Citation: *BK v Canada Employment Insurance Commission*, 2023 SST 1304

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated June 30, 2023 (GE-23-529)

Tribunal member:	Janet Lew
Decision date:	September 28, 2023
File number:	AD-23-757

Decision

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

Overview

[2] The Applicant, B. K. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant was suspended from her job because of misconduct. In other words, it found that she had done something that caused her to be suspended. The General Division found that the Claimant did not comply with her employer's vaccination policy.

[4] As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made procedural, legal, and factual errors. She denies that she committed any misconduct.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[7] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issues

[8] The issues 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 procedural or factual error by overlooking some of the evidence?

I am not giving the Claimant permission to appeal

[9] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or certain type of factual error.[3]

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

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

[11] The Claimant argues that the General Division misinterpreted what misconduct means. She denies that she committed any misconduct. She says that misconduct only arises (1) if conduct is wilful and (2) if a claimant breaches any duties that they owe to their employer. She says that misconduct does not arise if a claimant is entitled to an accommodation or exemption from their duties.

[12] At paragraph 16, the General Division found that for there to be misconduct, the conduct has to be wilful. This means that the conduct has to be conscious, deliberate, or intentional. It does not have to have wrongful intent.

[3] See section 58(1) of the DESD Act.

[13] At paragraph 17, the General Division found that for there to be misconduct, an appellant has to know or should know that their conduct could get in the way of carrying out their duties toward their employer and that there is a real possibility of being suspended because of that.

– The Claimant denies that her conduct was wilful

[14] The Claimant denies any misconduct because she says that she did not have any control over deciding whether to comply with her employer's vaccination policy. She says that she was "subjected to moral objections."[4] The Claimant objected to her employer's vaccination policy because of her religious beliefs. She found that she could not act against those beliefs.

[15] The Claimant does not disagree with the definition of misconduct that the General Division set out. Misconduct involves wilful conduct. But she disagrees with how the General Division applied the definition of misconduct to the facts of her case.

[16] In a case called *Quadir*, the Federal Court of Appeal determined that "The application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. In the result, the Appeal Division had no jurisdiction to interfere with the General Division decision."[5] The Court of Appeal affirmed this principle in *Garvey*,[6] though clarified that, where an error of mixed fact and law discloses an extricable legal issue, the Appeal Division may intervene.

[17] The Claimant's argument that her conduct was not wilful does not disclose an extricable legal issue. So, the appeal does not have a reasonable chance of success on this point.

[18] Aside from this consideration, when assessing whether there has been misconduct, the *Employment Insurance Act* does not take into account the reasons for a

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[4] Application to the Appeal Division – Employment Insurance, at AD 1-3.
[5] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9.
[6] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at paras 8 to 9.

claimant's non-compliance, which is essentially what the Claimant is asking the Appeal Division to do.

– The Claimant says that she fulfilled all of her duties

[19] The Claimant denies any misconduct because she says that she fulfilled all of the duties that she owed to her employer.

[20] The General Division found that the Claimant was under a duty to comply with her employer's vaccination policy. It found that the Claimant was in breach of that duty. Thus, it concluded that there was misconduct.

[21] I understand that the Claimant may be suggesting that the express or implied duty has to arise out of the contract of employment. She may be relying upon a case called *Lemire,*[7] in which the Federal Court of Appeal wrote:

> [14] To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; **the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment**: Canada (Attorney General) v. Brissette, 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684 (C.A.), at paragraph 14; Canada (Attorney General) v. Cartier, 2001 FCA 274, 284 N.R. 172, at paragraph 12; Canada (Attorney General) v. Nguyen, 2001 FCA 348, 284 N.R. 260, at paragraph 5.
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> (My emphasis)

[22] However, it is now well-established that an employer's policy does not have to form part of the employment agreement for there to be misconduct:

- In *Kuk*,[8] 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 the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. There was misconduct in that case because Mr. Kuk

[7] *Lemire v Canada (Attorney General)*, 2010 FCA 314.
[8] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

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

- In *Nelson*,[9] the appellant lost her job because of misconduct. She was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal said it was irrelevant that the employer's policy against consuming alcohol did not form part of her employment agreement. It found that Ms. Nelson had committed misconduct.

- In *Nguyen*,[10] the Court of Appeal found that the employer had a harassment policy that did not describe Mr. Nguyen's behaviour and did not form part of the employment agreement. Even so, the Court of Appeal found that Mr. Nguyen had committed misconduct when he harassed a work colleague at the casino where they worked.

- In another case, called *Karelia*,[11] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Court of Appeal determined that Mr. Karelia had to comply with them—even if they were new—otherwise there was misconduct.

[23] So, contrary to what the Claimant suggests, the duties that arose out of her employer's vaccination policy did not have to be part of her employment contract.

[9] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[10] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[11] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.

[24] As the courts have consistently stated, the test for misconduct is a very narrow and specific test. It involves assessing whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations.[12]

[25] I am not satisfied that the Claimant has an arguable case that the General Division made a legal error that for misconduct to arise, there has to be a breach of a duty under the contract of employment.

– **The Claimant asked for a religious accommodation**

[26] The Claimant denies that there was misconduct because she says that she was entitled to a religious accommodation. If she had received an accommodation from her employer, she would not have been non-compliant with her employer's vaccination policy and she would not have faced suspension.

[27] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,[13] an employer's lack of accommodations is not relevant to the misconduct issue. The General Division did not make a legal error when it did not address whether the Claimant should have been entitled to a religious accommodation.

[28] I am not satisfied that the Claimant has an arguable case that the General Division made a legal error on this point.

Is there an arguable case that the General Division made a procedural or factual error by overlooking some of the evidence?

[29] The Claimant argues that the General Division made a procedural and factual error by overlooking some of the evidence. She says that she testified about the document, "Congregation for the Doctrine of the Faith" at the General Division hearing. She argues that if the General Division had considered this document, it would have accepted that she had legitimate religious objections to her employer's vaccination

[12] *Kuk* and *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[13] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

policy. She says she had a moral duty to avoid being vaccinated. She says that she should have received an exemption from the policy.

[30] The Claimant also argues that the General Division failed to consider her employer's lack of transparency in response to her request for a religious accommodation. She says that the lack of transparency made it difficult for her to respond to any questions about her request for an accommodation. She says her employer's lack of transparency directly led to the suspension. If her employer had been transparent, she says that she would have been able to respond and get the accommodation she sought.

[31] Procedural errors involve matters of process, such as whether the Social Security Tribunal or the General Division might have failed to have disclose documents to the parties, or if it failed to give adequate notice of a hearing. The Claimant does not allege an error of that nature.

[32] The actual document was not in evidence before the General Division. But apart from that, a decision-maker does not have to refer to all of the evidence before it. There is a general presumption that they consider all of the evidence. A decision-maker does have to discuss evidence where it is of such significance that it could have an impact on the outcome. But that was not the case here.

[33] The Claimant had religious objections to her employer's vaccination policy. She was guided and felt bound by her faith as to whether she should comply with the policy. But the reasons for her non-compliance were immaterial to the misconduct question.

[34] As the courts have consistently stated, the test for misconduct is a very narrow and specific test. It involves assessing whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations.[14] It does not take into account reasons why a claimant declines to comply with an employer's policy.

[14] *Kuk* and *Cecchetto*.

[35] As the Claimant's evidence about her religious concerns and her employer's lack of transparency was not relevant to the misconduct issue, I am not satisfied that she has an arguable case that the General Division overlooked this evidence.

Conclusion

[36] I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division