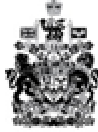

Citation: *OK v Canada Employment Insurance Commission*, 2023 SST 1195

Social Security Tribunal of Canada
Appeal Division

Decision

Applicant:	O. K.
Representative:	Philip Cornish
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 19, 2023 (GE-22-3140)

Tribunal member:	Neil Nawaz
Decision date:	September 1, 2023
File number:	AD-23-634

Decision

[1] I am refusing the Claimant permission to appeal because he does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Claimant, O. K., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] The Claimant worked as a recreation therapist for a regional hospital. On December 3, 2021, the hospital suspended the Claimant's employment after he refused to get vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his failure to comply with his employer's vaccination policy amounted to misconduct.

[4] This Tribunal's General Division held a hearing by teleconference and dismissed the Claimant's appeal. It found that the Claimant had deliberately broken his employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in his dismissal.

[5] The Claimant is now seeking permission to appeal the General Division's decision. He maintains that he was not guilty of misconduct and argues that the General Division made the following errors:

- It failed to appreciate that the hospital's vaccination policy was unclear;
- It misapplied a case called *Bellevance*, which involved a set of facts that differ from his own situation;[2]
- It failed to consider whether the vaccination policy was an implied or express term of employment, as required by a case called *Lemire*;[3]

[1] The hospital later terminated the Claimant's employment altogether.
[2] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87.
[3] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

- It failed to apply the principles of a case called *Rizzo & Rizzo Shoes*, which requires decision-makers to adopt a generous interpretation of benefits-conferring legislation;[4] and
- It failed to consider whether a policy established outside of the terms of a collective agreement needed to be assessed according to the KVP test.[5]

[6] Before the Claimant can proceed, I have to decide whether his appeal has a reasonable chance of success.[6] Having a reasonable chance of success is the same thing as having an arguable case.[7] If the Claimant doesn't have an arguable case, this matter ends now.

Issue

[7] Is there an arguable case that the General Division erred in finding that the Claimant's refusal to accept the COVID-19 vaccination amounted to misconduct?

Analysis

[8] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

There is no case that the General Division ignored or misunderstood the evidence

[9] The Claimant clearly disagrees with how the General Division looked at his employer's vaccination policy. However, this by itself is not enough to justify overturning the General Division's decision.

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[4] See *Rizzo v Rizzo Shoes Ltd. (Re)* 1998 CanLII 837 (SCC), [1998] 1 SCR 27.
[5] The Claimant is referring to case called *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, 1965 CanLII 1009 (ON LA).
[6] See section 58(1) of the *Department of Employment and Social Development Act*.
[7] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

– The General Division had a right to assess the evidence as it saw fit

[10] At the General Division, the Claimant argued that getting vaccinated was never a condition of his employment. He said that he didn't want to get vaccinated until he had enough information to decide whether it was safe and effective. He claimed that he was fully prepared to wear protective equipment and to submit to regular testing to keep patients and co-workers safe.

[11] I don't see how these arguments can succeed given the law surrounding misconduct. The Claimant made similar points to the General Division, which reviewed the available evidence and made the following findings:

- The Claimant's employer adopted and communicated a clear mandatory vaccination policy requiring employees to provide proof that they had been vaccinated;
- The Claimant was aware that failure to comply with the policy by a certain date would cause loss of employment; and
- The Claimant intentionally refused to comply with the policy.

[12] These findings appear to accurately reflect the Claimant's testimony, as well as the documents on file. The General Division concluded that the Claimant was guilty of misconduct because his actions were deliberate, and they foreseeably led to his dismissal. The Claimant may have believed that his refusal to follow his employer's vaccination policy was not doing his employer any harm, but that was not his call to make.

– The General Division did not mischaracterize the vaccination policy

[13] The Claimant alleges the General Division overlooked ambiguities in the hospital's vaccination policy. He argues that, because of those ambiguities, he couldn't have been reasonably expected to foresee that his failure to comply with the policy would lead to his suspension and dismissal.

[14] I don't see a case here.

[15] In its role as finder of fact, the General Division is permitted some leeway in how it weighs and assess the available evidence. In this case, the General Division made the following findings:

- The hospital's vaccination policy said that employees had to show proof of full vaccination against COVID-19 by November 1, 2021, unless they had a documented human rights exception;
- The policy also said that employees who fail to attest to their vaccination status by the deadline would be subject to progressive discipline, including suspension and or termination.[8]

[16] These findings appear to accurately reflect the hospitals vaccination policy. When I look at the policy itself, I see, contrary to the claimant's allegation, little ambiguity in its wording. True, the policy allowed the hospital some discretion in how it chose to address non-compliant employees (it said that a breach "may" result in discipline), but it was nonetheless clear that loss of employment was a real possibility.

[17] In the absence of a "perverse or capricious" factual error, or one that was "made without regard for the material," I see no reason to interfere with the General Division's findings on these points.

There is no case that the General Division misinterpreted the law

[18] This Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the *Employment Insurance Act* (EI Act) may seem unfair to the Applicant, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

[8] See McKenzie Health COVID-19 Immunization Policy dated September 8, 2021, GD2-38.

– Misconduct occurs when an employee deliberately breaks their employer's rules

[19] The Claimant argues that there was no misconduct because nothing in his employment contract required him to receive the COVID-19 vaccination. He alleges that his employer's imposition of the vaccine policy represented a unilateral change to his employment contract made without his consent. He suggests that, by forcing him to do so under threat of dismissal, his employer infringed his rights.

[20] I don't see a case for these arguments.

[21] The General Division defined misconduct as follows:

> Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. The Claimant 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.
>
> There is misconduct if the Claimant 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.[9]

[22] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division also found that the Claimant's employer was free to establish a policy requiring all its employees to be vaccinated.[10]

– Employment contracts don't have to explicitly define misconduct

[23] The Claimant argues that nothing in his employment contract or collective agreement required him to get the COVID-19 vaccination However, case law says that is

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[9] See General Division decision, paragraphs 22 and 23, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *McKay-Eden v Her Majesty the Queen*, A-402-96.
[10] See General Division decision, paragraphs 8 and 9, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

not the issue. What matters is whether the employer has a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> I can decide issues under the Act only. I can't make any decisions about whether the Claimant has options under other laws.
>
> Issues about whether the Appellant was wrongfully dismissed, whether the employer's penalty was too severe, or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[11]

[24] This passage echoes a case called *Lemire*, in which the Federal Court of Appeal had this to say:

> However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal.[12]

[25] The court in *Lemire* went on to find that an employer was justified in finding that it was misconduct when one of their food delivery employees set up a side business selling cigarettes to customers. The court found that this was so even if the employer didn't have an explicit policy against such conduct.

[26] *Lemire* also tells us that any alleged misconduct must be relevant to a claimant's ability to carry out their employment duties. In other words, an employee's "misconduct" can't be just whatever that the employer deems to be unacceptable behaviour.

[27] If a claimant is expected to foresee that their conduct is likely to result in suspension or dismissal, then it should be possible for them, or any reasonable person, to understand why. In this case, the General Division identified a causal link between the Claimant's refusal to get vaccinated and his ability to perform his job:

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[11] See General Division decision, paragraphs 25 and 26, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v Lemire*, 2010 FCA.

> The Appellant's employer decided, in the context of a global pandemic, to follow public health recommendations to change the terms of employees' contracts to impose a vaccination policy. The employer's policy required its employees to be vaccinated against COVID-19.
>
> An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, the policy became a condition of the Appellant's employment.[13]

[28] I am satisfied that the General Division established a rational connection between the Claimant's alleged misconduct and his job duties. It established that the Claimant's non-compliance with the hospital's vaccination policy rendered him unable to fulfill the terms of his employment.

– *Bellevance* is relevant to the Claimant's case

[29] The Claimant criticizes the General Division for relying on a case called *Bellevance*, which he says involves facts that are entirely distinguishable from his own.[14] He argues that, unlike him, the claimant in *Bellevance* broke a pre-existing code of conduct that he agreed to when his employer hired him.

[30] I don't agree with this argument. *Bellavance* primarily stands for the idea that misconduct doesn't necessarily involve wrongful or malicious intent—it only requires the employee's disputed act or omission to be deliberate. It is true that the code of conduct in *Bellavance* was an explicit term of employment, whereas the vaccination policy in the Claimant's case was an implicit term. But that point of distinction is immaterial and does not make *Bellavance* any less applicable to this case.

– Recent Federal Court decisions give employers wide latitude to implement COVID-19 policies

[31] Recent decisions have reaffirmed *Lemire*'s approach to misconduct in the specific context of COVID-19 vaccination mandates. *Cecchetto*, like this case, involved

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[13] See General Division decision at paragraphs 43 and 44.
[14] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

a claimant's refusal to follow his employer's COVID-19 vaccination policy.[15] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions:

> Despite the Applicant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[16]

[32] The Federal Court agreed that, by making a deliberate choice not to get vaccinated, the claimant lost his job because of misconduct under the EI Act. The Court said that there were other ways under the legal system in which the claimant could advance his human rights claims.

[33] Earlier this month, the Federal Court issued *Milovac*, another case involving an EI claimant who was let go after refusing to get vaccinated. Again, the Court found the claimant's objections to his employer's vaccination policy irrelevant:

> The Court appreciates that Mr. Milovac strongly believes that the Employer's policy was an over-reaction to the COVID-19 pandemic, and unfairly applied to him given his previous heart attack and his outstanding performance as an employee. The Court also understands that he is strongly of the view that his concerns about the violation of his *Charter* rights and employment contract were not dealt with by any of the decision-makers. However, the alleged violation of the collective agreement was properly dealt with by way of a union grievance… [T]his Court has previously ruled that *Charter* concerns are not matters properly before this tribunal.[17]

[34] As in *Cecchetto* and *Milovac*, the only questions that matter here are whether the Claimant breached his employer's vaccination policy and, if so, whether that breach was

[15] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[16] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[17] See *Milovac v Canada (Attorney General)* 2023 FC 1120.

deliberate and foreseeably likely to result in his dismissal. In this case, the General Division had good reason to answer “yes” to both questions.

– KVP has limited relevance to the Claimant’s case

[35] The Claimant cites a case called *KVP*, which he says prevents an employer from unilaterally imposing any rule or policy unless it was reasonable, consistent with the collective agreement, and agreed to by the union.[18] Because this legal test was developed in the context of employment and labour law, I didn’t find it helpful in interpreting the EI Act.

– *Rizzo Shoes* takes a back seat when the law is relatively unambiguous

[36] Finally, the Claimant argues that, since misconduct is not defined by the EI Act, it should be given a “fair, large and liberal construction” in accordance with the Supreme Court of Canada’s instruction in a leading case called *Rizzo Shoes*.[19] I agree that, as remedial legislation, the EI Act must be interpreted generously where possible, but it is important to remember that *Rizzo Shoes* is predominantly a case about the principles of **statutory** interpretation. Although the EI Act itself is silent about what misconduct means, the Courts have filled the void by setting out a clear, detailed, multipronged test for the concept. As a member of an administrative tribunal, I am obliged to apply that test, even if it takes me to what the Claimant regards as an ungenerous result.

Conclusion

[37] For the above reasons, I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This appeal will not proceed.

Neil Nawaz
Member, Appeal Division

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[18] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd*., 1965 CanLII 1009 (ON LA).
[19] See *Rizzo v Rizzo Shoes Ltd. (Re)* 1998 CanLII 837 (SCC), [1998] 1 SCR 27.