Citation: *YP v Canada Employment Insurance Commission*, 2023 SST 1821

# Social Security Tribunal of Canada
## Appeal Division

# Decision

| | |
|---|---|
| **Appellant:** | Y. P. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Jessica Earles |

---

| | |
|---|---|
| **Decision under appeal:** | General Division decision dated January 15, 2023 (GE-22-2672) |

---

| | |
|---|---|
| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | December 19, 2023 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | December 21, 2023 |
| **File number:** | AD-23-162 |

## Decision

[1] The appeal is allowed in part.

[2] The Appellant, Y. P. (Claimant), was suspended from his employment for misconduct. The General Division did not make an error when it found that he had been suspended due to misconduct.

[3] However, the General Division made an error when it found that this meant that the Claimant was disqualified from receiving Employment Insurance benefits. A claimant who is suspended from their employment because of their misconduct is disentitled, rather than disqualified, from receiving benefits.

[4] The General Division also overlooked some of the evidence. It failed to appreciate that the Claimant's contract with his employer ended on March 31, 2022. The end of the Claimant's employment ended the disentitlement. He was not disentitled from receiving benefits after this date.

## Overview

[5] The Appellant, Y. P. (Claimant), is appealing the General Division decision. The General Division found that the Claimant had been suspended from his job because of misconduct. In other words, it found that he had done something that caused him to be suspended. The Claimant had not complied with his employer's vaccination policy. The General Division found that, as a result of his misconduct, he was disqualified from receiving Employment Insurance benefits for an indefinite period.

[6] The Claimant argues that the General Division made legal and factual errors. He denies that he committed any misconduct. He says that when he began his employment, his employer did not require vaccination. He also says that his employer could have accommodated him by letting him work from home, without requiring vaccination. He says his employer's vaccination policy violated his rights under the *Canadian Charter of Rights and Freedoms*.

[7] The Claimant asks the Appeal Division to find that he did not commit any misconduct and to award him Employment Insurance benefits.

[8] The Respondent, the Canada Employment Insurance Commission (Commission), agrees that the General Division made two errors. One, it imposed a disqualification instead of a disentitlement, and two, it did not adequately assess the impact of the end of the Claimant's contract with his employer.

[9] The Commission asks that the Appeal Division to remove the disqualification and in its place, impose a disentitlement for misconduct. The Commission asks that the disentitlement remain in place from November 15, 2021, to March 31, 2022.

## Issues

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

a) Is there an arguable case that the General Division misinterpreted what misconduct means?

b) Is there an arguable case that the General Division made a legal error when it decided that the Claimant was disqualified from receiving Employment Insurance benefits following a suspension for misconduct?

c) Is there an arguable case that the General Division overlooked the fact that the Claimant's employment contract ended on March 31, 2022?

d) If the answer is "yes" to any of the above, how should the error be fixed?

## Analysis

[11] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[1]

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

[12] For factual errors, the General Division had to have based its decision on that error, and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.[2]

## The General Division did not misinterpret what misconduct means

[13] The General Division did not misinterpret what misconduct means for the purposes of the *Employment Insurance Act*. Misconduct can arise even if a policy does not form part of the original employment contract. It can also arise even if the employer could have accommodated its employees. Finally, the legality or reasonableness of an employer's vaccination policy is not relevant to the misconduct question.

[14] The General Division defined misconduct. It found that there is misconduct if a claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of facing consequences because of that.[3] This definition is consistent with the case law.

[15] The Claimant denies that he committed any misconduct. He says that for misconduct to arise, there has to be a violation of a term or condition of his contract of employment. He notes that his employment contract did not require vaccination. He also says that misconduct does not arise if his employer could have accommodated him. And finally, he argues that his employer's vaccination policy was unreasonable and did not respect his rights. So, he argues that he should not have had to comply with the policy. If he did not have to comply, then there was no misconduct.

### – Misconduct can arise even if a policy lies outside an employee's employment contract

[16] The General Division did not have to consider the Claimant`s employment contract when assessing whether there was any misconduct. An employer's policies do not have to form part of the original employment contract for there to be misconduct.

---

[2] See section 58(1)(c) of the DESD Act.
[3] The General Division decision, at paras 14 and 15.

[17] The Claimant denies that he committed misconduct because he says his employment contract did not require vaccination. He says misconduct only arises if there is a breach of the terms and conditions of one's employment.

[18] However, it has become well established that an employer's policies do not have to form part of the employment contract for there to be misconduct. Over the past year, the Federal Court and Federal Court of Appeal have issued cases involving employees who did not comply with their respective employer's vaccination policies. In each case, none of the original employment contracts required vaccination against COVID-19. Yet, the courts were prepared to accept the findings that there had been misconduct when the employees did not comply with the vaccination policies.

[19] For instance, in *Matti*, the Federal Court determined that it was unnecessary for the employer's vaccination policy to be in the initial agreement, as "misconduct can be assessed in relation to policies that arise after the employment relationship begins."[4]

[20] In *Kuk*,[5] the appellant chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. The Federal Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Federal Court found that there was misconduct because Mr. Kuk knowingly did not comply with his employer's vaccination policy and knew what the consequences would be if he did not comply.

[21] In *Cecchetto*[6] and in *Milovac*,[7] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

---

[4] See *Matti v Canada (Attorney General)I,* 2023 FC 1527 at para 19.
[5] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[6] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[7] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.

[22] There are also many cases outside of the context of vaccination policies that show that an employer's policies do not have to form part of the employment contract for there to be misconduct.[8]

### – Misconduct can arise even if an employer does not accommodate an employee

[23] The General Division did not have to consider whether the Claimant`s employer could have accommodated the Claimant.

[24] The Claimant argues that the General Division failed to consider whether his employer should have accommodated him or given him an exemption, by providing options or alternatives to vaccination. If his employer had accommodated him or given him an exemption, the General Division would have found that he had been compliant with his employer's vaccination policy.

[25] I find that the General Division did not fail to consider this issue because an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[9]

### – The legality or reasonableness of an employer's vaccination policy is not relevant to the misconduct question

[26] The General Division did not have to consider whether the employer's vaccination policy was unlawful or unreasonable.

[27] The Claimant argues that his employer's vaccination policy was unlawful and unreasonable. He argues that because the policy was unlawful and unreasonable, he did not have to comply with it.

[28] However, arguments about the legality and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has held

---

[8] See, for instance, *Canada (Attorney General) v Lemire*, 2010 FCA 314, *Nelson v Canada (Attorney General)*, 2019 FC 222, *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5, and *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.
[9] See *Kuk*, at para 36, citing *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 14.

that the General Division and the Appeal Division do not have the authority to address these types of arguments. In *Cecchetto*, the Court wrote:

> As noted earlier, it is likely that the Applicant [Cecchetto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
>
> The SST-GD [Social Security Tribunal-General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."…
>
> **Despite the Claimant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SSTGD**. [Citation omitted][10]
>
> (my emphasis)

[29] Recently, the Federal Court has held that the General Division and Appeal Division, "are not the appropriate fora to determine whether the [employer's] policy or [the employee's] termination were reasonable."[11]

[30] It is clear from the cases that the General Division did not have the authority to address whether an employer's vaccination policy is lawful or unreasonable.

## The General Division made a legal error when it decided that the Claimant was disqualified from receiving employment Insurance benefits following a suspension for misconduct

[31] The General Division erred when it found that the Claimant was disqualified from receiving Employment Insurance benefits following a suspension for misconduct. A claimant who is suspended from their employment because of their misconduct is

---

[10] See *Cecchetto*, at paras 46 to 48.
[11] See *Davidson v Canada (Attorney Genera)*, 2023 1555 at para 77.

disentitled, rather than disqualified, from receiving benefits.[12] The General Division should have found that the Claimant was disentitled and not disqualified from receiving benefits.

## The General Division overlooked some of the evidence

[32] The General Division made a factual error. It overlooked some of the evidence that could have had an impact on the outcome.

[33] In both his Request for Reconsideration and Notice of Appeal to the General Division, the Claimant noted that his employment contract ended on March 31, 2022. He noted that his employer should have updated the Record of Employment to indicate the end of the contract.[13]

[34] The Claimant's employer also confirmed that the Claimant's employment ended on March 31, 2022.[14]

[35] The General Division did not mention any of this evidence, or how it could have impacted the Claimant's application for benefits. The end of the Claimant's employment contract meant that the Claimant was no longer disentitled from receiving Employment Insurance benefits. So, the General Division should have addressed this evidence. This represented an error.

## Fixing the error

[36] The General Division made two succinct errors. The Commission argues that the Appeal Division should give the decision that it says the General Division should have made in the first place, rather than sending the matter back to the General Division for a reconsideration.

[37] For the first error, the Commission recommends that the Appeal Division remove the disqualification and replace it with a disentitlement. As for the second error, the

---

[12] See sections 30 and 31 of the *Employment Insurance Act*.
[13] See Request for Reconsideration, at GD 3-24, and Notice of Appeal, at GD 2-4.
[14] See employer's letter dated February 25, 2022, at GD 3-26 to GD 3-27.

Commission recommends that the Appeal Division end the disentitlement on March 31, 2022, when the Claimant`s employment contract concluded. The Claimant agrees with the remedy for the second error.

[38] There are no gaps in the evidence and the hearing at the General Division was fair. Giving the decision that the General Division should have made is the most efficient and cost-effective manner of resolving this matter, rather than sending this matter back to the General Division for a redetermination.

[39] The evidence shows that the Claimant knowingly did not comply with his employer's s vaccination policy. He was aware of the consequences of not complying. For various reasons, he found the policy unreasonable and disagreed with it. Even so, for the purposes of the *Employment Insurance Act*, he committed misconduct, resulting in a suspension. This meant that he was disentitled from receiving Employment Insurance benefits.

[40] The employer required vaccination by November 14, 2021. So, the disentitlement ran from November 15, 2021.

[41] The Claimant's employment contract ended on March 31, 2022, for reasons unrelated to the employer's vaccination policy. As the Claimant's contract concluded, this ended the disentitlement. So, the disentitlement ran to March 31, 2022.

[42] The Claimant was disentitled from receiving regular benefits for the period of the disentitlement. For greater clarity, this does not affect the Claimant's entitlement to sickness benefits that he has already received.

[43] The Commission notes that the Claimant's benefit period ended the week of November 6, 2022. The benefit period is the timeframe within which benefits may be paid. Benefits are not payable outside the benefit period.

[44] Assuming that the Claimant can verify that he was available for work between March 31, 2022, and the week of November 6, 2022, he should be entitled to receive Employment Insurance benefits for this timeframe.

## Conclusion

[45] The appeal is allowed in part. The disqualification is replaced with a disentitlement that ended on March 31, 2022.

Janet Lew
Member, Appeal Division