Citation: *PZ v Canada Employment Insurance Commission*, 2023 SST 1199

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	P. Z.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated January 25, 2023 (GE-22-2455)

Tribunal member:	Janet Lew
Type of hearing:	In person
Hearing date:	July 25, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	August 31, 2023
File number:	AD-23-169

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, P. Z. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had shown that the Claimant was suspended from his employment between December 8, 2021, and January 10, 2022, because of misconduct. He had not complied with his employer's COVID-19 vaccination policy.

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

[4] The Claimant argues that the General Division misinterpreted what misconduct means. In particular, he says that misconduct does not arise if it involves new terms and conditions of employment. He says that a claimant does not have to comply with new terms of employment that did not exist when they started working.

[5] The Claimant also argues that the General Division failed to appreciate some of the evidence. The Claimant says the evidence shows that his original employment contract did not require vaccination. He says the General Division should have considered this evidence.

[6] Finally, the Claimant also argues that the Appeal Division has the authority and enjoys a broad discretion to examine and decide on the legality and reasonableness of an employer's vaccination policy, in the context of deciding whether misconduct exists.

[7] The Claimant asks the Appeal Division to accept that he did not engage in any misconduct and to find that he was not disentitled from receiving Employment Insurance benefits.

[8] The Commission argues that the General Division did not make any reviewable errors. The Commission asks the Appeal Division to dismiss the appeal.

Preliminary matters: New evidence

[9] The Claimant relies on new evidence, including a newspaper article from late June 2023. This evidence did not exist when the General Division issued its decision. The Claimant says that the article refers to a decision of the Québec Superior Court. He claims that the Court determined that the vaccination policy in that case violated rights under the *Canadian Charter of Rights and Freedoms*.

[10] The Claimant also wants to file a copy of his employment contract with the provincial Cancer Board where he was employed since 1995. The Board no longer exists but became part of the provincial Health Services, his current employer. He says the contract with the Cancer Board will show that his employer did not require any kind of vaccination.

[11] The Claimant also relies on legal opinions that say his employer may have constructively dismissed him from his employment.

[12] The Claimant argues that the Appeal Division should accept this evidence because it speaks to the issues on appeal and proves that his employer's vaccination policy had no legal or constitutional basis.

[13] The Commission does not contest the fact that the Claimant's employment contracts, or collective agreements did not require vaccination. However, the Commission argues that the Appeal Division should not accept the new evidence because it is well established in the law that generally no new evidence is accepted. New evidence may be accepted where it provides general background information, but that is not the case here.

[14] I am not accepting the new evidence. It does not provide general background information or help to show any procedural defects. More importantly, as I will set out below, this evidence is not relevant to the misconduct issue.

Issues

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

(a) Did the General Division misinterpret what misconduct means?

(b) Did the General Division overlook some of the evidence?

(c) Did the General Division fail to exercise its jurisdiction?

Analysis

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

Did the General Division misinterpret what misconduct means?

[17] The Claimant argues that the General Division misinterpreted what misconduct means. The General Division found that there was misconduct because the Claimant deliberately chose not to comply with his employer's vaccination policy.

[18] The Claimant argues that the General Division failed to recognize that his initial employment contract in 2017 did not require vaccination. It was only well into his employment when his employer introduced a vaccination policy. The vaccination policy represented new terms and conditions of his employment.

[19] The Claimant argues that misconduct does not arise when a claimant is non-compliant with any new terms and conditions of employment. He says that an employer cannot unilaterally and substantially change one's employment contract.

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[1] Section 58(1) of the *Department of Employment and Social Development Act*.

[20] The Claimant acknowledges that he does not have any specific case law that supports his position. However, he says that, according to various legal opinions, his circumstances could amount to a constructive dismissal.

[21] The Commission argues that it does not matter whether a policy is not contained in an employment contract. The Commission relies on a case called *Nelson*.[2] In that case, the employer dismissed Ms. Nelson from her employment. She was seen to have breached her employer's prohibition against using alcohol and drugs on reserve. Ms. Nelson was seen publicly intoxicated on reserve, despite a prior warning.

[22] Ms. Nelson argued that there had to be a causal link between her off duty behaviour and her employment to find misconduct. The Federal Court of Appeal agreed, but it noted that the Appeal Division expressly found that such a link existed. The Court: continued:

> [25] Moreover, in my view, it is irrelevant that the Employer's alcohol prohibition existed only as a term of employment under its policies, and not in any written employment contract between the Applicant and the Employer… the Employer's policies clearly establish the standards of conduct expected of the Applicant and all other employees, including that employees may not drink alcohol on the reserve. Further, it is precisely on the basis of written policies that this Court found, in *Canada* (*Attorney General*) *v. Lemire*, 2010 FCA 314 (at paras 17, 19-20), that the claimant had breached a term of his employment.

[23] The Claimant responds that *Nelson* is distinguishable from his case, so is not applicable. In *Nelson*, there was already an established policy when Ms. Nelson started her employment. In his case, he notes that his employer did not require vaccination of any kind when he started his employment. Indeed, he states that his employer encouraged, but did not mandate vaccination.

– **Review of other court cases**

[24] However, the courts have decided other cases involving new policies that did not previously exist.

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[2] *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 25.

[25] In a case called *Karelia*,[3] 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, otherwise there was misconduct.

[26] Another case, called *Cecchetto*,[4] involved vaccination. Mr. Cecchetto had argued that it was not misconduct to refuse to abide by a vaccine policy that did not previously exist. His employer introduced the policy without his or his union's consent. He did not agree with the policy.

[27] The Federal Court was aware of the evidence and Mr. Cecchetto's argument. There was no dispute that the employer's vaccination policy had not formed part of Mr. Cecchetto's employment agreement. (In fact, the employer did not have its own vaccination policy but followed the rules set out by a provincial health directive.)

[28] The Federal Court found that Mr. Cecchetto's arguments did not give a basis to overturn the Appeal Division's decision in that case. In other words, the Court accepted that the employer could introduce a policy that required vaccination even if it did not form part of the original contract. It found that there was misconduct if employees knowingly failed to abide by that policy and were aware of the consequences that would result.

[29] The Federal Court examined this issue in a more recent case called *Kuk.*[5] The Federal Court issued this decision after the hearing in this matter.

[30] Mr. Kuk chose not to comply with his employer's vaccination policy. He argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated.

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[3] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[4] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[5] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[31] The Court wrote:

> [34] . . . **As the Federal Court of Appeal held in *Nelson*, an employer's written policy does not need to exist in the original employment contract to ground misconduct**: see paras 22-26. A written policy communicated to an employee can be in itself sufficient evidence of an employee's objective knowledge "that dismissal was a real possibility" of failing to abide by that policy. The Applicant's contract and offer letter do not comprise the complete terms, express or implied, of his employment… It is well accepted in labour law that employees have obligations to abide by the health and safety policies that are implemented by their employers over time.
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> . . .
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> [37] Further, unlike what the Applicant suggests**, the Tribunal is not obligated to focus on contractual language** or determine if the claimant was dismissed justifiably under labour law principles when it is considering misconduct under the [*Employment Insurance Act*]. Instead, as outlined above, **the misconduct test focuses on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations**.
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> (My emphasis)

[32] The Federal Court found that, for misconduct to arise, it was unnecessary that there was a breach of an express or implied duty arising out of the employment contract. Misconduct could arise even if there was a breach of a policy that did not form part of the original employment contract.

[33] The Federal Court found that it was reasonable for the Appeal Division to conclude that Mr. Kuk's arguments relating to his employment contract had no reasonable chance of success. The Federal Court dismissed Mr. Kuk's application for judicial review.

– **Misconduct is not limited to a breach of the employment agreement**

[34] It is clear from these authorities that an employer's policy does not have to form part of the employment agreement for there to be misconduct. As the courts have consistently stated, the test for misconduct is whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations. It is a very narrow and specific test.

[35] The General Division did not commit a legal error when it focused on the Claimant's actions and whether he should have foreseen that they would likely result in suspension and dismissal, to determine whether there was misconduct.

[36] So, it did not matter then that the vaccination policy did not exist previously or that it did not form part of the Claimant's employment agreement for misconduct to arise under the *Employment Insurance Act*.

Did the General Division overlook some of the evidence?

[37] The Claimant argues that the General Division overlooked some of the evidence. In particular, he says the General Division failed to consider the fact that his original employment contract did not require vaccination.

[38] As I have noted above, the cases make it clear that a claimant's employment contract is irrelevant to the misconduct issue. Misconduct can be found where there is a breach of a policy outside the employment contract. So, the General Division did not overlook the fact that the Claimant's employment contract did not require vaccination.

– The Claimant says his circumstances amount to a constructive dismissal

[39] The Claimant argues that he was constructively dismissed from his employment. He says he has supporting legal opinions. As the Federal Court pointed out in *Kuk*, if the Claimant wishes to pursue a constructive dismissal claim, this would be done in a different forum.[6]

Did the General Division fail to exercise its jurisdiction?

[40] The Claimant also argues that the General Division failed to exercise its jurisdiction by failing to decide on the legality and reasonableness of his employer's vaccination policy.

[41] The Claimant says the Appeal Division should decide whether his employer's vaccination policy was legal or reasonable. He argues that the Appeal Division has the

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[6] *Kuk*, at para 35.

authority and enjoys a broad discretion to examine and decide on the legality and reasonableness of an employer's vaccination policy, in the context of deciding whether misconduct exists.

[42] The Federal Court addressed this issue in *Cecchetto*. It determined that neither the General Division nor the Appeal Division have any jurisdiction to assess or rule on the merits, legitimacy, or legality of the vaccination policy. That simply falls outside their mandate.[7]

[43] So, the General Division did not fail to exercise its jurisdiction when it did not consider the legality or reasonableness of the employer's vaccination policy. The General Division simply lacked any authority to decide this issue.

Conclusion

[44] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal. The General Division properly determined that its focus was on whether the Claimant's action or inaction constituted misconduct under the *Employment Insurance Act*.

Janet Lew
Member, Appeal Division

[7] *Cecchetto*, at para 48.