Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 1190

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. K.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated March 8, 2023 (GE-22-3637)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	August 8, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	August 31, 2023
File number:	AD-23-326

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, A. K. (Claimant) is appealing the General Division decision. The General Division found that the Respondent, Canada Employment Insurance Commission (Commission), had proven that the Claimant was suspended from his employment because of misconduct. In other words, it found that he did something or failed to do something that caused him to be suspended. 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 made legal and factual errors. In particular, he argues that the General Division overlooked some of the evidence. He also argues that it applied the wrong test to determine whether there was misconduct. He also says that his employer's vaccination policy was unconstitutional. He asks the Appeal Division to give the decision he says the General Division should have given. He says the Appeal Division should find that there was no misconduct and that he is entitled to receive Employment Insurance benefits.

[5] The Commission argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal and keep the General Division decision in place. This would leave the Claimant disentitled from receiving benefits as of November 15, 2021, until his return to work.

Preliminary matter

[6] The Claimant has an active grievance relating to his suspension. He chooses to go ahead with the hearing of his appeal at the Appeal Division, without awaiting the outcome of that grievance.

Issues

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

a) Did the General Division apply the wrong legal test in determining whether there was misconduct?

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

Analysis

[8] 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]

Did the General Division apply the wrong legal test in determining whether there was misconduct?

[9] The Claimant argues that the General Division applied the wrong legal test when it determined whether there was misconduct.

[10] The General Division noted that the *Employment Insurance Act* does not define misconduct. The General Division turned to decisions from the courts and tribunals for guidance in determining whether misconduct arose in the Claimant's case. The General Division wrote:

> [26] Case law says that for misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intention. [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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law. [citation omitted]
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> [27] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that. [citation omitted]
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> [28] The law doesn't say I have to consider how the employer behaved. [citation omitted] Instead, I have to focus on what the Appellant did or failed to do

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

> and whether that amounts to misconduct under the [*Employment Insurance] Act*. [citation omitted]

[11] The Claimant denies that he did anything wrong. He denies that there could have been any misconduct in cases where an employer's policy is unconstitutional or if it contradicts existing laws. The Claimant says that he fulfilled all of his duties and responsibilities that he owed to his employer under his collective bargaining agreement.

[12] The Claimant argues that misconduct only arises if:

(a) An employee has to go through a progressive disciplinary process,

(b) Any employer confirms that there has been misconduct, or

(c) An employee breaches an existing term or condition of their collective bargaining agreement,

[13] The Claimant says that neither of these conditions existed for misconduct to have arisen.

– **The Constitutionality and legality of an employer's vaccination policy are irrelevant to the misconduct issue**

[14] The Claimant argues that his employer's vaccination policy is illegal and unconstitutional. He relies on *Ingram v Alberta (Chief Medical Officer of Health)*,[2] a decision from the Alberta Court of King's Bench. He also relies on recommendations from a Canadian Armed Forces committee.[3]

[15] The Claimant says that the Alberta Court of King's Bench and the Military Tribunal have found vaccination policies in those cases to be unconstitutional. He says that the vaccination policies in those cases are similar to his employer's vaccination policy. For that reason, he says the Appeal Division should also find his employer's

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[2] *Ingram v Alberta (Chief Medical Officer of Health)*, 2023 ABKB 453.

[3] The Claimant is likely referring to recommendations from the Military Grievances External Review Committee.

vaccination policy unconstitutional. He suggests that, as a result, he did not have to abide by his employer's policy, so there was no misconduct.

[16] The Claimant also argues that his employer's vaccination policy breached several laws. For instance, he says that the policy breached privacy laws.

[17] The Commission says that it is too late now for the Claimant to raise constitutional issues for the first time on appeal to the Appeal Division. The Commission also argues that the legality and constitutionality of the employer's vaccination policy are irrelevant issues.

[18] The Claimant would like to raise constitutional issues, but this is the first time that he has raised them. Even then, he has not detailed his constitutional arguments. Additionally, he has not given the appropriate notice of any constitutional question.

[19] Apart from these considerations, the Federal Court has made it clear that it is beyond the jurisdiction or the authority of the Social Security Tribunal to assess or rule on the merits, legitimacy, or legality of a vaccination policy.[4]

[20] The General Division did not fail to consider the legality or constitutionality of the employer's vaccination policy. It simply did not have the authority to consider these issues.

– **Progressive discipline and an employer's characterization of a claimant's conduct does not define misconduct**

[21] The Claimant also argues that there was no misconduct because he did not go through any progressive disciplinary process and because his employer never described his circumstances as misconduct. For instance, he says that his employer never issued any written warnings to him, nor threatened to dismiss him. He also says that his employer never mentioned or used the words "suspension" or "misconduct" in correspondence with him.

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[4] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[22] While that may be so, an employer's determination or subjective assessment of whether a claimant engaged in misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.[5]

[23] Instead of looking at the employer's or employee's determination as to whether misconduct occurred for the purposes of the *Employment Insurance Act*, the General Division has to conduct its own objective analysis as to whether misconduct arose. The General Division did so in this case.

– **Misconduct does not have to be a breach of the collective bargaining agreement or employment agreement**

[24] The Claimant argues that for misconduct to exist, there has to be breach of a term or condition of the collective bargaining agreement. He relies on the case of *Lemire*.[6]

[25] In *Lemire*, 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 FC 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)

[26] The Claimant says that his contract of employment did not say anything about vaccination. So, he says that he could not possibly have breached any duty resulting from the contract of employment. In other words, he says there was no misconduct.

[27] The Commission points to other cases of the Federal Court of Appeal. The Commission says that these cases show that the Court of Appeal in *Lemire* did not

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[5] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[6] *Canada (Attorney General) v Lemire*, 2010 FCA 314.

mean the breach of duty had to literally be a breach of a term of the contract of employment.[7]

[28] In the *Nguyen*[8] case, for instance, the Court of Appeal found that there was misconduct although the employer's harassment policy did not describe Mr. Nguyen's behaviour.

[29] Similarly, in the *Karelia*[9] case, the employer imposed new conditions on Mr. Karelia, in response to his chronic absenteeism from work. The new conditions did not form part of the employment agreement. The Court of Appeal determined that Mr. Karelia had to comply with these new conditions; otherwise, there was misconduct.

[30] More recently, in the *Cecchetto*[10] case, the Federal Court found misconduct when Mr. Cecchetto did not comply with his employer's vaccination policy. The vaccination policy had not formed part of Mr. Cecchetto's employment agreement. Indeed, his employer did not have its own policy, but followed the rules set out by a provincial health directive.

[31] 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.

[32] The Federal Court examined this issue in a more recent case called *Kuk.*[11] The Federal Court issued this decision after the hearing in this matter.

[33] 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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[7] Representations of the Commission to the Social Security Tribunal – Appeal Division, at AND 4-5.
[8] *Canada (Attorney General) v Nguyen,* 2001 FCA 348 at para 5.
[9] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[10] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[11] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[34] 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)

[35] 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.

[36] 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.

[37] It is clear from these cases that for misconduct to arise, the breach or violation does not have to be a breach of the original employment agreement or collective bargaining agreement. 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.

[38] 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*.

[39] The General Division did not misinterpret what misconduct means when it (1) did not consider the legality or constitutionality of the employer's vaccination policy, (2) did not apply the employer's characterization of the Claimant's actions, or (3) did not consider the Claimant's employment agreement.

Did the General Division overlook some of the evidence?

[40] The Claimant argues that the General Division failed to consider the terms and conditions of his collective bargaining agreement. He says that the agreement did not require him to get vaccinated.

[41] Misconduct does not have to be a breach of a duty "resulting from the contract of employment." So, the General Division did not have to consider the Claimant's collective bargaining agreement, or consider whether the Claimant's employer could unilaterally impose new conditions of employment.

Conclusion

[42] The General Division did not apply the wrong legal test for misconduct, nor overlook the Claimant's collective bargaining agreement. There did not have to be the breach of a term or condition of the employment agreement for misconduct to arise.

[43] The General Division acted appropriately by focusing on whether the Claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations, knowing that consequences could result.

[44] The appeal is dismissed.

Janet Lew
Member, Appeal Division