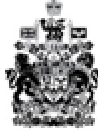

Citation: *SH v Canada Employment Insurance Commission*, 2024 SST 327

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. H.
Respondent:	Canada Employment Insurance Commission
Representative:	Jessica Earles

Decision under appeal:	General Division decision dated September 7, 2023 (GE-22-3868)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	March 8, 2024
Hearing participants:	Appellant Respondent’s representative
Decision date:	April 2, 2024
File number:	AD-23-940

Decision

[1] The appeal is allowed in part.

[2] The General Division made an error. The disqualification is replaced with an indefinite disentitlement, beginning January 10, 2022.

Overview

[3] The Appellant, S. H. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended from his employment due to misconduct. It found that he had done something that caused him to be suspended. He had not complied with his employer's COVID-19 vaccination policy. As a result of his misconduct, the General Division found that he was disqualified from receiving Employment Insurance benefits.

[4] The Claimant denies that he was suspended from his employment or that he committed any misconduct. He argues that the General Division made legal and factual errors by failing to consider (1) the constitutionality and legality of his employer's policy and (2) his collective agreement. The Claimant argues that, if he had committed any misconduct, he would have gone through the disciplinary process set out in the collective agreement. The Claimant also says that his employer placed him on an unpaid leave of absence, not a suspension.

[5] The Claimant also asks the Appeal Division to accept new evidence. He relies on a labour arbitration decision issued on December 14, 2023. The arbitrator decided in the union's favour. The arbitrator found the employer's vaccination policy unreasonable. The arbitrator decided that the grievers (Local 31 of the union) were entitled to compensation for their losses.

[6] The Commission argues that the General Division did not make any errors in finding that the Claimant committed misconduct. However, the Commission agrees that the General Division made a legal error, although for different reasons. The

Commission says that the General Division should have found that the Claimant was disentitled—rather than disqualified—from receiving Employment Insurance benefits. The Commission asks the Appeal Division to remove the disqualification and to replace it with an indefinite disqualification beginning on January 10, 2022, while maintaining the finding of misconduct.

New evidence

[7] The Claimant wants to rely on new evidence. This includes an arbitrator's decision issued in British Columbia on December 14, 2023, between his employer and the union. The decision involves a different local, but all other details (the employer, collective agreement, and vaccination policy) are the same. The Claimant says his local is pursuing the same outcome for his grievance, patterned after the British Columbia decision. He expects the same outcome from his grievance.

[8] The arbitrator found that the employer's vaccination policy graduated to unreasonable in late June 2022. He found that the grievers were entitled to be compensated for their losses, including any lost wages and benefits, between July 1, 2022, and their first day of work following May 1, 2023.

[9] The Claimant expects that once an arbitrator makes a decision in his case, he too will be compensated for any losses between July 1, 2022, to the present date. (He remains off work.) Once that occurs, he will be seeking Employment Insurance benefits between January 10, 2022, and July 1, 2022.

[10] The Claimant says his employer is currently seeking judicial review of the B.C. arbitrator's decision.

[11] The Commission argues the Appeal Division should not accept the Claimant's new evidence. The Commission says the Appeal Division generally cannot accept new evidence unless there are exceptional circumstances. The Commission says those circumstances do not exist here. The Commission argues that the Appeal Division is limited to the evidence that was before the General Division.

[12] It is well established that new evidence is not permitted at the Appeal Division (Employment Insurance section).[1] The Appeal Division is limited to considering the grounds of appeal in section 58(1) of the *Department of Employment and Social Development Act*. The appeal is not a hearing *de novo* (not a new hearing).

[13] There may be limited circumstances when the Appeal Division would allow new evidence. This could include if it assists in providing background information, or cases where both parties agree that an important document should be considered. This is not the case here. The Claimant cannot rely on the new evidence.

Issues

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

a) Did the General Division make a legal or factual error when it found that the Claimant had been suspended from his employment?

b) Did the General Division fail to consider the constitutionality, legality, or reasonableness of the Claimant's employer's COVID-19 vaccination policy?

c) Did the General Division fail to consider the Claimant's collective agreement?

d) Did the General Division base its decision on a factual error that the Claimant was aware that his employer would place him on a leave of absence for non-compliance with the employer's policy?

e) Did the General Division make a legal error when it decided that the Claimant was disqualified from receiving Employment Insurance benefits?

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

[1] See, for instance, *Marcia v Canada (Attorney General)*, 2016 FC 1367; *Parchment v Canada (Attorney General)*, 2017 FC 354; *Bartlett v Canada (Attorney General),* 2018 FCA 165; and *Sibbald v Canada (Attorney Canada)*, 2022 FCA 157 at para 39.

[15] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[2]

The General Division did not make a legal or factual error when it found that the Claimant had been suspended from his employment

[16] The General Division did not make a legal error when it decided that the Claimant had been suspended from his employment, rather than placed on a leave of absence. The *Employment Insurance Act* has a different definition for a leave of absence from the Claimant's employer's definition.

[17] The Claimant says the General Division made a legal error when it decided that he had been suspended from his employment. The Claimant does not accept that he was either suspended from his employment or that he committed any misconduct. He notes that he had a sparkling employment record for the 28 years that he worked for the company. He had been hailed as a "frontline hero" when the pandemic began. He was ready, willing, and able to work. He could have continued working without the need to comply with his employer's vaccination policy. He says the evidence shows that, at most, his employer placed him on an unpaid leave of absence.

[18] The Claimant says that if there was a suspension, he would have gone through the disciplinary process set out in his collective agreement. He says that, under his collective agreement, he would have contained working until at least the grievance was heard.

[19] The employer's policy stated that employees who did not comply with the policy would be placed on an unpaid leave of absence.[3] The Claimant says that his employer incorrectly coded the Record of Employment as a Code M - "dismissal or suspension." He says his employer should have used Code N for a leave of absence.

---

[2] See section 58(1) of the *Department of Employment and Social Development Act*.
[3] See policy, at GD 3-26 and GD 3-30. See also employer's message dated December 7, 2021, at GD 3-33, and employer's letter to Claimant, at GD 3-40.

[20] The Claimant's arguments are similar to those made in a case called *Davidson*.[4] There, Mr. Davidson argued that the General Division erred in deciding that his unpaid leave of absence was a suspension. The Appeal Division found that Mr. Davidson was suspended because he refused to follow his employer's policy, despite being informed of it and being given time to comply. It also found that he was aware that he could lose his job if he did not comply with the policy. The Appeal Division also found that the General Division did not err in finding that Mr. Davidson had committed misconduct.

[21] As the Federal Court set out, the Appeal Division had not erred in deciding that Mr. Davidson had been suspended. He had deliberately violated the employer's policy and that was considered misconduct within the meaning of the *Employment Insurance Act*. So, it found that the General Division had not erred in deciding the issue of misconduct, according to prevailing case law at the Federal Court and Court of Appeal.

[22] The employer's classification was not determinative because the *Employment Insurance Act* defines concepts such as a leave of absence and misconduct differently. So, the General Division had to turn to the *Employment Insurance Act* to decide whether the employer had suspended the Claimant or whether he was on a leave of absence.

[23] Under the *Employment Insurance Act*, a leave of absence contemplates an element of voluntariness on the part of a claimant. In other words, it is the claimant and not the employer who initiates the leave of absence. (See sections 29 and 32 of the *Employment Insurance Act*.)

[24] The Claimant says he did not initiate nor consent to being placed on an unpaid leave of absence by his employer. Hence, for the purposes of the *Employment Insurance Act*, the Claimant was not on a leave of absence, even if his employer described the separation as one.

[4] See *Davidson v Canada (Attorney General)*, 2023 FC 1555.

[25] So, much like the *Davidson* case, the evidence supported the General Division's findings that the Claimant had been suspended from his employment.

The General Division did not fail to consider the constitutionality, legality, or reasonableness of the Claimant's employer's vaccination policy

[26] The General Division did not fail to consider the constitutionality, legality, or reasonableness of the Claimant's employer's vaccination policy. The General Division simply did not have the power to consider these issues.

[27] The Claimant argues that the General Division should have considered the constitutionality, legality, and reasonableness of his employer's vaccination policy. He says that if it had done so, it would have accepted that the policy breached his human rights and violated several laws, including the *Ontario Health and Safety Act*. The Claimant also questions the reasonableness of the policy. He says that the vaccines are ineffective and his employer could have accommodated him. So, he says that he should not have had to comply with his employer's vaccination policy.

[28] However, arguments about the constitutionality, legality, and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has consistently held that the General Division and the Appeal Division do not have the authority to address these types of arguments. In a case called *Cecchetto*, the Court held:

> 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 [the vaccination policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SSTGD.** [Citation omitted][5]
>
> (My emphasis)

[29] In *Milovac*,[6] the Federal Court confirmed that *Charter* concerns as they relate to vaccination policies are not matters that are properly before the General Division or the Appeal Division.

[30] In *Davidson*, the Federal Court determined that the General Division and the Appeal Division, "are not the appropriate fora to determine whether the [employer's vaccination] policy or [the employee's] termination were reasonable."[7]

[31] It is clear from the authorities that the General Division and Appeal Division do not have the power to address these issues. Their role, as the courts have confirmed, is to determine whether an employee's suspension was due to their own misconduct, and not whether an employer's policies are reasonable, justifiable, meritorious, or legal. Other avenues exist to challenge employment-related policies.

The General Division did not fail to consider the Claimant's collective agreement

[32] The General Division did not fail to consider the Claimant's collective agreement. The collective agreement was irrelevant to the misconduct issue.

[33] The Claimant argues that the General Division should have considered his collective agreement. He says that it would have found that the collective agreement set out a disciplinary process for those who committed misconduct. As he did not go

[5] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[6] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[7] See *Davidson*, at para 77. Followed by *Butu v Canada (Attorney General)*, 2024 FC 321 and *Spears v Canada (Attorney Genera)*, 2024 FC 329.

through this disciplinary process, he argues that this shows that he did not commit any misconduct.

[34] There have been other cases in which claimants have argued that the General Division should have considered their collective agreements, although for different reasons. In those cases, claimants argued that, as their employer's vaccination policies were outside their collective agreements (or employment contracts), they did not have to get vaccinated or comply with their employer's vaccination policies.

[35] The courts have established that such vaccination policies are valid, even if they are not part of the original written contract or collective agreement. As the Federal Court recently stated in a case called *Spears*:

> [M]isconduct is possible even if the violated policy is adopted after hiring (*Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 22-26; *Kuk v Canada (Attorney General)*, 2023 FC 1134 [*Kuk*] at paras 34, 36-38). In addition, the Social Security Tribunal is not the proper form to challenge the validity of the employer's policy (*Cecchetto* at paras 47-48; *Kuk* at para 44).[8]

[36] So, in this case, it did not matter then that the Claimant's employer did not go through the disciplinary process set out in the collective agreement. Under its vaccination policy, the employer could place employees on an unpaid leave of absence if they were not compliant with the policy, without any regard for the collective agreement.

The General Division did not make a factual error about whether the Claimant was aware that his employer would place him on a leave of absence for non-compliance with his employer's policy

[37] The General Division did not base its decision on an erroneous finding of fact that the Claimant was aware that his employer would place him on a leave of absence for not complying with his employer's vaccination policy.

---

[8] *Spears v Canada (Attorney General),* 2024 FC 329 at para 22 and 26

[38] The Claimant denies that he could have been aware that he would face any consequences for not complying with his employer's vaccination policy. He was aware of the vaccination policy and its requirements. But he disagreed with the policy. He firmly believes that it violated his human rights. And he believed that his collective agreement and the *Canadian Charter of Rights and Freedoms* would protect him.

[39] In other words, although the Claimant was aware that the policy said the employer would place a non-compliant employee on an unpaid leave of absence, he did not foresee or expect that his employer would suspend him.

[40] The Federal Court said that this amounts to wilful blindness.[9] In other words, the Claimant should have known that he could or would face consequences, even if he disagreed with his employer's policy.

The General Division made a legal error when it concluded that the Claimant was disqualified from receiving Employment Insurance benefits

[41] The General Division made a legal error when it decided that the Claimant was disqualified from receiving Employment Insurance benefits.

[42] Having found that the Claimant was suspended from his employment due to misconduct, he should have been disentitled from receiving Employment Insurance benefits under section 31 of the *Employment Insurance Act*. The section states that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits. The section does not state that a claimant is disqualified.

[43] Section 30 deals with disqualifications. A claimant is disqualified from receiving Employment Insurance benefits if they lost any employment because of their misconduct or if they voluntarily left any employment without just cause. This does not describe the Claimant's circumstances.

---

[9] See *Milovac*, at para 26.

[44] The Claimant's circumstances fell into section 31 so the General Division should have found that the Claimant was disentitled form receiving Employment Insurance benefits.

Fixing the error

[45] The General Division made an error when it found that the Claimant was disqualified from receiving Employment Insurance benefits.

[46] The Commission asks the Appeal Division to correct this error by substituting the General Division decision with its own. In particular, it asks the Appeal Division to remove the disqualification and to replace it with an indefinite disentitlement beginning January 10, 2022. This corresponds with the date when the Claimant was suspended from his employment. The Commission also asks the Appeal Division to maintain the finding of misconduct.

[47] I agree that it is appropriate to give the decision that the General Division should have made, rather than returning this matter to the General Division for a redetermination.

[48] Given the evidence before it, the General Division could reasonably conclude that the Claimant had been suspended from his employment for misconduct. He had knowingly not complied with his employer's vaccination policy, despite being aware that his employer could suspend him. It was irrelevant that his employer did not discipline him through the process provided by the collective agreement. Although the Claimant argues that his employer's policy was unconstitutional, unlawful, and unreasonable, it was beyond the General Division's jurisdiction to address these issues.

[49] Having been suspended for misconduct, the Claimant was disentitled from receiving Employment Insurance benefits beginning January 10, 2022, for an indefinite period.

[50] The Claimant expects he will succeed with his grievance and that his employer will be ordered to reinstate him retroactively, with full compensation for losses, including

payment of wages and benefits. The Claimant can alert the Commission to any changes to his employment situation as they arise, as that could end the disentitlement. The Commission can then make a determination as to the appropriateness of maintaining or ending the disentitlement.

Conclusion

[51] The appeal is allowed in part.

[52] The General Division made an error. The disqualification is replaced with an indefinite disentitlement, beginning January 10, 2022.

Janet Lew
Member, Appeal Division