Citation: *NZ v Canada Employment Insurance Commission*, 2023 SST 1209

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 21, 2023 (GE-23-277)

Tribunal member:	Janet Lew
Decision date:	September 5, 2023
File number:	AD-23-697

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, N. Z. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Respondent, the Canada Employment Insurance Commission, had proven that the Claimant lost her job because of misconduct. In other words, it found that she had done something that caused her to lose her job. The General Division found that the Claimant did not comply with her employer's vaccination policy.

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

[4] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors. She argues, for instance, that the General Division should have considered the merits and validity of her employer's vaccination policy. She also argues that the General Division misinterpreted what misconduct means. She says that if it had not misinterpreted what misconduct means, it would have found that she did not commit any misconduct.

[5] 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]

[6] 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

[7] The issues are as follows:

a) Is there an arguable case that the General Division failed to exercise its jurisdiction?

b) Is there an arguable case that the process at the General Division was unfair?

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

d) Is there an arguable case that the General Division overlooked any of the evidence?

I am not giving the Claimant permission to appeal

[8] 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 might have made a jurisdictional, procedural, legal, or certain type of factual error.[3]

[9] 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 failed to exercise its jurisdiction?

[10] The Claimant argues that the General Division failed to exercise its jurisdiction. She argues that the General Division not only has the jurisdiction but that it was also under a duty to evaluate whether her employer's vaccination policy was reasonable and had been implemented according to administrative law principles. She says the General Division failed in its duty in determining whether her employer's policy was valid.

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

[11] The Claimant states that her employer's vaccination policy was invalid because her employer did not have any process to review and grant religious exemptions. She says the policy did not adhere to administrative law principles as her employer did not implement the policy "in full [nor] consistently enforc[e it] to ensure the inclusion of a fair review of human rights base exemptions."[4]

[12] The Federal Court addressed this very issue in a case called *Cecchetto*.[5] 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 a vaccination policy. That simply falls outside their mandate.[6]

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

[14] I am not satisfied that the Claimant has an arguable case on this point.

Is there an arguable case that the process at the General Division was unfair?

[15] The Claimant argues that the process at the General Division was unfair. However, she has not identified anything unfair or irregular about the process. She does not, for instance, suggest that she did not receive a fair hearing or that the General Division member was biased.

[16] The Claimant was aware of the case before her. She received documents in a timely manner. She was given the chance to file documents. Indeed, the General Division accepted documents that the Claimant filed after the hearing had concluded.

[17] The Claimant received adequate notice of the hearing. At the hearing, the General Division member gave the Claimant a full and fair opportunity to present her

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[4] Claimant's letter dated July 11, 2023, at AD 1-2.
[5] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[6] *Cecchetto*, at para 48.

case. There is no suggestion from the Claimant that the process was somehow unfair in any way.

[18] If anything, the Claimant argues that her employer's vaccination process was unfair. She claims that her employer's refusal of her religious exemption request lacked a fair and transparent process. She argues the lack of a fair process violated the principles of procedural fairness.

[19] But, even if the employer's vaccination process was unfair, that does not somehow become a procedural failing of the General Division. Additionally, it is not the type of issue that allows the Appeal Division to intervene in the General Division's decision.

[20] I am not satisfied that the Claimant has an arguable case that the General Division acted unfairly.

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

[21] The Claimant denies that she committed any misconduct. She argues that the General Division misinterpreted what misconduct means. She argues that misconduct did not arise because her employer's vaccination policy was invalid.

[22] The Claimant argues that the policy was invalid for the following reasons: (1) the policy did not form part of her original employment contract. Her employment contract never required vaccination, (2) the vaccination policy did not provide for any accommodations, and (3) finally, the Claimant says that individuals have a right to make decisions about their bodily integrity and any medical treatments. She says that she was simply exercising her constitutional rights to apply for a religious exemption, and says that this does not amount to misconduct.

[23] The Claimant points to arbitration cases. In one case, an arbitrator ruled that the employer in that case *prima facie* discriminated against a nurse when it applied its

vaccine policy to deny her requested exemption. The arbitrator found that she should have received an exemption.[7]

– **The Claimant's employment contract**

[24] The Federal Court recently issued a decision called *Kuk*,[8] involving a claimant who did not comply with his employer's vaccination policy. He denied that there was any misconduct because his employer's vaccination policy was not part of his employment contract. So, he argued that he did not breach his contractual obligations when he chose not to get vaccinated.

[25] The Federal 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)

[26] The Federal Court found that, for misconduct to arise, it was unnecessary for there to be a breach 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 employment contract.

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[7] Claimant's letter dated July 11, 2023, citing *Public Health Sudbury & Districts v Ontario Nurses' Association*, 2022 CanLII 48440 (ON LA), at AD 1-3.
[8] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[27] The Federal Court made it clear in that case that 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. The courts have consistently stated that the General Division has to focus on a claimant's actions and on whether that claimant knew or should have foreseen the consequences from their action or inaction.

– **The Claimant's request for accommodation**

[28] As for the Claimant's accommodation argument, as the Federal Court of Appeal stated in a case *Mishbinijima*,[9] an employer's lack of accommodations is irrelevant to the misconduct question.

– **The Claimant's right to make her own decisions**

[29] As for the Claimant's argument that she had a right to make her own decisions regarding vaccination, the Federal Court stated in *Kuk* and in *Cecchetto* that this too was an irrelevant consideration to the misconduct issue. In *Cecchetto*, the Federal Court wrote:

> While [Mr. Cecchetto] is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises—for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests—that does not make the decision of the Appeal Division unreasonable. The key problem with [Mr. Cecchetto's] argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[10]

[30] And, in another case, called *Milovac*,[11] the Federal Court confirmed that *Charter* concerns, as they relate to vaccination policies, are not matters properly before the General Division.

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[9] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] *Cecchetto*, at para 32.
[11] *Milovac v Canada (Attorney General)I,* 2023 FC 1120.

– **Summary on whether the Claimant has an arguable case**

[31] I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what misconduct means.

Is there an arguable case that the General Division overlooked any of the evidence?

[32] The Claimant argues that the General Division overlooked some of the evidence and focussed on irrelevant facts. The Claimant says that if the General Division had not misplaced its focus, it would have found that she had not engaged in any misconduct.

[33] The Claimant suggests that the General Division overlooked the fact that she had been an excellent employee. She notes that her job performance had been excellent over 18 years of employment. She says the General Division also overlooked the fact that she had been fully compliant with all other protocols. She regularly got tested, wore masks, social distanced, and worked remotely.

[34] The Claimant argues that the General Division should not have focused exclusively on the fact that she had not complied with her employer's policy, without also considering her excellent work performance, the fact that she followed all other safety protocols, and that fact that her employer did not provide accommodations.

[35] As the courts have established and as I have noted above, these considerations are irrelevant to the misconduct question. The General Division's focus had to be on whether the Claimant had engaged in conducted such that she could or should have foreseen that it would likely lead to suspension or dismissal.

[36] I am not satisfied that the Claimant has an arguable case that the General Division overlooked some of the evidence. That evidence simply was irrelevant to the misconduct issue.

Conclusion

[37] The appeal does not have a reasonable chance to success. For that reason, permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division