Citation: *KR v Canada Employment Insurance Commission*, 2023 SST 1235

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. R.
Representative:	Jim Farrell
Respondent:	Canada Employment Insurance Commission
Representative:	Jessica Grant

Decision under appeal:	General Division decision dated January 17, 2023 (GE-22-2291)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	June 23, 2023
Hearing participants:	Appelant Appellant's representative Respondent's representative
Decision date:	September 8, 2023
File number:	AD-23-161

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) lost her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). The employer did not grant her an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant lost her job because of misconduct, so it was not able to pay her EI benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost her job following her refusal to follow the employer's Policy. She was not granted an exemption. It found that the Claimant knew that the employer was likely to dismiss her in these circumstances. The General Division concluded that the Claimant lost her job because of misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division ignored evidence and made an error in law when it concluded that she lost her job because of misconduct.

[6] I must decide whether the General Division ignored evidence and whether it made an error in law when it concluded that the Claimant lost her job because of misconduct.

[7] I am dismissing the Claimant's appeal.

Issue

[8] Did the General Division ignore evidence and make an error in law when it concluded that the Claimant lost her job because of misconduct?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division ignore evidence and make an error in law when it concluded that the Claimant lost her job because of misconduct?

[12] The Claimant submits that the employer could have and should have followed the terms and conditions of the collective agreement that states that hospitals recognize that employees have the right to refuse any required vaccination.

[13] The Claimant submits that her evidence showed that the language of the collective agreement did not need to be interpreted by the General Division because that language had been interpreted and put into practice by the parties for some time with positive results.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

[14] The Claimant submits that it is the employer's conduct that led to her termination, not her alleged misconduct. There was no need for terminating her because she was a valued employee.

[15] The General Division had to decide whether the Claimant was dismissed because of misconduct.

[16] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that does not necessarily correspond to its everyday usage. An employee may be disqualified from receiving EI benefits because of misconduct under the *Employment Insurance Act* (EI Act), but that does not necessarily mean that they have done something "wrong" or "bad."[3]

[17] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[18] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[19] Based on the evidence, the General Division determined that the Claimant was dismissed because she refused to follow the Policy. She had been informed of the employer's Policy and was given time to comply. She was not granted an exemption.

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[3] In *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140, the Federal Court of Appeal said that it was beside the point whether the root cause of an employee's dismissal was "blameless." According to the Court, "relevant conduct is conduct related to one's employment."

The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal.

[20] The General Division found that the Claimant knew that her refusal to comply with the Policy could lead to her dismissal.

[21] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct.

[22] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[4] It is also considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.[5]

[23] It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace. In the present case, the employer followed the Government of Ontario directive to implement its Policy to protect the health of all employees and patients during the pandemic.[6] The Policy was in effect when the Claimant was dismissed.

[24] The Claimant agrees that it was not up for the General Division to interpret the Claimant's collective agreement. However, she submits that the evidence presented showed that the language of the collective agreement did not need to be interpreted by the General Division because that language had already been interpreted and put into practice for some time by the parties with positive results. This time, the employer did not consult the Union regarding its vaccination Policy.

[25] The Claimant is essentially arguing that her employer violated the terms and conditions of her collective agreement that states that hospitals recognize that employees have the right to refuse any required vaccination.

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[4] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[5] CUB 71744, CUB 74884.
[6] Directive 6 was issued on August 17, 2021, demanding that hospitals implement a COVID-19 vaccination policy. See GD3-28.

[26] I must reiterate that the General Division could not focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. It had to focus on the Claimant's conduct.

[27] It is one thing to ask whether an express or implied duty exists. It is another to ask whether the duty was validly imposed by the employer. The second question falls outside of EI law.

[28] During the term of employment, the employer may try to impose policies that encroach on their employees' rights. If they believe that a new policy violates their employment contract or collective agreement, they can sue their employer for wrongful dismissal or file a grievance. If they believe that a new policy violates their bodily integrity or freedom of speech, they can take their employer to court or to a human rights tribunal. However, the EI claims process is not the way to litigate such disputes.

[29] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."[7]

[30] The question of whether the employer should have accommodated the Claimant by allowing her to use other means of protection, or whether the employer violated her collective agreement, or whether the employer's Policy violated her human and constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[8]

[31] The Federal Court has rendered a recent decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.[9]

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[7] *Dubeau v Canada (Attorney General)*, 2019 FC 725.

[8] In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

[9] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.

[32] The claimant *Cecchetto* submitted that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct. He put forward that it was not proven that the vaccine was safe and efficient. The claimant felt discriminated against because of his personal medical choice. The claimant submitted that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[33] The Federal Court confirmed the Appeal Division's decision that by making a personal and deliberate choice not to follow the employer's vaccination Policy, the claimant had breached his duties and had lost his job because of misconduct under the EI Act.[10] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[34] The *Cecchetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[11] These decisions all say that it is not for this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's vaccination Policy.

[35] In the *Mishibinijima* case, the Federal Court of Appeal stated that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[36] As stated previously, the General Division's role is not to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[37] The preponderant evidence before the General Division shows that the Claimant, **made a personal and deliberate choice** not to follow the employer's Policy in response to the exceptional circumstances created by the pandemic and this resulted in her being dismissed from work.

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[10] The Court refers to *Bellavance,* see note 4.

[11] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[38] I see no reviewable error made by the General Division when it decided the issue of misconduct solely within the parameters set out by the Federal Court of Appeal, which has defined misconduct under the EI Act.[12]

[39] I am fully aware that the Claimant may seek relief before another forum if a violation is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was dismissed because of misconduct.

The employer's conduct

[40] The Claimant submits that it is the employer's conduct which led to her alleged misconduct.

[41] The mere fact that the employer instituted a health and safety policy during the pandemic, as directed by the Chief Medical Officer of Health, with which the Claimant disagreed with from its implementation does not constitute a behavior that would justify a conclusion that the employer's conduct led to the Claimant's misconduct. Here, the employer implemented a policy that applied to all its employees. The employees could refuse to follow the employer's Policy. There is no suggestion that the employer actively targeted the Claimant.[13] This ground of appeal is without merits.

Conclusion

[42] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division

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[12] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.
[13] See *Astolfi v Canada (Attorney General)*, 2020 FC 30.