Citation: *AM v Canada Employment Insurance Commission*, 2024 SST 804

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. M.
Representative:	James S.M. Kitchen and Jody Wells (counsel)
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Duggan

Decision under appeal:	General Division decision dated August 15, 2023 (GE-23-1374)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	April 17, 2024
Hearing participants:	Appellant Appellant's representatives Respondent's representative
Decision date:	July 12, 2024
File number:	AD-23-825

Decision

[1] The appeal is allowed in part.

[2] The General Division made a legal error when it determined that the Appellant, A. M. (Claimant), was disqualified from receiving Employment Insurance benefits because she had been suspended from her employment due to misconduct. A suspension due to misconduct results in a disentitlement.

[3] The Claimant was disentitled from receiving Employment Insurance benefits from December 13, 2021, when her employer placed her on an unpaid leave, to January 7, 2022.

Overview

[4] The Claimant is appealing the General Division decision of August 15, 2023.

[5] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended from her job on December 13, 2021, because of misconduct. It found that she had done something or had failed to do something that caused her to be suspended. The General Division found that she had not complied with her employer's vaccination policy.

[6] The General Division also found that, because of the Claimant's misconduct, she was disqualified from receiving Employment Insurance benefits.

[7] The Claimant denies that she was suspended from her employment or that she committed any misconduct. She argues that her employer placed her on a leave of absence from her employment. She says the General Division should have accepted her employer's characterization of the separation from her employment. She also argues that for misconduct to arise, there must be reprehensible conduct. The Claimant argues that the General Division failed to follow established jurisprudence.

[8] The Commission concedes that the General Division made a legal error, although it disagrees with the Claimant over the nature of that error. The Commission argues that the General Division made a legal error when it determined that the Claimant was disqualified—rather than disentitled—from receiving Employment Insurance benefits.

[9] Both parties ask the Appeal Division to give the decision they say the General Division should have made. However, they do not agree on what that decision should look like.

[10] The Claimant asks the Appeal Division to make a finding that (1) her employer placed on a leave of absence and (2) she was not suspended and did not commit any misconduct. The Claimant asks the Appeal Division to find that she was neither disqualified nor disentitled from receiving Employment Insurance benefits. She is also seeking costs.

[11] The Commission argues that other than deciding that the Claimant was disqualified from receiving Employment Insurance benefits, the General Division otherwise did not make any errors. The Commission asks the Appeal Division to substitute the disqualification with a disentitlement. The Commission asks the Appeal Division to deny the Claimant's request for costs.

Issues

[12] The issues in this appeal are:

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

b) Did The General Division make a legal error when it found that the Claimant had been suspended from her employment, rather than placed on a leave of absence?

c) Did the General Division misinterpret what misconduct means?

d) Does the Appeal Division have the jurisdiction to award costs? If so, should costs be awarded?

Analysis

[13] 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]

[14] 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]

The General Division made a legal error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for being suspended from work

[15] The General Division made a legal error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for being suspended from her employment due to misconduct.

[16] A suspension for misconduct results in a disentitlement, rather than a disqualification from receiving Employment Insurance benefits.[3] The result may appear the same, as a claimant would not receive any benefits in either case. But there is a distinction between the two. A disqualification can lead to harsher consequences.

[17] So, the General Division made a mistake in concluding that the Claimant was disqualified from receiving Employment Insurance benefits after having found that she had been suspended from her employment due to misconduct.

[18] Having determined that the Claimant had been suspended from her employment due to misconduct, the General Division should have found that the Claimant was disentitled from receiving benefits.

---

[1] See section 58 (1) of the *Department of Employment and Social Development* (DESD) Act.
[2] See section 58(1)(c) of the DESD Act.
[3] See section 30 of the *Employment Insurance Act*.

[19] The Claimant disputes that she committed any misconduct, irrespective of whether it results in a disentitlement or disqualification. Hence, it is necessary to address the balance of the Claimant's arguments about whether the General Division made any errors when it decided that she was suspended from her employment because of misconduct.

The General Division did not make a legal error when it found that the Claimant's leave of absence amounted to a suspension

[20] The General Division did not make a legal error when it found that the Claimant's leave of absence should be treated as a suspension from her employment, for the purposes of the *Employment Insurance Act*.

[21] The Claimant argues that her employer never suggested that it was suspending her from her employment. Her employer wrote to her in early December 2021, and stated that unless she became fully immunized, it would place her on a general unpaid leave of absence.[4] The employer also stressed that the leave was not disciplinary.[5] The record of employment stated "leave of absence" to explain the Claimant's separation from work. Her employer could have chosen to characterize her separation as a dismissal or suspension,[6] but it did not.

[22] The Claimant argues that the General Division also made a perverse and capricious factual finding by substituting the term "suspend" in the place of "leave of absence" that the employer had used throughout. The Claimant argues that the General Division also overstepped its authority when it did so.

[23] The Commission argues that it did not matter whether the Claimant's employer described the separation as a "leave of absence" rather than a suspension in any of the documentation, including the record of employment. The Commission argues that one

[4] See employer's letter dated December 6, 2021, at GD 2-25 (and GD 3-71).
[5] See employer's letter dated December 6, 2021, at GD 2-26 (and GD 3-72).
[6] See Record of Employment dated December 31, 2021, at GD 3-14.

has to consider all of the circumstances that existed when the Claimant stopped working.

[24] In other words, while the Claimant and her employer might have agreed that she was placed on a leave of absence, it may not necessarily be considered a leave of absence for the purposes of the *Employment Insurance Act*.

[25] The Commission argues, for instance, that if the Claimant had truly been placed on a leave of absence for the purposes of the *Employment Insurance Act*, then she would have had to meet the requirements of section 32 for the separation to qualify as a leave of absence.

[26] Section 32 of the *Employment Insurance Act* reads:

> 32.(1) Disentitlement – period of leave without just cause – A claimant who voluntarily takes a period of leave from their employment without just cause is not entitled to receive benefits if, before or after the beginning of the period of leave,
> (a) the period of leave was authorized by the employer, and
>
> (b) the claimant and employer agreed as to the day on which the claimant would resume employment.

[27] The Commission argues that, if the Claimant had taken a leave of absence, then she would have had to voluntarily taken that leave, her employer would have had to authorize that leave, and they would have had to agree on the date when she would be resuming her employment. As neither of those elements were present, then the Commission argues, the Claimant could not have been on a leave of absence for the purposes of the *Employment Insurance Act*.

[28] The Commission argues that, for Employment Insurance purposes, therefore, the leave without pay in this case is equivalent to a suspension. The Commission argues that this is because the Claimant's conduct led the employer to place the Claimant on an unpaid leave.

[29] This same argument arose in *Davidson*.[7] The case involved a claimant who had been placed on an unpaid leave of absence from his employment for refusing to disclose his vaccination status. Mr. Davidson argued that his unpaid leave of absence should not have been treated as a suspension. He relied on the Record of Employment, which was coded "N" for a leave of absence.

[30] The Appeal Division there found that the evidence showed that Mr. Davidson had been *de facto* suspended for the purposes of the *Employment Insurance Act* because he had refused to follow his employer's policy, despite being informed of the policy and being given time to comply with it.

[31] The Federal Court found that the decision of the Appeal Division was reasonable in that case. The Court found that the General Division was not required to determine whether Mr. Davidson had met the statutory requirements for Employment Insurance benefits because his Record of Employment had been coded as a leave of absence.

[32] The Court held that, "the [General Division] was required to determine whether Mr. Davidson was suspended due to his own misconduct, and therefore ineligible for [Employment Insurance] benefits under the [*Employment Insurance*] *Act*."[8]

[33] This was the same approach that the Federal Court took in *Boskovic*.[9] Mr. Boskovic denied that his employer had suspended him. The employer put code "N" on his Record of Employment, meaning leave of absence. He claimed that his employer's policy was not disciplinary and did not call for a suspension.

[34] The Federal Court rejected Mr. Boskovic's arguments that the Record of Employment and his employer's characterizations were determinative. The Court held that the record of employment was not the proper basis for determining eligibility for

---

[7] See *Davidson v Canada (Attorney General)*, 2023 FC 1555. The Claimant argues this case is distinguishable and therefore inapplicable. She says it is indistinguishable because it involves a claimant who was dismissed from his employment. However, the General Division found that the evidence showed that Mr. Davidson's employer placed him on an unpaid leave of absence. The General Division determined that Mr. Davidson had been suspended from his employment. This case is indeed factually similar to the Claimant's case.
[8] See *Davidson*, at para 75.
[9] See *Boskovic v Canada (Attorney General)*, 2024 FC 841.

Employment Insurance benefits. Rather, it said that the General Division was required to assess whether Mr. Boskovic's suspension was due to misconduct.

[35] The circumstances of the Claimant's case mirror those in *Davidson* and *Boskovic*. The Claimant had been informed of her employer's policy and had been given time to comply with it. She did not comply. Her employer then placed her on an unpaid leave of absence for not complying. So, similar to those two authorities, the leave of absence is considered a suspension for the purposes of the *Employment Insurance Act*. The General Division did not err in treating the leave of absence as a suspension.

The General Division did not misinterpret what misconduct means

[36] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means for the purposes of the *Employment Insurance Act*.

– Misconduct does not require wrongdoing or reprehensible conduct

[37] The Claimant says that the General Division misinterpreted what misconduct means by failing to require that there be any wrongdoing. She argues that misconduct involves reprehensible, morally repugnant, or undesirable conduct or behaviour.

[38] The Claimant cites several Federal Court decisions where a claimant's conduct was found to be reprehensible, and thus, amounted to misconduct. This includes cases involving habitual absenteeism, alcohol-fuelled absenteeism, work-related shortcomings, smoking illicit substances at work, selling contraband at work contrary to pre-existing company policy, getting angry and leaving a shift without permission, manually altering timecards contrary to pre-existing company policy, failing to report fraud, acting in a conflict of interest, amongst other cases.[10]

[39] The Claimant denies that she acted in such a manner or did anything wrong or inappropriate. She did not comply with her employer's vaccination policy but says this does not rise to the level of reprehensibility. She says refusing vaccination does not

[10] See Claimant's Application for Leave to Appeal / Notice of Appeal, at ADN 1-12.

constitute serious wrongdoing or doing anything inappropriate. She was simply exercising her right to bodily autonomy. For that reason, she denies that she committed any misconduct.

[40] And besides, the Claimant also notes that her employer never suggested that she had committed any misconduct. Correspondence from her employer indicated that it would place her on a general unpaid leave of absence,[11] and that the leave was not disciplinary.[12] The record of employment stated "leave of absence" to explain the Claimant's separation from work. The Claimant did not have to undergo any remedial action and her employer recalled her to work the following month. The Claimant returned to work on January 7, 2022.

[41] The Claimant argues that, had she engaged in any wrongdoing or reprehensible conduct, she would have faced some measure of discipline, and her employer certainly would not have recalled her to work a month later. She argues that her employer temporarily laid her off to undergo an administrative restructuring.

[42] The Claimant argues that the General Division failed to follow *Attorney General v MacDonald, J., Laurie*.[13] The Claimant argues that the Federal Court of Appeal, "specifically states that 'misconduct must be a reprehensible act or omission."[14]

[43] However, this decision is not of any particular assistance to the issues before me. The judgment of the Court was delivered orally and consists of one paragraph which reads as follows:

> We are all of the view that the learned Umpire was correct in finding that the Board of Referees erred in law in not considering whether the misconduct it found was the real cause of the claimant's dismissal from employment. The Umpire's discussion of the facts may be taken as a suggestion of some relevant

[11] See employer's letter dated December 6, 2021, at GD 2-25 (and GD 3-71).
[12] See employer's letter dated December 6, 2021, at GD 2-26 (and GD 3-72).
[13] See Claimant's arguments at ADN 1-22 at para 39, citing *Attorney General v MacDonald, J., Laurie*, A- 152-96, at RGD 6-57.
[14] See Claimant's submissions at AND 5-23 at para 103.

> matters on which a new Board may have to make findings upon the reference to it of this case.[15]

[44] The decision is limited to saying that the misconduct has to be the real cause of a claimant's dismissal from their employment. It does not say anything about the nature of that conduct.

[45] Here, there is no dispute that the Claimant's conduct led to her suspension. The issue remains whether there must be an element of wrongdoing or reprehensibility before it can be considered misconduct.

[46] The courts have defined what misconduct means for the purposes of the *Employment Insurance Act*. The courts have not required that there be an element of wrongdoing. In a case called *Tucker*,[16] the Federal Court of Appeal examined misconduct under the *Unemployment Insurance Act,* 1971.

[47] The Federal Court of Appeal wrote, "Finally, and perhaps most important, there is the rationale of the whole provision, which is to impose a disqualification as a kind of 'punishment' for undesirable conduct which falls short of the true unemployment the Act intends to benefit."[17] However, contrary to what the Claimant suggests, the Federal Court of Appeal did not require that the conduct had to be reprehensible. At most, the majority of the Court determined that there had to be a mental element of wilfulness or conduct so reckless as to approach wilfulness.

[48] In *Spears*,[18] the applicant raised the same argument that misconduct involves only reprehensible conduct. She denied that there was any misconduct when she did not attest to her vaccination status. She argued that this did not involve reprehensible conduct. The Federal Court was unpersuaded by Ms. Spears's argument. The Federal Court found that the Appeal Division reasonably stated that misconduct within the

---

[15] See *Macdonald*, at RGD 6-57.
[16] *Canada (Attorney General) v Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 FCA 329.
[17] See *Tucker*, at page 341.
[18] See *Spears v Canada (Attorney General)*, 2024 FC 329.

meaning of the *Employment Insurance Act* is to "consciously, deliberately or intentionally" violate the employer's policy.[19]

[49] And more recently, in *Hazaparu*, the Federal Court noted that misconduct under the *Employment Insurance Act* has, "a wider meaning than in common parlance or in dictionaries. It includes any conscious contravention of a policy set by the employer. **It does not require a particular level of moral blameworthiness**."[20] (My emphasis)

[50] The General Division defined misconduct as follows:

> Case law says that, to be misconduct, 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law. [Citation omitted]
>
> There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go or suspended because of that. [Citation omitted][21]

[51] The General Division adopted the definition of misconduct from several Federal Court of Appeal decisions. The General Division's interpretation of misconduct under the *Employment Insurance Act* is consistent with the decisions of the Federal Court and Federal Court of Appeal.

[52] The General Division did not misinterpret what misconduct means. It accepted that an employee's conduct has to be wilful. There does not have to be any wrongdoing, nor does an employee have to face any discipline for their conduct.

---

[19] See *Spears v Canada (Attorney General)*, 2024 FC 329 at para 24.
[20] See *Hazaparu v Canada (Attorney General)*, 2024 FC 928 at para 18.
[21] See General Division decision, at paras 23 and 24.

– **Misconduct can arise even if an employer introduces a new policy that is not part of an employee's original employment contract or collective agreement**

[53] The Claimant denies that she committed any misconduct. She denies that she could have breached any duties under her employer's vaccination policy as she says the policy was not validly imposed.

[54] From this, I understand that the Claimant is essentially arguing that she did not have to comply with her employer's vaccination policy as it did not form part of her collective agreement and as she did not consent to any changes to the terms and conditions of her employment.

[55] However, it has become well established that an employer's policies and requirements do not have to form part of the employment contract or collective agreement for there to be misconduct.

[56] The Federal Court and Federal Court of Appeal have issued several cases involving employees who did not comply with their respective employer's vaccination policies. In each case, none of the original employment contracts or collective agreements required vaccination against COVID-19. Yet, the courts were prepared to accept that there had been misconduct when the employees did not comply with their employer's vaccination policies.

[57] For instance, in *Matti*,[22] 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."

[58] In the case of *Kuk*,[23] Mr. Kuk 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, even so, there was misconduct because Mr. Kuk knowingly did not comply with his

[22] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[23] See *Kuk v Canada (Attorney General)*, 2023 FC 1134; affirmed in *Kuk v Canada (Attorney General)*, 2024 FCA 74.

employer's vaccination policy and knew what the consequences would be if he did not comply.

[59] In *Cecchetto*,[24] *Milovac*,[25] and in *Boskovic*,[26] vaccination was not part of the collective agreement or contract of employment. The Federal Court determined that the case law shows that a policy does not have to form part of the original employment contract to ground misconduct.[27] Misconduct arose when the appellants did not comply with their employer's vaccination policies.

[60] There are also many cases not involving vaccination policies that show that an employer's policies do not have to form part of an employee's employment contract or a collective agreement for there to be misconduct.[28]

[61] The General Division did not make a legal error when it determined that misconduct could arise if there is breach of a policy that was not part of the collective agreement or original contract.

Costs

[62] The Claimant is seeking $5,000 in costs. She had been successful in her appeal of the General Division decision dated November 9, 2022 (file number GE-22-2684), arising out of the same subject matter. The General Division in that case had summarily dismissed her appeal. The Appeal Division set aside the summary dismissal on May 4, 2023 (file number 80-23-225) and returned the matter to the General Division for a redetermination.

---

[24] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102; affirmed in *Cecchetto v Canada (Attorney General)*, 2024 FCA 102.
[25] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[26] See *Boskovic*.
[27] See *Boskovic*, at para 32.
[28] 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)*,

[63] The Appeal Division however lacks any jurisdiction to order costs against a party or to award damages.[29]

Conclusion

[64] The appeal is allowed in part.

[65] The General Division made a legal error when it determined that Claimant was disqualified from receiving Employment Insurance benefits because she had been suspended from her employment due to misconduct. A suspension due to misconduct results in a disentitlement.

[66] The evidence shows that, for the purposes of the *Employment Insurance Act*, the Claimant was suspended from her employment due to misconduct. She is therefore disentitled from receiving Employment Insurance benefits from December 13, 2021, when her employer placed her on an unpaid leave, to January 7, 2022, when she returned to work.

Janet Lew
Member, Appeal Division

[29] See *Mudie v Canada (Attorney General)*, 2021 FCA 239 at para 16.