



Citation: *NS v Canada Employment Insurance Commission*, 2023 SST 1040

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** N. S.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Daniel McRoberts

---

**Decision under appeal:** General Division decision dated January 26, 2023  
(GE-22-3892)

---

**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** June 6, 2023

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

**Decision date:** August 2, 2023

**File number:** AD-23-200

## Decision

[1] I am allowing the appeal and returning the matter to the General Division for a determination on the issue of what effect reinstatement had and on whether there was any misconduct.

## Overview

[2] The Appellant, N. S. (Claimant), is appealing the General Division decision of January 26, 2023. The General Division refused the Claimant's application to rescind or amend its earlier decision made on October 7, 2022.<sup>1</sup>

[3] In its earlier decision, the General Division dismissed the Claimant's appeal for Employment Insurance benefits. It dismissed the appeal because it found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his job because of misconduct. As a result, the Claimant was disqualified from receiving benefits.

[4] The Claimant filed an application with the General Division to rescind or amend its earlier decision. The Claimant provided new evidence with his application. The Claimant argued that this new evidence gave the General Division the basis to rescind or amend its earlier decision.

[5] The General Division dismissed the Claimant's application to rescind or amend because it found that the new evidence did not have any impact on whether the Claimant should be disqualified from receiving benefits. On top of that, the General Division found that it had not made its earlier decision without knowledge of, or that it had not been based on a mistake, as to some material fact.

[6] The Claimant argues that the General Division made an important factual error in dismissing his application to rescind or amend. He asks the Appeal Division to make the decision he says the General Division should have made in the first place. He says that

---

<sup>1</sup> The General Division decision of October 7, 2022 is the subject of another appeal at the Appeal Division, under file number AD-22-809.

the new evidence shows that his employer wrongfully dismissed him. He says that when someone is reinstated to their employment without loss of seniority, that establishes that there was no misconduct. He says that he is entitled to receive Employment Insurance benefits.

[7] The Commission agrees that the General Division made a mistake when it dismissed the Claimant's application to rescind or amend and when it found that he was disqualified from receiving Employment Insurance benefits. The Commission also agrees that the Appeal Division should give the decision it says the General Division should have made in the first place.

[8] However, the Commission argues that the General Division should have found that the Claimant was disentitled from receiving Employment Insurance benefits. In other words, the Commission says that even with reinstatement, the Claimant's conduct still amounted to misconduct.

[9] I find that the General Division made a mistake when it dismissed the application to rescind or amend its earlier decision. It made a mistake about the new evidence and about how that new evidence would have impacted the outcome.

[10] The new evidence showed that the Claimant was reinstated to his employment without loss of seniority. However, the evidence did not show that his employer fully compensated him for his absence from work. The Claimant's reinstatement to his employment meant that he was not disqualified from receiving Employment Insurance benefits.

## **Issues**

[11] The issues in this appeal are:

- a) Did the General Division make a factual error about the outcome of the Claimant's grievance?
- b) If so, how should the error be fixed?

## Analysis

[12] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.<sup>2</sup>

[13] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

### **Did the General Division make a factual error about the outcome of the Claimant's grievance?**

[14] The Claimant argues that the General Division made an important factual error. The General Division found that the Claimant provided a grievance record that said he was unjustly terminated from his employment. The General Division also found that the Claimant had been "reinstated with full compensation for losses sustained and [that he] didn't lose his seniority."<sup>3</sup>

[15] The General Division found that the Claimant's reinstatement did not have any impact on whether the Claimant should be disqualified from Employment Insurance benefits.

[16] The Claimant acknowledges that he was reinstated without loss of seniority. But he says that he did not receive full compensation for his losses. So, he says that the General Division made a mistake on this point. He claims that because he did not get fully compensated for his losses, he is entitled to Employment Insurance benefits for the time that he was unemployed.

[17] The Commission agrees that the General Division made an error of fact. However, the Commission says that the fact that the Claimant's employer reinstated him does not change the General Division's original finding of misconduct. The Commission explains that, while the Claimant may not have been dismissed, he was

---

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

<sup>3</sup> General Division decision at para 5.

effectively suspended. The Commission argues that the Claimant's suspension was due to misconduct.

[18] The Commission argues that because the Claimant was suspended for misconduct, the General Division should have amended its earlier decision to replace the disqualification with a disentitlement.<sup>4</sup>

– **The General Division misread the Grievance**

[19] The General Division misread the Grievance.<sup>5</sup> The Grievance set out the resolution that the Claimant was seeking. It showed that the Claimant sought full compensation for his losses.

[20] The Claimant's employer reinstated the Claimant to his employment<sup>6</sup> with a return date of October 24, 2022. His employer did not compensate him for any time off work.

[21] Reinstatement effectively meant that the separation was no longer treated as if the Claimant had been dismissed. So, the Claimant would not be disqualified from receiving Employment Insurance benefits.

## **Fixing the error**

[22] The General Division made a mistake about how the reinstatement affected the Claimant's application for Employment Insurance benefits. What is the best way to correct this error?

– **The parties' arguments**

[23] Both parties argue that the Appeal Division should give the decision that they say the General Division should have given.

[24] In the Claimant's case, he says the Appeal Division should find that his employer wrongfully dismissed him and that, as a result, there was no misconduct. He denies that

---

<sup>4</sup> Representations of the Commission to the Social Security Tribunal-Appeal Division, at AD 4-4.

<sup>5</sup> Claimant's Grievance, at RAGD 2-5.

<sup>6</sup> Mediator's email of October 14, 2022, at RAGD 2-6.

his employer would have continued to suspend him if it had not dismissed him in the first place. He argues that he is entitled to receive Employment Insurance benefits.

[25] As for the Commission, it argues that the Appeal Division should find that the Claimant was suspended from his employment and that he would have continued to have been suspended, had his employer not dismissed him.

[26] The Commission says that this means the General Division decision should be amended by replacing the disqualification with a disentitlement from receiving Employment Insurance benefits, up to the time of the Claimant's return to the workforce.

[27] The Commission also argues in the alternative that, in the event the Appeal Division determines that it needs additional evidence with respect to the grievance settlement, it would not object to having the matter returned to the General Division for a redetermination on the whole misconduct question.

– **The Claimant's absence from work: the Claimant argues it should not be viewed as a suspension**

[28] The Claimant was off work between November 18, 2021 to October 24, 2022. He argues that it is wrong to assume that he was suspended for misconduct during this period.

[29] The Claimant argues that he has proven that his employer wrongfully dismissed him from his employment. He says that his employer's reinstatement without loss of seniority means that he would have been working throughout this period. He says that the fact that his employer reinstated him without loss of seniority proves that his employer agreed that he did not act inappropriately.

[30] The Claimant cites a case called *D. V. v Canada Employment Insurance Commission*, 2014 SSTGDE 75 (GE-13-1632). He says that this case shows that there is no misconduct when an employee is reinstated to their employment.<sup>7</sup>

---

<sup>7</sup> Representations of the Claimant to the Social Security Tribunal-Appeal Division, at AD 5-5.

– ***D.V. v Canada Employment Insurance Commission***

[31] D. V.'s employer dismissed him after he was caught smoking on work premises. D. V. grieved the dismissal and reached a settlement with his employer. D. V. received a cash settlement and a reference letter, in lieu of reinstatement.

[32] The General Division found that there was no misconduct in D. V.'s case. But it was not because he reached a settlement with his employer. The General Division found that there was contradictory evidence over whether the employer had warned D. V. against smoking on the premises. In other words, D. V. did not and could not have known that smoking on the premises could lead to his dismissal.

[33] The General Division also found that D. V.'s dismissal was not linked to smoking on the premises. There were other unexplained aspects that led to the disciplinary action the employer took against D. V.

[34] More importantly, D. V.'s separation from employment was because of a mutual decision between the employer and D. V., and not because of any conduct by him.

[35] In other words, simply because there is a settlement following a grievance, one still has to examine the circumstances that led to the separation, as there may or may not have been misconduct. Settlement alone, including a reinstatement to one's employment, is not determinative.

[36] *D. V.* is factually distinguishable. The facts are not similar enough to the Claimant's case. So, it is not directly applicable.

– **There are gaps in the evidence**

[37] The Claimant argues that the reinstatement without loss of seniority means that he would have been working throughout the entire time. But there simply is insufficient evidence to definitively conclude that the Claimant would have been working from November 18, 2021 to October 24, 2022.

[38] When the Commission asked the employer why it required rapid antigen testing administered at a pharmacy or retailer, instead of at-home testing, the employer

responded that it required verification. The employer required verification in the event there was a random public health inspection. The employer faced large fines.<sup>8</sup>

[39] Initially the employer placed the Claimant on a three-week suspension for not adhering to its vaccination policy.<sup>9</sup> The Claimant confirmed that his employer placed him on a three-week suspension.<sup>10</sup>

[40] The Claimant grieved the suspension and dismissal. The employer's vaccination policy remained in place during the grievance process. The employer still required its employees to either be vaccinated or to provide negative test results. Testing was at employees' own expense.

[41] According to the mediator's email, the Claimant and the employer reached a settlement on or before October 14, 2022.<sup>11</sup> The employer reinstated the Claimant.

[42] The Claimant continued to be non-compliant with his employer's vaccination policy. I understand that the Claimant remained off work and only returned to work after his employer ended its vaccination policy.<sup>12</sup> However, this needs to be clarified.

[43] The following is missing from the evidence and needs to be clarified:

- Whether the Claimant's employer waived or changed its requirements under its vaccination policy anytime between November 18, 2021 and October 24, 2022.
- Whether the employer continued to have concerns about random public health inspections after November 18, 2021.
- Whether the employer would have continued to place the Claimant on a leave of absence or a suspension until either the Claimant complied with the vaccination policy, or until the employer varied or ended its policy.

---

<sup>8</sup> Supplementary Record of Claim dated February 10, 2022, at GD 3-24.

<sup>9</sup> Supplementary Record of Claim dated February 3, 2022, at GD 3-21, and Supplementary Record of Claim, dated February 8, 2022, at GD 3-23.

<sup>10</sup> Supplementary Record of Claim dated February 7, 2022, at GD 3-22.

<sup>11</sup> Mediator's email of October 14, 2022, at RAGD 2-6.

<sup>12</sup> This is based on the Claimant's statements to the Appeal Division.



- Whether the Claimant would have returned to work before the employer ended its vaccination policy.

[44] The Claimant might have had his job back, but it is unclear from the evidence whether he would have been back at work and whether there was a change in or end to his employer's vaccination policy.

[45] The underlying appeal relates to the General Division's decision refusing the Claimant's application to rescind or amend its earlier decision made on October 7, 2022.<sup>13</sup> Returning the matter to the General Division on this limited issue is of no practical utility, given the gaps in the evidence. If I were to return the matter to the General Division to allow it to remove the disqualification, this would still leave unanswered the question of the Claimant's entitlement to any benefits.

[46] Given the gaps in the evidence, I am returning the matter to the General Division on the issue beyond correcting the disqualification. That way, the General Division can consider and decide whether the Claimant would have resumed working between November 18, 2021 and October 24, 2022.

[47] As the matter will be heard anew at the General Division, the parties may introduce new evidence.

**– Was the Claimant's suspension due to misconduct?**

[48] The parties argue over whether there was any misconduct. The Claimant denies that his behaviour amounted to misconduct, whereas the Commission argues that the Claimant's suspension was due to misconduct.

[49] As the General Division did not address the issue of whether the Claimant's suspension was due to misconduct, it is appropriate to return the matter to the General Division for this reason as well. That way, it can review the facts and determine whether any suspension was due to misconduct.

---

<sup>13</sup> The General Division decision of October 7, 2022 is the subject of an application at the Appeal Division, under file number AD-22-809.

## Conclusion

[50] The appeal is allowed. The General Division overlooked the fact that reinstatement meant that the Claimant should be treated as if his employer had never dismissed him from his employment.

[51] I am granting the Claimant's application to rescind or amend the General Division decision of October 7, 2022. I am accepting the Claimant's new evidence that his employer reinstated him to his job. Having been reinstated to his employment, the Claimant is not disqualified from receiving Employment Insurance benefits.

[52] However, this does not necessarily mean the Claimant is entitled to receive benefits. There still needs to be a determination as to what the Claimant's status likely would have been between November 18, 2021 and October 24, 2022, had he not been dismissed.

[53] The parties disagree about what other effects the reinstatement might have had on the Claimant's employment. They dispute whether he would have resumed working between November 18, 2021 and October 24, 2022.

[54] I am returning the matter to the General Division so that it may fully consider the effect of the reinstatement and to determine whether any potential (ongoing) suspension was due to misconduct.

[55] This decision now renders the Claimant's application (under file number AD-22-809) moot. In that application, the Claimant disputed that he lost his job because of misconduct. In light of the Claimant's reinstatement and my finding that he is not disqualified from receiving Employment Insurance benefits, there is no need for him to pursue his application (file number AD-22-809) further.

Janet Lew  
Member, Appeal Division