Citation: *KZ v Canada Employment Insurance Commission*, 2023 SST 1286

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. Z.
Representative:	Steven Barker
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated June 21, 2023 (GE-23-695)

Tribunal member:	Pierre Lafontaine
Decision date:	September 19, 2023
File number:	AD-23-719

Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

Overview

[2] The Applicant (Claimant) was suspended and lost her job. The employer said the Claimant was suspended because she did not comply with the employer's COVID-19 vaccination policy (Policy). She was not granted an exemption. The employer said the Claimant was later dismissed for refusing to report back to work. The Claimant then applied for Employment Insurance (EI) regular benefits.

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

[4] The General Division found that the Claimant was suspended and dismissed from 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 suspend and dismiss her in these circumstances. The General Division concluded that the Claimant was suspended and dismissed from her job because of misconduct.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division refused to exercise its jurisdiction or made an error of law when it concluded that she was suspended and dismissed from her job because of misconduct.

[6] I must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

[7] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[8] Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

Analysis

[9] Section 58(1) of the *Department of Employment and Social Development Act* specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Claimant does not have to prove her case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before I can grant leave, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[12] In support of her application for leave to appeal, the Claimant submits the following grounds of appeal:

a) The General Division made an error of jurisdiction when it refused to address the terms of her collective agreement;

b) It was incorrect for the General Division to assert that it had no authority to consider the collective agreement – the very document setting out the Claimant's terms and conditions of employment;

c) It is well established that an employer's attempts to impose unilateral changes to the terms and conditions of an employee's contract have been accepted as "just cause" under section 29(c) (vii), (viii), ix) of the *Employment Insurance Act* (EI Act); the same reasoning should apply to the interpretation of misconduct;

d) Accepting the General Division's construction of its authority would be to create a situation in which an employee might be terminated from their employment due to a unilateral change of the working conditions and disentitled to regular EI benefits; Had they quit, due to the same unilateral change, they might be entitled to EI regular benefits;

e) The General Division erred when it disregarded the *AL* decision not because it was distinguishable on its facts but because it was an "outlier";

f) The *AL* decision was correctly decided and legally sound insofar as it reflected a genuine authority on behalf of the General Division to consider the terms and conditions of employment when deciding the question of misconduct;

g) The Claimant had no express or implied duty to follow the Policy, like the finding in the *AL* decision.

[13] The General Division had to decide whether the Claimant was suspended and dismissed from her job because of misconduct.[1] 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

[1] Section 29(c) of the *Employment Insurance Act* does not apply in the present case because the Claimant did not leave her job. In a voluntary leave case, the Appeal Division refused leave to appeal of a General Division decision that found that the employer's policy that imposed certain requirements on employees in order to protect the health and safety of its employees in their workplace during the exceptional circumstances created by the COVID-19 pandemic was not a significant change to the terms and conditions of the claimant's employment - *CK v Canada Employment Insurance Commission* 2022 SST 1012.

benefits because of misconduct under the EI Act, but that does not necessarily mean that they have done something "wrong" or "bad."[2]

[14] 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.

[15] 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 suspending and dismissing the Claimant in such a way that her suspension and dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension and dismissal.

[16] Based on the evidence, the General Division determined that the Claimant was suspended and lost her job 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. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her suspension and dismissal.

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

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

---

[2] 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."

[19] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[3] 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.[4]

[20] 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 British Columbia Public Health recommendations to implement its Policy to protect the health and safety of all its employees during the pandemic.[5]

[21] The question of whether the employer's Policy violated her collective agreement, or whether the 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.[6]

[22] In her application for leave to appeal, the Claimant relies heavily on the General Division decision, *AL*. However, said decision was overturned by a panel of three members of the Appeal Division.[7] The claimant *AL* argued that her collective agreement and employment contract did not contain an express or implied duty to be vaccinated against COVID-19.

[23] The members unanimously concluded that the General Division made two errors in *AL*. First, it misinterpreted the meaning of misconduct under the EI Act. Then, it went beyond its powers by deciding the merits of a dispute between an employer and an employee.

---

[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460. Refusing to report to work is also misconduct under the *Employment Insurance Act*.
[4] CUB 71744, CUB 74884.
[5] See GD3-50.
[6] 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.
[7] *Canada Employment Insurance Commission v AL*, 2023 SST 1032.

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

[25] Furthermore, the Federal Court of Canada has rendered a recent decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.

[26] The claimant *Cechetto* 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.[8]

[27] The Federal Court confirmed the Appeal Division's decision that, by law, this Tribunal is not permitted to address these questions. The Court agreed that by making a personal and deliberate choice not to follow the employer's vaccination policy, the claimant had breached his duties owed to his employer and had lost his job because of misconduct under the EI Act.[9] The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[28] The *Cechetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[10] These decisions all say that the claimants had a duty to follow the employer's vaccination policy and that it is not for this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

[29] The Federal Court found it reasonable for this Tribunal to conclude that the claimants had lost their employment because of their misconduct because they were

---

[8] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[9] The Court refers to *Bellavance*, see note 3.
[10] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134.

aware of their employer's vaccination policies and the consequences that would result from refusing to comply.

[30] The Federal Court reiterated that there are available remedies for a claimant to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Employment Insurance Program."[11]

[31] 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 suspended and dismissed from work.

[32] 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]

[33] 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 suspended and dismissed because of misconduct.

Conclusion

[34] After reviewing the appeal file and the General Division's decision as well as considering the Claimant's arguments in support of her request for leave to appeal, I have no choice but to find that the appeal has no reasonable chance of success. The Claimant has not set out a reason, which falls into the above-enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

---

[11] See also *Dubeau v Canada (Attorney General)*, 2019 FC 725: 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."

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

[35] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division