Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 1411

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. K.
Representative:	Philip Cornish
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated October 6, 2022 (GE-22-1616)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	April 12, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	October 26, 2023
File number:	AD-22-811

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, A. K. (Claimant), an IT systems analyst, is appealing the General Division decision.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his job because of misconduct. In other words, it found that he did something that caused him to be suspended. He did not comply with his employer's COVID-19 vaccination policy. Having determined that there was misconduct, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made procedural, legal, and factual errors when it found that there was misconduct in his case.

[5] The Claimant says that there are natural justice issues as he says the General Division failed to give him the opportunity to test the Commission's evidence. He also argues that the General Division failed to apply relevant case law or to properly interpret what misconduct means. He says that misconduct should have been given a large and liberal construction.

[6] The Claimant argues that the General Division made an error in finding that his employer's vaccination policy formed part of his employment obligations. As the vaccination policy was outside his employment agreement, he says that misconduct did not arise when he did not comply with his employer's policy.

[7] The Claimant asks the Appeal Division to find that he did not commit any misconduct. He asks the Appeal Division to decide that he was not disqualified from receiving Employment Insurance benefits.

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

Issues

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

(a) Did the General Division breach the principles of natural justice?

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

(c) Did the General Division make an error in finding that the employer's vaccination policy formed part of the Claimant's contractual obligations?

[10] There is considerable overlap between the second and third issues, so I will address them together.

Analysis

[11] The Appeal Division may intervene in General Division decisions if the General Division committed any jurisdictional, procedural, legal, or certain types of factual errors.[1]

Did the General Division breach the principles of natural justice?

[12] The Claimant argues that the General Division breached the principles of natural justice. He says that, as the General Division relied on the employer's evidence over his own sworn testimony, the employer should have been made to affirm its evidence or have its evidence tested. The Claimant says he was deprived of the opportunity to conduct any cross-examination of his employer.

[13] The Claimant does not appear to have voiced any objections to the admissibility of the employer's evidence during the General Division proceedings.

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

[14] The Claimant contests his employer's evidence about whether its vaccination policy should have applied to him. The Claimant worked remotely. His amended employment contract allowed him to continue working remotely on an indefinite basis.

[15] The Claimant disagreed with his employer's statement that emergency circumstances could require him to attend the employer's workplace. He disputes that there would have been any circumstances that could have required him to be at the employer's workplace, as he could have performed all of his duties remotely.

[16] The Claimant says that if he did not have to attend at his employer's workplace, he should have not had to get vaccinated as the employer's vaccination policy required.

[17] The General Division's decision noted the Claimant's arguments. But ultimately the General Division's decision did not turn on the issue of whether the Claimant might have been called to attend at his employer's workplace. The General Division determined that the employer's vaccination policy applied whether an employee worked remotely or not. So, the employer's evidence regarding the possibility of working at the workplace was irrelevant.

[18] Apart from that, the issue with the Claimant's arguments is that he presupposes that the General Division strictly adheres to the rules of evidence and that it has the power to compel witnesses.

[19] Proceedings at the General Division are less formal or rigid. The process is intended to be accessible to laypersons, particularly as many, if not most, appeals involve self-represented claimants. The General Division is not bound by the strict rules of evidence and can receive and accept unsworn evidence.

[20] The General Division does not require sworn statements. And even if the Claimant had asked, but his employer did not attend the hearing at the General Division for the purposes of cross-examination, the General Division lacks any power to compel witnesses.

[21] The General Division is entitled to accept evidence in whatever form it deems appropriate, whether sworn or unsworn. If anything, the issue is over the quality of that evidence. And the response to any questions about the quality of the evidence is the weight to assign to that evidence.

[22] The General Division constantly assesses the evidence before it and determines the appropriate amount of weight to give to that evidence. This exercise involves determining the overall credibility and reliability of evidence, seeing whether that evidence is consistent and reasonable. This could include seeing whether any evidence could be tainted, for instance, by the passage of time, or by any particular interest that a witness could hold.

[23] There is no reason to believe that the General Division did not perform this exercise or that it overlooked any of the evidence. The Claimant's dispute is that the General Division accepted the employer's evidence, even if it was speculative, as the Claimant describes it. But, it was within the General Division's purview to accept the employer's evidence, even in its absence.

Did the General Division misinterpret what misconduct means?

[24] The Claimant argues that the General Division misinterpreted what misconduct means. The Claimant denies that he did anything wrong. He says that misconduct arises only if there is serious conduct or misdoing.

[25] The Claimant denies that he engaged in any misconduct. For one, he says that the vaccination policy with which he did not comply fell outside his contract of employment. The Claimant argues that for misconduct to arise, there has to be a breach of an express or implied duty arising from the employment contract. The Claimant points to *Lemire*,[2] where the Federal Court of Appeal wrote:

> 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;

[2] See *Lemire v Canada (Attorney General*, 2010 FCA 314 at para 14.

> the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment …

[26] Further, he says that misconduct did not arise when he did not comply because he was exercising his freedom of conscience and religion. So, he says that the General Division made a mistake in finding that there was misconduct.

[27] Finally, the Claimant argues that the General Division should have a given a wide and liberal interpretation to the meaning of misconduct.

[28] Since the hearing in this matter, the Federal Court has issued two decisions, in addition to the case of *Cecchetto*,[3] that provide much clarity and guidance on what constitutes misconduct in the context of vaccine mandates.

– The vaccination policy did not form part of the Claimant's employment contract

[29] The Claimant was an employee of a hospital for about ten years. His employment contract was amended consensually. This enabled the Claimant to work from home.

[30] The provincial Chief Medical Officer of Health issued Directive 6. It required hospitals and healthcare organizations to implement COVID-19 vaccination policies. The Claimant's employer then introduced a mandatory vaccination policy for its employees. The policy did not form part of the Claimant's employment contract.

[31] The Claimant argues that, as the vaccination policy did not form part of his employment contract, he could not possibly have breached any duties arising out of his employment contract. And, if he did not breach any duties arising out of his employment contract, denies that there was any misconduct.

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

[32] The Claimant's factual circumstances are similar to those in *Kuk*.[4] Mr. Kuk chose not to comply with his employer's vaccination policy.

[33] Mr. Kuk argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated. He denied any misconduct.

[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 the vaccination requirements did not have to be part of the employment agreement. As long as Mr. Kuk knowingly did not comply with his employer's vaccination policy, and knew what the consequences would be, misconduct would arise.

[36] Other cases have also examined whether misconduct arises when the breach does not involve breach of the terms of an employment contract.

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[4] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[37] In the case of *Nelson*[5] (referred to by the Court in *Kuk*), the applicant lost her employment because of misconduct under the *Employment Insurance Act*. The Federal Court of Appeal found that, contrary to the terms of her employment, Ms. Nelson was seen publicly intoxicated on the reserve.

[38] Ms. Nelson argued that the Appeal Division made a mistake in finding that her employer's alcohol prohibition was a condition of employment causally linked to her job.

[39] Ms. Nelson argued that there was no rational connection between her consumption of alcohol and her job performance, particularly as she had consumed alcohol off-duty and during her private time and there was nothing to suggest that she had arrived at work intoxicated or impaired. She denied that there was an express or implied term of her employment contract that prohibited alcohol on the reserve.

[40] The Federal Court of Appeal wrote, " …, in my view, it is irrelevant that the Employer's alcohol prohibition existed only as a term of employment under its policies, not in any written employment contract …"[6] In other words, the policy did not have to be in the employment agreement.

[41] Similarly, in a case called *Nguyen*,[7] the Court of Appeal found that there was misconduct. Mr. Nguyen harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and the policy did not form part of the employment agreement.

[42] In another case, called *Karelia*,[8] 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.

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[5] See *Nelson v Canada (Attorney General)*, 2019 FCA 222
[6] *Nelson*, at para 25.
[7] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[8] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.

[43] It is clear from these authorities that an employer's policy (or a provincial health order) does not have to form part of the employment agreement for misconduct to arise. As long as an employee does not comply with their employer's policy and is aware that that conduct will lead to certain consequences, that will suffice. For this reason, it is unnecessary to examine the employment agreement, and whether the employer's policy met the "*KVP* test."[9]

[44] 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.[10]

– **The Claimant says the meaning of misconduct should be given a wide and liberal interpretation**

[45] The *Employment Insurance Act* does not define misconduct. For that reason, and because the Claimant says the *Employment Insurance Act* is intended to be social benefits-conferring legislation, he argues that the General Division should have given the term misconduct a large and liberal construction and interpretation "as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."[11]

[46] The Claimant says that the Federal Court of Appeal endorsed this approach in *Villani*.[12] In *Villani*, the issue was whether the appellant had a severe and prolonged disability within the meaning of the *Canada Pension Plan*.

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[9] Under the "*KVP* test," any rule or policy that an employer unilaterally imposes and is not subsequently agreed to by the union, must be consistent with the collective agreement and be reasonable: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.,* 1965 CanLII 1009 (ON LA). The Supreme Court of Canada approved the *KVP* test in *Communications, Energy and Paperworkers Union of Canada*, *Local 30 v Irving Pulp and Paper, Ltd.,* 2013 SCC 34 (CanLII), [2013] 2 SCR 458.
[10] See *Kuk*, at para 37.
[11] The Claimant says that this is the appropriate approach, under *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para 22.
[12] See *Villani v Canada (Attorney General)*, 2001 FCA 248

[47] The Claimant acknowledges that, thus far, the courts have not gone so far as to describe the *Employment Insurance Act* as benefits-conferring legislation. However, he says that there are parallels to *Rizzo*, in that both deal with employees.

[48] In *Rizzo*, the issue was whether employees, who lost their employment due to their employer's bankruptcy, could make a claim for termination pay and severance pay. That is, could they rely on the protections afforded under employment standards legislation. The Supreme Court of Canada examined what the words "terminated by an employer" meant.

[49] The Court rejected a restrictive interpretation to the words "terminated by an employer." The Court concluded that there was ample support for the conclusion that these words had to be interpreted to include termination resulting from the bankruptcy of an employer.

[50] The Court found that denying employees the right to claim termination and severance pay where the employer's bankruptcy led to the termination would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of employment standards legislation. The Court found that the purpose of these provisions was to protect the interests of as many employees as possible.

[51] Here, it seems that the Claimant in fact would favour a more restrictive or strict definition for misconduct, rather than a large or wide and liberal interpretation. For instance, he says that it should include only serious wrongdoing. But this would be inconsistent with the case law that has evolved. Wrongful intent is unnecessary; the act or omission has to be wilful, in that it has to be conscious, deliberate, or intentional.[13]

[52] Giving a large and liberal interpretation to misconduct would necessarily expand what type of conduct or behaviour would fall into the definition. And the consequences

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[13] See, for instance, *Canada (Attorney General) v Secours*, [1995] F.C.J. No. 210 (QL); *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *Canada (Attorney General) v Jolin*, 2009 FCA 303, and *Canada (Attorney General) v Caron*, 2009 FCA 141 at para 5.

for misconduct would of course result in either disentitlement or disqualification from receiving Employment Insurance benefits.

[53] Giving a large and liberal interpretation for misconduct would not favour the Claimant. It is clear that he intends a strict definition for misconduct. Even so, I find it unnecessary to undergo an exercise in statutory interpretation for misconduct under the *Employment Insurance Act*.

[54] As the Appeal Division determined in *A.L.,* while the *Employment Insurance Act* does not define misconduct, "the Courts have filled the void by setting out a detailed, multipronged test."[14] The General Division alluded to and applied this test.[15]

[55] Hence, while the *Employment Insurance Act* does not define misconduct, the test for misconduct is well established. It is largely a matter of factual determination.

– **The Claimant relies on *AL v Canada Employment Insurance Commission***

[56] The Claimant relies on a case called *A.L.*,[16] a decision issued by the General Division. The General Division found that there was no misconduct in that case because the employer had unilaterally introduced a vaccination policy without consulting employees and getting their consent.

[57] However, the Appeal Division has since overturned the General Division's *A.L.* decision.[17] The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract.

[58] The Appeal Division also found that the General Division made legal errors. The General Division made an error when it declared that an employer could not impose new conditions to the collective agreement. The Appeal Division found that the General

[14] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032 at footnote 5.
[15] See General Division decision, at paras 10 to 11.
[16] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[17] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.

Division also made an error when it found that there had to be a breach of the employment contract for misconduct to arise.[18]

– **The Claimant says he had religious and other rights**

[59] As for the Claimant's arguments that the General Division should have considered his religious and other rights, the courts have determined that these are irrelevant considerations. In *Milovac*,[19] the Federal Court confirmed that *Charter* concerns, as they relate to vaccination policies, are not matters properly before the Appeal Division (or, for that matter, the General Division). That is not to say that the Claimant is without any options to pursue any remedies, but they lie elsewhere.[20]

– **The Claimant says *Clark* applies**

[60] The Claimant argues that the General Division failed to apply the principles set out by the Federal Court of Appeal in *Clark*.[21] The Court wrote:

> [2] In the circumstances of this case, the Board of Referees was entitled to find on the evidence before it that the respondent's failure to retain a valid driver's license did not amount to misconduct under s. 30 of the Act since it was not an essential condition of the employment that had been performed by him at the time of his dismissal.

[61] In other words, the Claimant argues that vaccination was not an essential condition of his employment.

[62] For misconduct to arise, there has to be a breach of an essential condition of the Claimant's employment. But this calls for a factual determination as to whether vaccination was indeed an essential condition. There has to be a factual error of the nature described under section 58(1)(c) of the *Department of Employment and Social Development Act* before the Appeal Division can intervene.

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[18] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).
[19] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[20] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[21] See *Canada (Attorney General) v Clark*, 2007 FCA 181.

[63] It is clear from the General Division's analysis that it considered the employer's vaccination requirements an essential condition of the Claimant's employment. While clearly the Claimant was able to perform his usual duties as an IT systems analyst, for which he was hired, this does not mean that his employer did not have other requirements that were essential to maintain employment. Indeed, the employer's vaccination policy makes it clear that it regarded vaccination as an essential condition of employment.

[64] The General Division applied the principles set out in *Clark*. But the factual circumstances were dissimilar from those of the Claimant.

Conclusion

[65] The appeal is dismissed.

Janet Lew
Member, Appeal Division