



Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 1264

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** J. P.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

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**Decision under appeal:** General Division decision dated March 11, 2023  
(GE-22-3333)

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**Tribunal member:** Janet Lew

**Type of hearing:** Videoconference  
**Hearing date:** August 9, 2023  
**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** September 12, 2023  
**File number:** AD-23-345

## Decision

[1] The appeal is allowed in part. The Appellant, J. P. (Claimant), is not disentitled from receiving Employment Insurance benefits between March 25, 2022 and April 11, 2022.

## Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Respondent, Canada Employment Insurance Commission (Commission), had proven that the Claimant had been placed on an unpaid leave of absence because of misconduct. It found that he did something that caused him to be suspended. It found that he had not complied with his employer's vaccination policy. As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural and factual errors. In particular, he argues that the General Division failed to consider important evidence. He denies that he committed any misconduct. He claims that he faithfully followed his employer's vaccination policy and that he could not have foreseen that his employer would place him on a leave of absence when it did.

[4] The Claimant asks me to give the decision he says the General Division should have made. He says the General Division should have determined that he fully complied with his employer's vaccination policy and that he could not have been aware that his employer would ever place him on a leave of absence for non-compliance. In short, he asks me to find that he was entitled to receive Employment Insurance benefits.

[5] The Commission argues that the General Division did not make any mistakes. The Commission says the General Division's findings are consistent with the evidence before it. Besides, the Commission says that the evidence does not support the Claimant's assertions that he complied with his employer's vaccination policy. The Commission asks me to dismiss the appeal.

## Issue

[6] The issue in this appeal is: Did the General Division misapprehend or overlook any of the evidence?

## Analysis

[7] 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>1</sup>

[8] For factual errors, the General Division had to have based its decision on that factual error, and it had to have made that finding in a perverse or capricious manner or without regard for the material before it.<sup>2</sup>

### **Did the General Division misapprehend or overlook any of the evidence?**

[9] The Claimant argues that the General Division misapprehended and overlooked some of the evidence, particularly his employer's vaccination policy regarding dates for attestation and compliance. He says that if the General Division had not misapprehended or overlooked this evidence, it would have found that he had been compliant with his employer's vaccination policy. And, if he had been compliant, then he did not commit any misconduct.

[10] Under his employer's vaccination policy, the Claimant could request either religious or medical accommodation. The Claimant says that the vaccination policy required him to attest as to his vaccination status within two weeks after getting a decision from his manager that he did not qualify for accommodation.

[11] The Claimant also says that the vaccination policy gave him a further two weeks after attesting as to his vaccination status before he would face any consequences for remaining unvaccinated.

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

<sup>2</sup> Section 58(1)(c) of the DESDA.

[12] In short, the Claimant says that employees had a full four weeks after getting turned down for an accommodation request before they would be placed on a leave of absence.

[13] The Claimant also says that for those who became infected with COVID-19, they would be unable to receive the vaccine until after eight weeks had passed from the time of infection. In other words, he says that getting COVID-19 also extended the deadline for complying with the employer's vaccination policy.

[14] The Claimant says the General Division failed to recognize these timelines. He says that if it had recognized these timelines, it would have determined that he had been compliant with his employer's vaccination policy. He says it would have concluded that he was not disentitled from receiving Employment Insurance benefits.

[15] In summary, the Claimant says the following extensions applied in his case:

- After his employer turned down his accommodation request – two weeks to attest
- After attesting as to his status – another two weeks before he would face any consequences
- After getting COVID-19 – another eight weeks before having to attest as to his status.

[16] The Claimant says that there was no limit in the number of accommodation requests an employee could have made, and no deadline by which they had to make such requests.<sup>3</sup> (Theoretically, this meant an employee could continually seek accommodation. This would continually extend the date by which an employee had to attest or face any consequences for not complying with the employer's vaccination policy.)

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<sup>3</sup> Claimant's undated letter, at GD 3-53.

[17] The Claimant relies on sections of his employer's vaccination policy and its guide for implementation of the policy. The sections relied upon by the Claimant are attached to these reasons as an Appendix.

– **The Claimant's chronology of events**

[18] The Claimant gives the following timeline of events:<sup>4</sup>

November 2021	Introduction of vaccination policy
November 2021	The Claimant attested that he was unvaccinated. He requested religious accommodation.
January 17, 2022	The Claimant's manager denied his religious accommodation request. His employer gave him two weeks to attest again. If he did not comply, he would be placed on leave without pay.
February 11, 2022	The Claimant's manager advised him that he could wait until March to get vaccinated because he had COVID-19.
February 28, 2022	The Claimant attested that he was unvaccinated and requested medical accommodation.
March 25, 2022	The Claimant's manager denied his medical accommodation request. His employer placed him on a leave of absence as of March 28, 2022.
June 20, 2022	The employer suspended its vaccination policy. The Claimant was permitted to return to work and was no longer on a leave without pay.

– **The Claimant sought and was denied a religious accommodation**

[19] The Claimant requested a religious accommodation. His employer denied his request by letter dated January 17, 2022. The employer wrote:

As per the *Policy*, you have until 2 weeks following the date of this letter to attest to your vaccination status against COVID-19 and receive your COVID-19 vaccine at the earliest opportunity. Should you not attest or are unwilling, you will be required to complete online training on the benefits of Covid 19 vaccination.

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<sup>4</sup> Claimant's submissions, at GD 3-51.

Should you not comply with the Policy **before February 14, 2022**, you will be placed on administrative LWOP until such time as you comply with the Policy.<sup>5</sup>

[20] There were four weeks between the date of the employer's letter and the date the Claimant's employer would be placing him on a leave of absence. For the Claimant, this letter confirmed that he had two weeks to attest after getting turned down for an accommodation request, and another two weeks after that before facing any consequences for not complying with his employer's policy.

– **The Claimant sought and was denied a medical accommodation**

[21] On February 10, 2022, the Claimant informed his employer that he tested positive for COVID-19 on January 3, 2022. This meant he would be unable to comply with his employer's policy by February 14, 2022, as he could not get vaccinated before then.

[22] The Claimant understood that, ideally, he would be unable to get vaccinated for another three months. He scheduled a vaccination appointment for April 3, 2022.<sup>6</sup>

[23] The Claimant's employer responded that, in cases like the Claimant, the minimum delay for getting vaccinated was eight weeks. The employer asked the Claimant to reschedule an appointment for the beginning of March 2022.<sup>7</sup>

[24] On February 28, 2022, before the Claimant could get vaccinated in early March 2022, he asked for a medical exemption based on the prior infection on January 3, 2022. He noted that the employer's policy did not restrict the number of accommodation requests nor the timing of such requests.<sup>8</sup>

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<sup>5</sup> Employer's letter dated January 17, 2022, at GD 3-60.

<sup>6</sup> Claimant's email to his employer on February 10, 2022, at GD 3-59.

<sup>7</sup> Employer's response to the Claimant's email of February 10, 2022, at GD 3-59.

<sup>8</sup> Claimant's undated letter, at GD 3-53.

[25] The Claimant's employer wrote to the Claimant on March 14, 2022.<sup>9</sup> The employer provided the Claimant with a link to a form for his doctor to complete. The employer stated that it needed the completed document by March 25, 2022, to avoid placing the Claimant on leave without pay. The Claimant's employer advised the Claimant that leave without pay would start on March 28, 2022 unless:

- The Claimant provided the completed document exempting him from COVID-19 vaccination for medical reasons or,
- He had received his first COVID-19 vaccination dose by that date.

[26] On March 25, 2022, the Claimant wrote to his employer.<sup>10</sup> He disputed his employer's demand that he had to provide documentation signed by his doctor. He claimed that he could provide alternative documentation, in consultation with labour relations.<sup>11</sup>

[27] The Claimant's employer wrote to the Claimant later that same day.<sup>12</sup> The employer advised the Claimant that his Medical Statement for Exemption from COVID-19 Vaccination was not completed by a licensed physician, as had been requested. As a result, the employer was denying the Claimant's request for an accommodation for medical reasons.

[28] The employer confirmed that it would be placing the Claimant on leave without pay effective March 28, 2022, as set out in its email of March 14, 2022.

[29] The Claimant confirmed that his last day of work was on March 25, 2022.<sup>13</sup> His employer placed him on a leave of absence on March 28, 2022.

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<sup>9</sup> Employer's email dated March 10, 2022, at GD 3-56 to 57.

<sup>10</sup> Claimant's email dated March 25, 2022, at GD 3-55 to GD 3-56.

<sup>11</sup> [Employer's] Guide, at GD 3-45. However, the employer's vaccine policy (Section 7.7) indicates that Labour Relations were available to management, rather than employees. Either way, there is no evidence that the Claimant consulted with Labour Relations. The hearing file does not include a copy of the Claimant's supporting documentation so it is unclear what he provided to his employer to support his request for a medical accommodation.

<sup>12</sup> Employer's email dated March 25, 2022, at GD 3-55.

<sup>13</sup> Claimant's application for Employment Insurance benefits, at GD 3-3 to GD 3-12.

[30] The Claimant alleges that his employer failed to follow its own vaccination guidelines. He says that his employer was obligated to give him an additional month to comply with the policy after it decided an accommodation request. He says that, based on his employer's decision of March 25, 2022, he had at least April 25, 2022 to comply before his employer could place him on a leave of absence.

– **The Claimant caught COVID-19 a second time**

[31] The Claimant states that he was infected with COVID-19 a second time, sometime before April 25, 2022. So, he says that he should have had a further eight weeks months before he had to comply with the policy. Before eight weeks had passed, the Claimant's employer lifted its vaccination policy and requirements for vaccination.

[32] As his employer had already placed him on a leave of absence, he did not notify his employer of this second infection, nor request another medical exemption

– **The Claimant says his employer should never have placed him on a leave of absence**

[33] As far as the Claimant is concerned, he was fully compliant with his employer's vaccination policy and guidelines in seeking accommodations and attesting as to his status. The Claimant argues that his employer should never have placed him on a leave of absence because his employer failed to give him the appropriate amount of time by which to comply:

- After his employer turned down his accommodation request, he says he should have had until April 25, 2022 to comply
- Before April 25, 2022 arrived, he caught COVID-19 a second time. He says he should have had another eight weeks before he had to comply
- By then, his employer had lifted its vaccine requirements.

[34] The Claimant says he could not have predicted that his employer would place him on a leave of absence when it did.



– **The Commission says the Claimant was non-compliant with the employer’s policy and guidelines**

[35] The Commission argues that, as the Claimant was not fully compliant with his employer’s vaccination policy and guidelines, he is unable to avail himself of any extended deadlines.

[36] For instance, the Commission notes that under Step 2: Gathering Relevant Information of the Duty to Accommodate, employees were responsible for “promptly informing their manager of their need for accommodation.”<sup>14</sup> The Commission argues that it is clear the Claimant was not prompt with his requests. For instance, he had COVID-19 in early January 2022 but waited until the end of February 2022 to ask for a medical accommodation.

[37] The Commission also argues that employees were required to provide medical documentation from their treating medical physician or nurse practitioner. The documentation had to set out the grounds for not receiving or for delaying the COVID-19 vaccine.<sup>15</sup> The Commission says that the Claimant failed to provide this basic information. (In response, the Claimant says that he was providing “Other alternative documentation ... in consultation with labour relations.”<sup>16</sup>)

[38] The Commission also notes that the Claimant’s employer had provided the Claimant with a link to the medical form for his treating physician or nurse practitioner to complete.<sup>17</sup> The employer had also informed the Claimant that he would have to provide the completed document by March 25, 2022, to avoid being placed on a leave of absence. The employer wrote that the leave of absence would start on March 28, 2022 unless he provided the completed medical statement, or he had received his first vaccination dose.

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<sup>14</sup> [Employer’s] Guide, at GD 3-44.

<sup>15</sup> [Employer’s] Guide, at GD 3-45.

<sup>16</sup> Claimant’s email of March 25, 2022 to his employer, at GD 3-56, referring to the Employer’s Guide, at GD 3-45 (Supporting documentation, bullet 5).

<sup>17</sup> Employer’s email of March 14, 2022 to the Claimant, at GD 3-56 to GD 3-57.

– **The General Division decision**

[39] In its overview, the General Division wrote that the Claimant was put on a leave without pay on March 25, 2022. This is a clear error, as it was the last day for which the Claimant was paid, according to the Record of Employment.<sup>18</sup> The Claimant confirmed that his employer suspended him as of March 28, 2022.<sup>19</sup>

[40] However, for there to be a factual error that requires intervention by the Appeal Division, the General Division had to have based its decision on that factual error, and it had to have made it in a perverse or capricious manner, or without regard for the evidence before it. The error meets this last part of the test: there is no evidence on file to support the General Division's finding that the Claimant's leave began on March 25, 2022.

[41] I find that nothing turns on whether the General Division mis-recorded the date of suspension as March 25, 2022 rather than March 28, 2022. It would make little difference to the outcome. So, it does not meet the first part of the test. The General Division did not base its overall decision that there was misconduct on this fact.

[42] However, the gist of the Claimant's argument is not that his suspension began on March 28, 2022 rather than on March 25, 2022, but that the General Division miscalculated how to calculate when the suspension should have begun. He says the General Division should have considered the dates for attestation. He says that one has to determine the attestation date as this will decide the appropriate date for compliance.

[43] The General Division did not set out in any appreciable detail the extent of the Claimant's arguments. But it was not required to fully set out nor address all of the Claimant's arguments nor the evidence upon which he relied.<sup>20</sup>

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<sup>18</sup> Record of Employment, at GD 3-13.

<sup>19</sup> See, for instance, Supplementary Record of Claim, dated September 23, 2022, at GD 3-26 to GD 3-27.

<sup>20</sup> *Simpson v Canada (Attorney General)*, 2012 FCA 82 and *Canada v South Yukon Forest Corporation*, 2012 FCA 165 (CanIII), at para 50.

[44] The General Division noted the policy's vaccination and attestation requirements. The General Division noted that the consequences for failing to comply with these requirements were set out in section 6.7 of the policy. The consequences would apply when an accommodation did not apply or when an employee was unwilling to be fully vaccinated or was unwilling to disclose his vaccination status.<sup>21</sup>

[45] The General Division wrote:

[29] The main consequence is the following: two weeks after the attestation deadline, an employee who is non-compliant will be placed on administrative leave without pay until he or she becomes vaccinated, or an accommodation is approved. [Reference to GD 3-31 at 6.7.1.2]

[30] . . . the first important date to take into consideration is November 26, 2021. That is the date by which employees must enter their vaccination status in the system.

[46] Contrary to the Claimant's arguments, the General Division did in fact consider the attestation date.<sup>22</sup> It found that employees had to give their vaccination status by November 26, 2021. The real issue is whether the General Division properly calculated the attestation date.

– **Did the evidence support the General Division's findings regarding the attestation date?**

[47] The General Division pointed to 6.7.1.2 of the employer's vaccination policy. The section states that the employer will place employees on leave without pay "two (2) weeks after the attestation deadline."<sup>23</sup>

[48] The General Division found the attestation deadline was November 26, 2021.<sup>24</sup> The General Division relied on the "Timeline for implementation and compliance" found

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<sup>21</sup> General Division decision, at para 28.

<sup>22</sup> General Division decision, at para 30.

<sup>23</sup> Policy on COVID-19 Vaccination for the [Employer], at GD 3-31.

<sup>24</sup> General Division decision, at para 30.

in the employer's guide. However, the General Division failed to note that the Timeline also provided other attestation deadlines.<sup>25</sup>

[49] Appendix A of the employer's policy on vaccination defined the attestation deadline. The general deadline was November 26, 2021. But the definition also provided a deadline of "Two (2) weeks after the date on which an employee had been informed of their manager's decision that the Duty to Accommodate does not apply."

[50] The General Division did not address this part of the definition. This represented a flaw in the General Division's analysis and computation. The proper attestation date was critical to determining and when any consequences could start to flow.

– **Other errors**

[51] The General Division also made a factual error when it concluded that the Claimant had been dismissed from his employment<sup>26</sup> and that he was therefore disqualified from receiving Employment Insurance benefits. The evidence shows that the Claimant was suspended from his employment. This should have resulted in a disentitlement.

## **Remedy**

[52] The General Division focused on just part of the employer's definition of the attestation deadline, rather than the whole definition. The General Division also found that the Claimant had been dismissed from his employment, although there was no evidence to support this conclusion.

[53] To remedy these errors, I can send the appeal back to the General Division for reconsideration or I can give the decision that the General Division should have given.

[54] The Claimant asks me to give the decision that he says the General Division should have given. He says the evidence shows that he was fully compliant with his employer's vaccination policy. He denies any misconduct and says that he is entitled to

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<sup>25</sup> [Employer's] Guide, at GD 3-41.

<sup>26</sup> General Division decision, at paras 2, 5, 7, 9, and 42.

receive Employment Insurance benefits following his suspension from work on March 28, 2022 to his return to work on June 20, 2022.

[55] The Commission Division says that the General Division did not make any consequential errors. Or, if it did, argues that the Claimant committed misconduct as he was not fully compliant with his employer's vaccination policy, so should not be entitled to receive any Employment Insurance benefits.

[56] There is no compelling reason to return this matter to the General Division. The parties had a fair hearing at the General Division. They had the chance to produce any documents and call any witnesses. They were able to make full submissions. There is no suggestion from either party that there are any material gaps in the evidence, or that there is any need to file more documents or call extra witnesses.

[57] I find that all the evidence is before me to allow me to give the decision that the General Division should have given.

– **The Claimant was placed on a leave of absence from his employment**

[58] The evidence clearly shows that the Claimant's employer placed him on a leave of absence or suspension from his employment.

– **The Commission says the Claimant was non-compliant with the employer's policy**

[59] The Commission says that the Claimant had to be fully compliant with the employer's vaccination policy. Otherwise, it argues he should not be able to benefit from any extended deadlines or be able to deny that he committed misconduct.

[60] For instance, the Commission says that the Claimant did not inform his manager of the need for medical accommodation at the earliest opportunity. The Commission says that this was required under section 7.9 of the employer's policy.<sup>27</sup>

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<sup>27</sup> Policy on COVID-19 Vaccination for the [Employer], at GD 3-34.

[61] The Claimant tested positive for COVID-19 on January 3, 2022 and spoke with his employer on February 10, 2022 to inform it that he had COVID-19. He did not seek an accommodation until more than two weeks later, on February 28, 2022—just before his employer expected him to get vaccinated. (Indeed, when the Claimant spoke with his employer on February 10, 2022, this was just four days before his employer was to have placed him on a leave of absence.)

[62] The Commission argues that the evidence shows that the Claimant delayed ever having to fully comply with his employer’s vaccination policy and undergo vaccination, to avoid any consequences for non-compliance.

[63] While the evidence could lend itself to such a conclusion, it is uncertain that the Claimant had already determined that he would be seeking a medical exemption in early January 2022, or even by February 10, 2022. Unless he had already determined that he would be seeking a medical exemption, he could not be expected to let his manager know that he was seeking accommodation.

[64] Furthermore, section 7.9 of the employer’s policy required employees to inform their manager of their need for accommodation “at the earliest opportunity or by the attestation deadline, if possible”<sup>28</sup> (My emphasis).

[65] In fact, the employer’s policy allowed the Claimant to seek an accommodation by the attestation deadline, rather than at the earliest opportunity. And, although the policy suggested the deadline was the attestation deadline, the words “if possible” meant there was no fixed date by which an employee even had to seek accommodation.<sup>29</sup>

[66] And, as the definition of the attestation deadline included “two weeks after the date on which an employee has been informed of their manager’s decision that the Duty

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<sup>28</sup> Section 7.9, Policy on COVID-19 Vaccination for the [Employer], at GD 3-34.

<sup>29</sup> The employer’s Guide to Implementation did not include the words “if possible.” Where any discrepancies arise, the policy takes precedence.

to Accommodate does not apply,”<sup>30</sup> this seemingly provided an endless deadline to seek accommodation.

[67] Under the policy, the Claimant had to seek accommodation by the attestation deadline. The policy defined the deadline as two weeks after being turned down for an accommodation. So, the Claimant had to seek accommodation two weeks after being turned down for an accommodation. At best, this part of the policy was poorly worded.

[68] The Commission has not shown that the Claimant was necessarily non-compliant when he did not inform his manager of his need for accommodation “at the earliest opportunity or by the attestation deadline.”

[69] At the same time, neither the employer’s policy nor the guide provided for any consequences for the type of “non-compliance” that the Commission describes. So, even if the Claimant did not ask for an accommodation “at the earliest opportunity,” (or by the attestation deadline) and was not compliant with that portion of the employer’s policy, that would not be a sufficient basis to find that the Claimant had committed misconduct for the purposes of the *Employment Insurance Act*.

– **The Claimant argues that he had at least four weeks to comply**

[70] The Claimant sought an accommodation and says he should have been given two weeks to attest after his employer turned down his request. He argues that after the two-week period for attestation, he had at least another two weeks before facing any consequences. This totalled four weeks. He says his employer’s letter of January 17, 2022<sup>31</sup> confirmed his interpretation of the employer’s policy. (He also says that he had an extra eight weeks to attest, after catching COVID-19 a second time.)

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<sup>30</sup> Appendix A: Definitions, Policy on COVID-19 Vaccination for the [Employer], at GD 3-36.

<sup>31</sup> Employer’s letter dated January 17, 2022, at GD 3-60.

– **The attestation deadline**

[71] The employer’s vaccination policy included a deadline for attestation as, “Two (2) weeks after the date on which an employee has been informed of their manager’s decision that the Duty to Accommodate does not apply.”<sup>32</sup>

– **The timing of consequences of non-compliance**

[72] Section 6.7.1.2 of the employer’s policy states that two weeks after the attestation deadline, the employer is to:

- Remove employee access to systems and restrict their access to worksites, off-site visits, business travel and conferences; and
- Place employees on administrative Leave without Pay advising them not to report to work, or to stop working remotely, and taking the required administrative action to put them on Leave without Pay until such time as their status changes (i.e. vaccination or accommodation approved).<sup>33</sup>

[73] The employer’s guide provided that:

If a decision has been taken that the duty to accommodate does not apply, then the [Employer’s] Policy on Vaccination requirements apply. The date of the decision will be the attestation deadline as defined in Appendix A of the [Employer’s] policy on Vaccination for the purposes of determining the timing of consequences.<sup>34</sup> (My emphasis)

[74] Under the guide, the Claimant had two weeks after his employer turned down his request when he would face any consequences.

[75] The employer’s policy and guide appear to conflict. On one hand, the policy stated that the attestation date was two weeks after an employee was informed of the

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<sup>32</sup> Appendix A: Definitions, of the Policy on COVID-19 Vaccinations for the [Employer], at GD 3-36.

<sup>33</sup> Section 6.7.1.2, Policy on COVID-19 Vaccination for the [Employer], at GD 3-31

<sup>34</sup> [Employer’s] Guide, at GD 3-46.



employer's decision not to accommodate. On the other hand, the guide stated that the attestation date was the same as the decision date.

[76] Where a conflict arises, the policy takes precedence over the guide.

– **Application of the vaccination policy**

[77] From the Claimant's perspective, his employer turned down his accommodation request on March 25, 2022. So, by his calculation, he should have had until at least March 22, 2022 before he potentially faced any consequences.

[78] The Claimant had already attested as to his status on February 28, 2022. The employer may have been using this date to determine the timing of any consequences, although the policy refers to the attestation deadline to determine the timing.<sup>35</sup>

[79] The Claimant states that he made his accommodation request on February 28, 2022. There is no evidence on file that the Claimant's employer responded to his request at anytime before March 14, 2022.

[80] The Claimant's employer wrote to the Claimant on March 14, 2022. From the employer's perspective, it was turning down the Claimant's request, unless the Claimant could meet its requirements for making a request by March 25, 2022.

[81] In other words, the employer made its decision on the Claimant's accommodation request by March 14, 2022. The employer communicated to the Claimant that, to avoid being placed on leave without pay, he would have to comply with the requirements for getting an exemption.

[82] The employer told the Claimant that leave without pay would start on March 28, 2022 unless he provided supporting medical documentation or unless he received his first vaccination dose. This way, the employer was communicating to the Claimant that it was turning down his request.

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<sup>35</sup> Section 6.7, Policy on COVID-19 Vaccination for the [Employer], at GD 3-31.

[83] It is clear that the employer had essentially turned down the Claimant's accommodation request on March 14, 2022. So, this gave the Claimant two weeks to attest and another two weeks before facing consequences. This gave him until April 11, 2022 before he would face any consequences. The employer should have given the Claimant until April 11, 2022 before placing him on an administrative leave of absence.

– **The Claimant says he should have been given another eight weeks to comply**

[84] The Claimant says that, once he caught COVID-19 a second time, his employer should have given him another eight weeks to comply before placing him on an administrative leave. And, because the employer lifted its vaccination policy before the eight weeks had elapsed, he says that his employer should never have placed him on a leave of absence.

[85] There is no basis for a second eight-week extension. The Claimant states that he was already on a suspension at the time and did not inform his employer that he had COVID-19 again.

– **Misconduct**

[86] The Claimant does not challenge the General Division's interpretation of what misconduct means. He simply challenges the General Division's findings that he engaged in misconduct.

[87] Despite the Claimant's denials, the evidence shows that the Claimant knowingly did not comply with his employer's vaccination policy. The evidence also shows that he was aware that, if he did not comply, that his employer would place him on a leave of absence, which it did. This constituted misconduct.

– **Summary**

[88] The General Division's analysis of the attestation date was incomplete. The attestation date was critical to determining when any consequences would arise. The policy defined the attestation date and it included "two weeks" after getting a decision

from his manager that he did not qualify for an accommodation. The General Division overlooked this part of the definition.

[89] It was irrelevant that the Claimant had already attested on February 28, 2022 because the timing of any consequences was based on the attestation deadline, which was defined by the employer's policy.

[90] The Claimant's employer wrote to the Claimant on March 14, 2022 and again on March 25, 2022.

[91] The Claimant understood that the attestation deadline fell two weeks after March 25, 2022, and that he would have another two weeks after that before he should have faced any consequences for not complying with his employer's policy. This was not an unreasonable interpretation.

[92] But, given the wording in the employer's email of March 14, 2022, the employer was clearly turning down the Claimant's request for an accommodation on that date (though was prepared to revisit the request for accommodation if the Claimant provided the appropriate documentation). It should have been apparent to the Claimant that his employer was *de facto* turning down his request because his employer was quick to point out the consequences and when they would start.

[93] However, the attestation deadline should not have passed until March 25, 2022, as there should have been two weeks after the employer turned down the Claimant's accommodation request on March 14, 2022. Then, the Claimant should have been given a further two weeks before facing any consequences.

## **Conclusion**

[94] The appeal is allowed in part. The Claimant is not disentitled from receiving Employment Insurance benefits between March 25, 2022 and April 11, 2022.

Janet Lew  
Member, Appeal Division

## **APPENDIX**

### Policy on COVID-19 Vaccination

The Claimant relies on the following section of his employer's vaccination policy:

#### **13. Appendix A: Definitions<sup>36</sup>**

##### **Attestation deadline**

The date by which an employee's attestations must be entered in the Corporate Administrative System (CAS), or provided to managers if the employee does not have access to CAS:

...

- Two (2) weeks after the date on which an employee has been informed of their manager's decision that the Duty to Accommodate does not apply ...

### Guide for Implementation of the Policy on COVID-19 Vaccination and Testing

[95] The Claimant relies on the following section of his employer's Guide for Implementation of the Policy on COVID-19 Vaccination and Testing.

#### **Timeline for implementation and compliance<sup>37</sup>**

...

##### **November 8, 2021 to November 26 – Attestation Period**

- Employees enter their vaccination status into CAS, no later than November 26, 2021 (Attestation Deadline) by email invitation.
- Employees unable to be vaccinated begin making accommodation requests to their manager. Employees unable to be vaccinated should request accommodation no later than November 26, 2021. Managers gather relevant information and consult with labour relations to determine if the Duty to Accommodate applies or does not apply.

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<sup>36</sup> Policy on COVID-19 Vaccination for the [Employer], at GD 3-36.

<sup>37</sup> [Employer's] Guide, at GD 3-41.

...

- Special situations – **Other Attestation deadlines (as defined in Appendix A of the [employer's] Policy on Vaccination): . . .**
  - 2 weeks after the date on which an employee has been informed of their manager's decision that the duty to accommodate does not apply ...

### **Duty to accommodate (for employees unable to be vaccinated)<sup>38</sup>**

Nothing in this Guide supersedes [the employer's] legal obligations with respect to the Duty to Accommodate. The [employer] has a duty to accommodate individuals' needs when those needs relate to one or more of the prohibited grounds of discrimination under the *Canadian Human Rights Act* up to the point of undue hardship. In the case of vaccines, this could include:

- Certified medical contraindications;
- Religion; and
- Other prohibited grounds under the *Canadian Human Rights Act*.

### **Step 3: Making an informed decision<sup>39</sup>**

...

- Managers are required to consider requests for accommodations no matter the date of receipt of such a request.

### **Step 4: Communicating the implications of the decision<sup>40</sup>**

Managers must promptly advise employees of the decision in writing, the rationale for the decision, the accommodation to be provided, if applicable, and the appropriate next steps that must be taken: . . .

- If a decision has been taken that the duty to accommodate does not apply, then the [Employer] Policy on Vaccination requirements apply. The date of the decision will be the attestation deadline as defined in Appendix A of the [Employer] Policy on Vaccination for the purposes of determining the timing of consequences.

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<sup>38</sup> [Employer's] Guide, at GD 3-44.

<sup>39</sup> [Employer's] Guide, at GD 3-45.

<sup>40</sup> [Employer's] Guide, at GD 3-46.