Citation: *BW v Canada Employment Insurance Commission*, 2022 SST 1444

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	B. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 26, 2022 (GE-22-2039)

Tribunal member:	Charlotte McQuade
Decision date:	December 9, 2022
File number:	AD-22-883

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] B. W. the Claimant. She was a manager of a health spa located in a medical facility. The Claimant did not disclose her vaccination status to her employer, as required by her employer's policy. As a result, the Claimant's employer terminated her on November 11, 2021.

[3] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided the Claimant had lost her employment for reason of her own misconduct so disqualified her from benefits from November 14, 2021.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. The General Division decided the Claimant lost her job due to misconduct. The Claimant is now asking to appeal the General Division's decision to the Appeal Division. However, she needs permission for her appeal to move forward.

[5] The Claimant submits the General Division misinterpreted her actions to be misconduct. She says the requirement to disclose personal medical information to her employer or to undergo a medical procedure were not part of her initial employment contract.

[6] She also submits that medical information is private and while she understands why the employer took measures during the pandemic, she disagrees that refusing to disclose medical information or to undergo a medical procedure should be considered misconduct under the *Employment Insurance Act* (EI Act). She maintains it is unethical to deny her EI benefits when she has paid into EI, and she lost her job through no fault of her own.

[7] I am satisfied that the Claimant's appeal has no reasonable chance of success, so I am refusing permission to appeal.

Issue

[8] Is it arguable that the General Division made a reviewable error when it concluded the Claimant lost her job due to misconduct?

Analysis

[9] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[10] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1] The law says that I can only consider certain types of errors. These are:[2]

- The General Division hearing process was not fair in some way.
- The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided, or it decided something it did not have the power to decide).
- The General Division based its decision on an important error of fact.
- The General Division made an error of law

[11] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

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[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I must apply.
[2] Section 58(1) of the DESD Act describes these errors.
[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.

It is not arguable that the General Division made an error of law

[12] The General Division had to decide whether the Claimant lost her job due to misconduct.

[13] The EI Act provides for disqualification from benefits where a claimant has lost their job because of their misconduct.[4]

[14] Misconduct is not defined in the EI Act. However, the Federal Court of Appeal has come to a settled definition about what this term means.

[15] Misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[5]

[16] Misconduct also includes conduct that is so reckless that it is almost wilful.[6]

[17] The Federal Court of Appeal has explained that another way to put this is that there is misconduct if a claimant knew or should have known their conduct could get in the way of carrying out her duties toward their employer and there was a real possibility of being let go because of that.[7]

[18] The Claimant's employer implemented a Covid-19 vaccination policy requiring all employees to provide proof of full vaccination by October 15, 2021. The policy also noted that staff would not be permitted to attend the workplace after November 15, 2021, until 14 days after they were fully vaccinated and provided proof of that.[8]

[19] The Claimant did not disclose her vaccination status to her employer, as required by the policy. There was no dispute before the General Division that this was the reason for termination.[9]

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[4] See section 30(1) of the *Employment Insurance Act* (EI Act).
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA.
[8] GD3-27.
[9] See paragraphs 9 to 12 and 28 of the General Division decision.

[20] The General Division decided the employer had to manage the day-to-day operations of the workplace, which included developing and applying policies related to health and safety in the workplace. The General Division found as a fact that once the employer imposed a vaccination policy, this became a fundamental condition of employment.[10]

[21] The General Division decided, based on the Claimant's testimony, that she was notified of the policy on October 6, 2021, and she was aware that non-compliance could result in the end of the employment relationship.[11]

[22] The General Division found as a fact that the Claimant did not ask for any exemptions to the vaccination policy.[12]

[23] The General Division decided that the Claimant knew or should have known the consequence of not following the employer's vaccination policy.[13]

[24] The General Division decided the Claimant had made a conscious and deliberate breach of the duty owed to the employer.[14]

[25] The General Division decided the Commission had proven the claimant's conduct was misconduct. By refusing to disclose her vaccination status and after failing to persuade her employer to accommodate her with alternatives such as testing, the Claimant made a personal decision that led to the foreseeable consequences for her employment.[15]

[26] The Claimant disagrees with the General Division's labelling her conduct as misconduct. She submits that this suggests that her actions were nefarious and were made with the blatant disregard of the organization's outlined policies. The Claimant

[10] See paragraph 28 of the General Division decision.
[11] See paragraph 23 of the General Division decision.
[12] See paragraph 25 of the General Division decision.
[13] See paragraph 26 of the General Division decision.
[14] See paragraph 31 of the General Division decision.
[15] See paragraph 30 of the General Division decision.

points out that she didn't steal or behave in a way that could be considered illegal or criminal in a professional environment.

[27] The Claimant also argues she didn't violate her signed contract with her employer. She only stood by the fact that medical information is private information, and that a decision to have a medical procedure, such as a vaccine, should be made freely without coercion. She submits that, at the time, everything was so new, so she wanted to take her in time making such an important long-lasting medical decision.

[28] The Claimant submits further that the General Division made an unethical decision by denying her EI benefits. She says EI is money taken off her own paycheque to ensure financial security when she loses a job through no fault of her own.

[29] The evidence before the General Division was that the Claimant made a personal decision not to comply with her employer's policy. She did so, knowing she was putting her employment at risk.

[30] Deliberately engaging in conduct in which a claimant knows or ought to know puts their employment at risk is considered to be misconduct, as the Federal Court of Appeal has defined misconduct.[16] It is not arguable, therefore, that the General Division misinterpreted what misconduct means under the law.

[31] I recognize that the Claimant sees a personal decision to refuse providing her medical information as different from other types of wrongful behaviour, which might be considered to be misconduct. However, as the General Division correctly pointed out, it is not necessary that a claimant have wrongful intent for their conduct to be considered misconduct under the EI Act.[17]

[32] Duties owed to an employer are broader than just the job tasks themselves. For example, a duty owed to an employer can include following safety policies.[18]

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[16] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[17] See *Attorney General of Canada v Secours*, A-352-94.
[18] See, for example, CUB 80774 and CUB 71744.

[33] The Federal Court of Appeal has said that breaching an express or implied duty owed to an employer can result in a finding of misconduct.[19]

[34] The General Division decided that once the employer imposed a vaccination policy, that became a fundamental condition of the Claimant's employment. That finding of fact is consistent with the evidence. The policy expressly required employees to provide proof of vaccination, or they would not be permitted to attend work.[20]

[35] The Federal Court of Appeal has also said that a deliberate violation of an employer's policy can be considered to be misconduct.[21] That is what happened here. The Claimant deliberately breached her employer's policy, knowing she was putting her employment at risk by doing so.

[36] The General Division addressed the Claimant's argument that disclose her vaccination status or being required to undergo a medical procedure were not terms of her initial employment contract. The General Division decided that the employer has to manage the day-to-day operations of the workplace. The General Division said this included developing and applying policies related to health and safety in the workplace.[22]

[37] The employer's policy noted it was implemented in line with government guidance and protocols, public health guidelines and the employer's legal obligation to maintain a health and safe workplace under occupational health and safety laws.The policy also noted the policy was implemented having regard to the employer's duty to accommodate under human rights legislation and applicable privacy considerations.[23]

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[19] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA.
[20] GD3-28.
[21] See *Attorney General of Canada v Secours*, A-352-94; See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87; See also *Canada (Attorney General) v Gagnon*, 2002 FCA 460. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).
[22] See paragraph 28 of the General Division decision.
[23] GD3-27.

[38] There was no evidence before the General Division that the employer's policy was unlawful nor did the Claimant argue that was the case.

[39] The Claimant did not in fact dispute that the employer had the right to introduce new policies before the General Division. She testified that she understood that the unprecedented situation of COVID-19 meant employers needed to make this type of decision. Rather her dispute was with the labelling of that conduct as misconduct under the EI Act.[24]

[40] However, as above, a deliberate breach of a policy, knowing that breach is putting a person's employment at risk, is considered to be misconduct under the EI Act.

[41] The General Division also addressed the Claimant's argument that she had paid into the EI system. The General Division noted that the fundamental principle of employment insurance is that an employee must not voluntarily place herself in a position of unemployment. The General Division decided that was what the Claimant did when she consciously and deliberately breached a duty owed to the employer.[25]

[42] I see no error of law in this conclusion. The collection of premiums does not guarantee payment of benefits. To receive benefits, claimants must meet the eligibility requirements. One of those requirements is that there cannot be any circumstances or conditions that have the effect of disqualifying a person from receiving benefits.[26]

[43] It is not arguable, therefore, that the General Division made an error of law. The General Division applied settled law to the facts.

It is not arguable that the General Division based its decision on an important error of fact or made an error of jurisdiction or breached procedural fairness

[44] The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence of any procedural unfairness.

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[24] See paragraph 22 of the General Division decision.
[25] See paragraph 31 of the General Division decision.
[26] See section 49(1)(b) of the EI Act.

[45] The Claimant has not identified any factual errors made by the General Division either. Aside from the Claimant's arguments, I have reviewed the documentary file, and listened to the audio recording from the General Division hearing. I did not find any key evidence that the General Division might have ignored or misinterpreted.[27]

[46] It is not arguable that the General Division an error of jurisdiction. The General Division did not decide anything it did not have authority to decide, and it decided the issue it had to decide, which was whether the Claimant lost her job due to misconduct.

[47] The Claimant is essentially repeating the same arguments she made before the General Division. However, the Appeal Division is not a forum to reargue the case and hope for a different outcome.

[48] The Claimant has not raised an arguable case that the General Division made any reviewable errors.

[49] Having regard to the record, the decision of the General Division and considering the arguments made by the Claimant in her Application to the Appeal Division, I find that the appeal has no reasonable chance of success. So, I am refusing leave to appeal.

Conclusion

[50] Permission to appeal is refused. This means that the appeal will not proceed.

Charlotte McQuade
Member, Appeal Division

[27] See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.