



Citation: *AD v Canada Employment Insurance Commission*, 2023 SST 1394

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. D.

Respondent: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Decision under appeal: General Division decision dated April 25, 2023
(GE-22-3921)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: September 19, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: October 23, 2023

File number: AD-23-555

Decision

[1] The appeal is dismissed.

Overview

[2] The employer said the Appellant (Claimant) was suspended from his job because he did not comply with the employer's COVID-19 vaccination policy (Policy). He was not granted an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from his job because of misconduct, so it was not able to pay him benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant was suspended from his job following his refusal to follow the employer's Policy. He was not granted an exemption. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was suspended from his job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored his evidence that the real reason for losing the job is that his position was eliminated, and that the employer had no plans to return him back to work. He submits that the General Division made an error in law when it concluded that he was suspended because of misconduct.

[6] I must decide whether the General Division based its decision without regard for the material before it and whether it made an error of law when making its decision.

[7] I am dismissing the Claimant's appeal.

Issue

[8] Did the General Division decision ignore the Claimant's evidence that the real reason for losing the job is that his position was eliminated, and that the employer had no plans to return him back to work?

Preliminary matters

[9] It is well-established that I must decide the present appeal based on the evidence presented to the General Division. The powers of the Appeal Division are limited to reviewing the evidence that was presented to the General Division.¹

[10] The present appeal only concerns the General Division decision rendered in file GE-22-3921.

Analysis

Appeal Division's mandate

[11] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.²

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.³

[13] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a

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

² *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

³ *Idem*.

perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

Did the General Division decision ignore the Claimant's evidence that the real reason for losing the job is that his position was eliminated, and that the employer had no plans to return him back to work?

[14] The General Division found that the Claimant was suspended from his job following his refusal to follow the employer's Policy. He was not granted an exemption. It found that the Claimant knew that the employer was likely to suspend him in these circumstances. The General Division concluded that the Claimant was suspended from his job because of misconduct.

[15] The Claimant submits that the General Division ignored his evidence that the real reason for losing the job is that his position was eliminated, and that the employer had no plans to return him back to work - that his termination was masked as an indefinite leave by the employer. He submits that the General Division did not consider it in its decision.

[16] The Commission agrees that the General Division does not mention the Claimant's representations in its decision.

[17] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[18] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it; it must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[19] After reading the General Division decision, I find that the Claimant's argument whether there exists a causal connection between his suspension and misconduct was not addressed by the General Division.⁴ This is an error of law.

[20] I am therefore justified to intervene.

There are two ways to fix the General Division's errors

[21] When the General Division makes an error, the Appeal Division can fix it in one of two ways:

- 1) It can send the matter back to the General Division for a new hearing.
- 2) It can give the decision that the General Division should have given.

The record is complete, and I can decide this case on its merits

[22] The Claimant insists that I render the decision that the General Division should have given. The Claimant considers the record is complete and that I can decide the case on its merits. The Commission agrees with the Claimant.

[23] I agree with the parties. The record is complete. The parties had the opportunity to fully present their case before the General Division. I therefore can give the decision that the General Division should have given.

Misconduct

[24] To decide the appeal, I proceeded to listen to the recording of the General Division hearing that was held on April 11, 2023.

[25] The only question that was raised before me is to decide whether there existed a causal link between the Claimant's suspension and misconduct.

⁴ The Claimant made the argument in his written submissions and during the General Division hearing: 51:25 and 1:13:50.

[26] To answer this question, I must determine whether the evidence shows that the employer had planned to replace or abolish the Claimant's position prior to his suspension for not following its Policy. In other words, I must determine whether the employer used the Policy as an excuse to suspend the Claimant and abolish his position.

[27] The Claimant submits that the employer had already planned to eliminate his position at the time he was suspended from work. The Policy was only an excuse to put him on indefinite leave. The employer cut him off from his work on November 30, 2021, and gave him a reference letter in December 2021. The company decided to replace two positions with one person who would take on his administrative responsibilities and project management functions.

[28] The employer stated that the Claimant was suspended for not complying with the Policy by the requested deadline. He was aware of the Policy. On November 30, 2021, he was placed on an unpaid leave of absence. On March 30, 2022, the employer terminated the Claimant on a without cause basis and offered him a severance package because he was replaced in his absence.

[29] The evidence shows that the employer tried to persuade the Claimant to receive the vaccine prior to his suspension in person and by phone.⁵ He decided not to receive the COVID-19 vaccine and advised the employer of his decision not to disclose confidential information.⁶ The employer refused to accommodate the Claimant with alternative solutions. He was put on unpaid leave in conformity with the Policy.

[30] The evidence does not support a conclusion that the merger of job positions was decided prior to the Claimant's suspension beside his statement that the employer had talked of a restructuration of the company months before the Policy.

[31] The employer's requirement that he remit all company items during his suspension does not support a conclusion that he was suspended for another reason

⁵ Recording of the General Division hearing: 32:00.

⁶ Recording of General Division hearing: 46:47.

then refusing to follow the employer's Policy. The reference letter of December 2021 was given to the Claimant upon his demand.⁷

[32] The evidence shows that the employer decided, **after the suspension**, to merge the Project Manager position and the Claimant's position. They posted the job offer on Indeed in December 2021. The Claimant stated that he felt the employer had no intention to bring him back to work "**once they put him off**".⁸ He received a letter from the employer on March 20, 2022, advising that **he was terminated** without cause and was also issued pay in lieu of notice monies.

[33] Based on the evidence, the Claimant was aware of the Policy, and he had clearly decided not to receive the COVID-19 vaccine. He did not request an exemption. The Claimant refused intentionally; this refusal was wilful. **This was the direct cause of his suspension**. He was suspended because of misconduct.

[34] The Claimant knew that his refusal to comply with the Policy could lead to his suspension. The Claimant stated that the employer tried to convince him to accept the vaccine before suspending him. The employer would not have made that effort if it had already planned to abolish the Claimant's position prior to his suspension.

Conclusion

[35] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

⁷ See GD3-42 of file GD-22-4030.

⁸ See GD3-46 of file GE-22-4030.