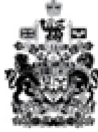

Citation: *BA v Canada Employment Insurance Commission*, 2023 SST 1799

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen

Decision under appeal:	General Division decision dated August 24, 2023 (GE-23-66)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	November 30, 2023
Hearing participants:	Appellant Respondent’s representative
Decision date:	December 14, 2023
File number:	AD-23-880

Decision

[1] The appeal is allowed in part.

[2] The matter will go back to the General Division for reconsideration on the disqualification issue only.

Overview

[3] The Appellant, B. A. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant had been suspended and then lost his job because of misconduct. In other words, he had done something or had failed to do something that caused him to be suspended and then lose his job. As a result, the Claimant was disentitled from receiving Employment Insurance benefits for the duration of his suspension, and then disqualified after that.

[4] The Claimant argues that the General Division made legal and factual errors in dismissing his appeal. He says that the General Division overlooked the fact that he had been on a medical leave of absence when his employer suspended and dismissed him. He says that he was unaware that he would face any consequences for not complying with his employer's vaccination policy while he was on a medical leave of absence. Therefore, he denies that he committed any misconduct.

[5] The Claimant asks the Appeal Division to return this matter to the General Division for a redetermination on all issues.

[6] The Commission argues that the General Division did not make any errors on the disentitlement issue. The Commission argues that the evidence shows that the Claimant had committed misconduct, thus leading to the suspension. The Commission also says that the evidence shows that the Claimant's employer had already suspended him before he sought a medical leave of absence. The Commission asks the Appeal Division to dismiss the appeal dealing with that issue.

[7] As for the disqualification issue, the Commission agrees that the General Division did not properly address the events surrounding the Claimant's dismissal. As the facts are incomplete with regard to the Claimant's medical leave of absence, the Commission recommends that the Appeal Division refer the matter back to the General Division for reconsideration.

[8] I find that the General Division did not make an error on the disentitlement issue. However, it overlooked some of the evidence on the disqualification issue, so I am returning the matter to the General Division for reconsideration on that issue only.

Issues

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

a) Did the General Division misinterpret what misconduct means?

b) Did the General Division fail to consider the reasonableness of the employer's vaccination policy?

c) Did the General Division overlook any evidence regarding the Claimant's medical leave?

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

Analysis

[10] 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]

[11] For these types of 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]

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

Did the General Division misinterpret what misconduct means?

[12] No. The General Division did not misinterpret what misconduct means.

[13] The Claimant denies that he committed any misconduct at any time. He says the General Division misinterpreted what misconduct means. However, he did not explain how the General Division might have misinterpreted what misconduct means.

[14] The General Division defined misconduct as follows:

> To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law. [Citation omitted]
>
> There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[3]

[15] The General Division's interpretation of misconduct is consistent with the case law. The Claimant has not shown otherwise.

Did the General Division fail to consider the reasonableness of the employer's vaccination policy?

[16] No. The General Division did not fail to consider the reasonableness of the employer's vaccination policy.

[17] The Claimant argues that the General Division should have considered the reasonableness of his employer's vaccination policy. He says that if it had, it would have found the policy overly broad and unreasonable.

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

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[3] General Division decision, at paras 16 and 17.

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

> [46] 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.
>
> [47] 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."…
>
> [48] **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][4]
>
> (my emphasis)

[19] 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."[5]

[20] So, the General Division did not fail to consider the reasonableness of the Claimant's employer's vaccination policy.

Did the General Division overlook any evidence regarding the Claimant's medical leave of absence?

[21] When it came to the Claimant's suspension from his employment, the General Division did not overlook any evidence. As it was, there wasn't any evidence that could have shown that the Claimant had already begun a medical leave of absence when his

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[4] See *Cecchetto v Canada (Attorney General*), 2023 FC 102.
[5] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 77.

employer suspended him. As this evidence was not before it, the General Division could not possibly have overlooked it.

[22] As for the issue of the Claimant's dismissal, the General Division overlooked some of the evidence. The General Division did not fully consider whether the Claimant had been on a medical leave of absence when his employer dismissed him. If the Claimant was on a medical leave of absence, that could have impacted the question of whether he had committed any misconduct. After all, if he was on a medical leave of absence, he may have been unaware that he could be dismissed from his employment if he did not comply with his employer's vaccination policy.

– **The Claimant's suspension: the General Division did not overlook any evidence regarding the Claimant's suspension**

[23] The Claimant argues that the General Division overlooked some of the evidence. He says that he asked his employer for a medical leave of absence in October 2021. He also says that his employer granted him a leave of absence. He says that this all happened before the deadline of October 26, 2021, for complying with his employer's vaccination policy.

[24] As he claims that he was on a medical leave of absence after October 25, 2021, he denies that he committed any misconduct. He denies any misconduct because he says that he was unaware that his employer could suspend or dismiss him while on a medical leave of absence.

[25] The Commission says that the evidence at the General Division showed that the Claimant did not request a medical leave of absence until after his employer had already suspended him for not complying with its vaccination policy. At first, the Claimant acknowledged that he did not submit his request for a medical leave on time,[6] but then later stated that he submitted his request to his employer by

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[6] At approximately 11:34 of the audio recording at the Appeal Division.

October 25, 2021[7]. However, there was no evidence to support what the Claimant says he did.

[26] The Claimant's doctor completed a medical form dated November 15, 2021.[8] He also prepared Work Absence Certificates. He was of the opinion that the Claimant was unable to work because of illness, starting from October 25, 2021, through to at least April 2022.[9] However, there wasn't any evidence at the General Division showing that the Claimant gave his employer the Work Absence Certificates, or that his employer approved his medical leave request. Indeed, the Claimant confirmed that he knew his employer would be placing him on a leave of absence after October 25, 2021.[10]

[27] The Claimant did not tell the General Division that he had sought and had received a medical leave of absence by that date. He did not do this or file any medical records until he was at the Appeal Division.

[28] However, the Appeal Division generally is unable to accept new evidence. There are exceptional circumstances whereby it can accept new evidence, but they do not exist here. So, I cannot consider this new evidence for the purposes of determining whether the General Division might have made an error when it concluded that the Claimant had been suspended due to misconduct.

[29] The General Division could only make its decision based on the evidence before it. So, it did not overlook evidence if it did not have that evidence. The evidence at the General Division showed that the Claimant had not asked for a medical leave of absence before his employer placed him on a leave of absence. So, the General Division did not make an error when it found that the Claimant had been suspended from his employment for misconduct.

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[7] At approximately 12:32 of the audio recording at the Appeal Division

[8] See medical form dated November 15, 2021, at AD 5-2.

[9] See Work Absence Certificates between October 25, 2021, and January 17, 2022, at AD 3-5 to AD 3-8.

[10] See Supplementary Record of Claim dated December 1, 2022, at GD 3-31, and approximately 17:15 to 19:55 of the audio recording of the General Division hearing.

[30] This means that the Claimant remains disentitled from receiving regular benefits between October 25 and December 10, 2021, when he was on an unpaid leave of absence.

[31] However, as the Commission notes, the Claimant already received the maximum of 15 weeks of Employment Insurance sickness benefits for this timeframe. So, he would not have received regular benefits anyway, even if he had not been suspended for misconduct. A claimant cannot get both regular and sickness benefits at the same time.

– **The Claimant's dismissal: the General Division overlooked evidence relating to the Claimant's dismissal from his employment**

[32] The General Division overlooked evidence relating to the Claimant's dismissal. The Claimant argues that the General Division overlooked the fact that he had been on a medical leave of absence when his employer dismissed him from his employment. Indeed, he reported to the Commission that he had gone on stress leave and then his employer dismissed him. The evidence shows the following conversation took place between the Commission and the Claimant:

> Q: So as of 26/10/2022 you were considered to be on unpaid leave?
>
> A: I was put on unpaid leave for a couple weeks and then I also went on stress leave at some point around there.
>
> Q: Did they allow the medical leave/stress leave?
>
> A: Yes and then they fired me while I was on it.[11]

[33] The General Division did not address this evidence. Yet, this evidence was important. It could have shown that the Claimant was unaware that he could face consequences if he did not comply with his employer's vaccination policy. If he was

[11] See Supplementary Record of Claim dated December 1, 2022, at GD 3-31.

unaware that he could face consequences for not complying, then he may not have committed any misconduct.[12]

[34] The General Division should have addressed this evidence. This represents an error.

Remedy

[35] I am sending this back to the General Division rather than making my own decision on the dismissal issue. There are gaps in the evidence, leaving me unable to make a decision on the issue.

[36] The Claimant says he was on medical leave when his employer dismissed him. He denies that he was aware that he had to comply with his employer's vaccination policy or that he faced dismissal while on a medical leave of absence.

[37] By sending the matter back to the General Division, this will let the Claimant fill in the gaps in the evidence. He says that he has documents showing when his employer approved his medical leave of absence. He should file this evidence with the Social Security Tribunal.

[38] If the Claimant can show that he was on a medical leave of absence and did not know that he could be dismissed, then likely he would not be disqualified from receiving Employment Insurance regular benefits.

Conclusion

[39] The appeal is allowed in part. The General Division did not make an error regarding the Claimant's suspension. The disentitlement shall remain in place. As for the disqualification issue, the General Division did not address all of the relevant evidence. The Claimant says he was on medical leave when his employer dismissed

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[12] This is a different issue from whether the Claimant's employer wrongfully dismissed him while he was on a medical leave of absence. That issue has no relevance or any bearing on whether there was misconduct under the *Employment Insurance Act*. Any options that the Claimant may have for a claim in wrongful dismissal lie elsewhere.

him. So, I am sending the matter back to the General Division on the disqualification issue only.

Janet Lew
Member, Appeal Division