30] The Commission and Claimant agree that, if there is an error, I should give the decision the General Division should have given. In making this decision, I can make necessary findings of fact.²⁹

[31] I agree with the parties. They were given a full opportunity to present their cases, and the file is complete. So, I will fix the error by giving the decision the General Division should have given.

– **The Claimant stopped working because she was put on unpaid leave**

[32] The Claimant was a support worker. The employer put her on unpaid leave (suspended her from working) effective December 10, 2021, for three months. Her application for EI benefits and Record of Employment (ROE) both indicate that she was suspended.³⁰ The employer later extended the suspension for another three months on February 23, 2022.³¹ She remains suspended and has not been dismissed as of the date of the Appeal Division hearing.

[33] The employer put the Claimant on unpaid leave because she didn't comply with its direction and policy to either be fully vaccinated against COVID-19 or have a medical exemption as required by an order from the Provincial Health Officer (PHO). This is consistent with the unpaid leave letter, the employer's discussion with the Commission, and the ROE.³²

– **The PHO order and the employer's COVID-19 vaccination policy**

[34] The PHO issued a legal order on November 18, 2021.³³ Staff of funded service providers had until January 14, 2022, to confirm that they were fully vaccinated or had a medical exemption. The Claimant's employer was a funded service provider, so it was legally required to follow and implement the PHO order.

²⁹ See section 64 of the DESD Act.

³⁰ See the application for EI benefits at page GD3-7 and the Record of Employment at page GD3-18.

³¹ See the February 23, 2022, letter extending the unpaid leave at GD3-57.

³² See the unpaid leave letter at page GD3-56, the employer's discussion with the Commission at GD3-22, and the Record of Employment at page GD3-18.

³³ See the Order of the Provincial Health Officer, pursuant to sections 30, 31, 32, 39(6), 54, 56, 57, 67(2), and 69 of the *Public Health Act*, SBC 2008.

[35] Because of the PHO order, the employer imposed a COVID-19 vaccination policy.³⁴ It applied to all employees, including the Claimant.

[36] The policy set out **COVID-19 vaccination requirements** along with deadlines to comply with them:³⁵

December 3, 2021: Current employees must report their vaccination status to X.

December 10, 2021: Employees who were not fully vaccinated on or before December 10 must have received and submit proof of vaccination that they have had their first dose of a COVID-19 vaccine approved by Health Canada or have an exemption and provided documentation of same to the Employer.

January 14, 2022: All employees must have received and prove that they have had their second dose of a COVID-19 vaccine approved by Health Canada and submit proof of vaccination [*sic*] of same to the Employer or have applied for or secured an exemption and provided documentation of same to the Employer.

[37] The policy says that **employees who didn't comply** would not be permitted to work and would be put on unpaid leave for three months.³⁶ After that, they could be dismissed for just cause. However, employees on unpaid leave could go back to work by proving they were fully vaccinated.

[38] According to the policy, the PHO permitted only **medical exemptions**.³⁷ To get one, an employee had to make a request directly to the PHO and include medical documentation.

[39] The policy didn't provide an exemption for employees asking for accommodation under **other protected grounds**.³⁸ They also could not be re-deployed to other positions. Because of that, the policy says that these employees would be put on unpaid

³⁴ See the COVID-19 vaccination policy at GD3-58 to GD3-60.

³⁵ See page GD3-59.

³⁶ See the section on non-compliance at GD3-59.

³⁷ See pages GD3-59 and GD3-60.

³⁸ See pages GD3-59 and GD3-60.

leave for three months. It states that, depending on the grounds for accommodation, the employer might not dismiss these employees for just cause.

– **The Claimant didn't have a medical exemption**

[40] As noted above, the PHO's office was considering only medical exemptions. The Claimant didn't ask the PHO for a medical exemption. This means that she wasn't exempt from the employer's policy for medical reasons.

– **The Claimant asked for a religious exemption**

[41] The Claimant asked her employer for a religious exemption.³⁹ The file shows a copy of a religious exemption request and an affidavit.⁴⁰

[42] The employer told the Commission that it could not allow the Claimant to continue working because of the PHO order.⁴¹ However, to accommodate the Claimant, it would impose a suspension only and not dismiss her.

[43] This is consistent with the policy because it says that employees asking for accommodation under other protected grounds would be put on unpaid leave for three months and might not be dismissed for just cause.⁴²

– **The Claimant complied with only part of the employer's policy**

[44] The Claimant complied with only part of the employer's policy.

[45] The policy required employees to report their vaccination status by December 3, 2021.⁴³ The employer told the Commission that the Claimant disclosed that she was unvaccinated.⁴⁴

³⁹ See page GD3-23.

⁴⁰ See the religious exemption request at pages GD3-29 to GD3-31 and the affidavit at page GD3-32.

⁴¹ See page GD3-22.

⁴² See page GD3-22.

⁴³ See page GD3-59.

⁴⁴ See page GD3-22.

[46] The Claimant didn't comply with the other parts of the employer's policy.⁴⁵ Specifically, she didn't provide proof that she had her first COVID-19 vaccine dose by December 10, 2021, or her second dose by January 14, 2022.

– **The Claimant knew that she would be put on unpaid leave**

[47] The Claimant knew that the employer would put her on unpaid leave if she didn't comply with its policy. She also knew that it would put her on unpaid leave if she asked for a religious exemption.

[48] The policy says that non-compliance would lead to three months' unpaid leave and could lead to termination for just cause.⁴⁶ As well, the unpaid leave letter and subsequent letter from the employer both say that the Claimant was on unpaid leave but might still be subject to termination.⁴⁷

[49] This means that the Claimant committed misconduct under the EI Act. She committed misconduct because she wilfully went against the employer's policy. Specifically, she didn't get her first or second COVID-19 vaccination dose by the deadlines set out in the policy. She didn't have a medical exemption from the PHO's office exempting her from the policy.

[50] The Claimant knew or should have known that she would be put on unpaid leave by choosing not to comply with the policy. She knew about the policy, the deadlines, and the consequences of not following the policy.

[51] The Claimant didn't comply with the policy, and that is the reason she isn't working. The employer put her on unpaid leave starting on December 10, 2021, for three months, and this was extended.

[52] I accept that the employer accommodated the Claimant by suspending her instead of dismissing her. But, that didn't mean it would not dismiss her in the future. Its letter after the initial three month suspension confirms that she was still suspended and

⁴⁵ See page GD3-59.

⁴⁶ See page GD3-59.

⁴⁷ See page GD3-56 and GD3-57.

still subject to termination.⁴⁸ It says that a decision about termination hadn't been made, so she would stay on unpaid leave until further notice. It says that she can go back to work by proving she was fully vaccinated.

[53] The Claimant argues that being accused of misconduct means habitual neglect and incompetence.⁴⁹ However, the Court has said that a claimant doesn't have to have wrongful intent for their actions to be misconduct under the law.⁵⁰

[54] *Cecchetto* confirms that misconduct doesn't require that the employee act with malicious intent.⁵¹ The facts of this case are similar. In both cases, the claimants were suspended for not complying with a COVID-19 vaccination policy.⁵² Neither of them had wrongful or malicious intent.

[55] The only difference is that the Claimant in this case asked the employer for a religious exemption. But that wasn't enough to avoid getting suspended for violating the employer's policy. Even so, the employer's letter to her says she could still be dismissed for not complying with the policy.⁵³

[56] *Cecchetto* is relevant because it supports that a deliberate violation of the employer's COVID-19 vaccination policy while knowing the consequences will result in a finding of misconduct based on the EI Act. The fact is that the Claimant has other legal avenues to challenge the employer's conduct and advance that claim.

[57] I accept that the Claimant was a good worker and well liked. But, she didn't comply with the employer's policy and knew it would result in unpaid leave. She cannot go back to work until she complies. This means that she remains disentitled to EI benefits until she meets criteria set out in the law.⁵⁴

⁴⁸ See page GD3-57.

⁴⁹ See page GD3-54.

⁵⁰ See *Canada (Attorney General) v Secours*, A-352-94.

⁵¹ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 37.

⁵² In *Cecchetto*, the claimant was suspended and later dismissed.

⁵³ See pages GD3-56 and GD3-57.

⁵⁴ See section 31 of the EI Act or the summary of this section at paragraph 15 of this decision.

Conclusion

[58] The appeal is allowed. The General Division made an error of law. I have decided to give the decision that the General Division should have given. The Claimant was suspended because of misconduct.

Solange Losier
Member, Appeal Division