Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1046

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated December 21, 2022 (GE-22-3322)

Tribunal member:	Neil Nawaz
Type of hearing:	In writing
Decision date:	August 3, 2023
File number:	AD-23-63

Decision

[1] The appeal is allowed. The General Division acted unfairly by proceeding without giving the Claimant an opportunity to await the outcome of a pending grievance. I have decided to return this matter to the General Division for a new hearing.

Overview

[2] The Claimant, M. M., was a transit operator with the City of Brampton. On November 18, 2021, the City placed him on a series of involuntary leaves of absence after he failed to provide proof that he had been vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his failure to comply with his employer's vaccination policy amounted to misconduct.

[3] This Tribunal's General Division agreed with the Commission. It found that the Claimant had deliberately broken his employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely lead to suspension or dismissal.

[4] The Claimant sought permission to appeal the General Division's decision. He argued, among other things, that the General Division proceeded unfairly by not offering him an adjournment pending resolution of his outstanding complaint to the Ontario Labour Relations Board (OLRB).

[5] Earlier this year, I granted the Claimant permission to appeal because I thought he had an arguable case that the General Division had denied him an opportunity to present his best case. When the Commission submitted written submissions indicating a willingness to send this matter back to the General Division,[2] I scheduled a settlement conference to see if there was some basis for the parties to come to an agreement.

---

[1] The City terminated the Claimant's employment altogether on December 1, 2021.
[2] See Commission's representations to the Tribunal dated July 28, 2023, AD4.

[6] At settlement conference, the parties did reach an agreement.[3] This decision reflects that agreement.

Agreement

[7] The Commission proposed that, in the interest of natural justice, this matter be returned to the General Division for rehearing.[4] The Claimant agreed to this proposal.

Analysis

[8] For the following reasons, I accept the parties' agreement. I am satisfied that the General Division failed to provide the Claimant with a full and fair hearing.

[9] On December 3, 2022, a few days before the scheduled General Division hearing, the Claimant sent the Tribunal a written confirmation that he had filed an application before the OLRB related to his dismissal.[5] In an accompanying email, the Claimant expressed surprise that the hearing was going forward while the OLRB application remained outstanding.[6]

[10] The General Division was already aware that the Claimant had taken active steps to defend his right, as he saw it, to refuse the COVID-19 vaccine without jeopardizing his job. In his notice of appeal to the General Division, the Claimant wrote, "there has been no decision rendered by an arbitrator for my wrongful dismissal and the matter is yet to be resolved by the Ontario Labour Relations Board. Should you require more information, then you may contact the union who owns the grievance."[7] During the General Division hearing, the Claimant mentioned the grievance several times.[8]

---

[3] Refer to the recording of the settlement conference held on August 3, 2023.
[4] This reflects the wording of one of the grounds of appeal to the Appeal Division, as set out in section 58(1)(a) of the *Department of Employment and Social Development Act* (DESDA).
[5] See Confirmation of Filing of Application with the OLRB on November 7, 2022, GD6-4.
[6] See Claimant's email dated December 3, 2022, GD4-1.
[7] See notice of appeal to General Division dated October 5, 2022, GD2-20.
[8] Refer to recording of General Division hearing at 3:40, 8:50,18:00 and 22:00. At the hearing, the Claimant said that he had entered into a settlement agreement with his employer. He also said that he had filed a Duty of Fair Representation complaint with the OLRB because, in his view, his union had not fairly represented his interests.

[11] Nevertheless, it apparently didn't occur to the General Division to offer the Claimant an opportunity to delay the proceedings to allow the grievance process to play itself out.

[12] The Claimant's grievance is what distinguishes his case from many other similar ones. When it comes to finding misconduct, the courts recognize a low bar. Case law says that the only questions that matter are whether an EI claimant breached their employer's policy and, if so, whether that breach was deliberate and foreseeably likely to result in dismissal.[9]

[13] The General Division found that it didn't have the authority to decide whether an employer's policies are fair or reasonable:

> I realize the Claimant testified that the employer could have made some type of accommodation with him on the Covid-19 testing. However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.[10]

[14] However, this is a case where there was evidence on the record that the Claimant was in the process of doing just what the General Division suggested he do—challenge his employer's actions by other avenues, specifically, arbitration through the Claimant's collective agreement and review by the OLRB.

[15] In my view, the member should have been aware that the grievance process might yield an answer to the question of whether, in fact, the Claimant did anything to warrant his dismissal. For that reason, I am satisfied that the General Division proceeded without first giving him an option to ask for an adjournment pending receipt of important information.

---

[9] See for example *Paradis v Canada (Attorney General)*, 2016 FC 6.
[10] See General Division decision, paragraph 19.

Remedy

[16] When the General Division makes an error involving an EI matter, the Appeal Division can fix it by one of two ways: it can (i) send the matter back to the General Division for a new hearing or (ii) give the decision that the General Division should have given.[11]

[17] In this case, I have no choice but to send this matter back to the General Division for rehearing. That's because I don't think the record is complete enough to allow me to make an informed decision on the merits of the Claimant's case. When I substitute my decision for the General Division's, I can only consider the record that was available to the General Division at the time of hearing. In this case, owing to failure to observe a principle of natural justice, the record is missing the outcome of the proceedings that Claimant initiated at the OLRB—proceedings that he believed would prove he was not guilty of misconduct.

[18] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to consider the arbitration decision and to explore whatever avenues of inquiry that may arise from it.

Conclusion

[19] For the above reasons, I find that the General Division committed breach of procedural fairness. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[20] The appeal is allowed.

Neil Nawaz
Member, Appeal Division

---

[11] See DESDA, section 59(1).