Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 435

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated April 7, 2023 (GE-22-3555)

Tribunal member:	Janet Lew
Type of hearing:	In person
Hearing date:	August 23, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	September 26, 2023
File number:	AD-23-421

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, C. L. (Claimant), an engineer, is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his employment because of misconduct. In other words, it found that he did something that led to his dismissal. He had not complied with his employer's COVID-19 vaccination policy.

[3] The General Division found that there was misconduct. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made a legal error. He denies that there was any misconduct because he says that he did not breach any duties that he owed to his employer under the terms of his employment agreement.

[5] The Claimant notes that his employment agreement did not require vaccination. He argues that, because his employer introduced a new policy that was not part of his employment contract, he did not have to comply with that new policy. And, if he did not have to comply with that new policy, then he says that there was no misconduct if he did not comply with it. The Claimant also notes that there was neither federal nor provincial legislation that required vaccination.

[6] The Claimant also argues that misconduct does not arise if his employer failed to accommodate him. He says that numerous options were available to his employer that would have allowed him to continue to work.

[7] As the Claimant denies that there was any misconduct, he asks the Appeal Division to find that he was entitled to receive Employment Insurance benefits.

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

Issues

[9] The issues in this appeal relate to whether the General Division misinterpreted what misconduct means:

i) Does misconduct arise if an employee does not comply with a new policy that does not form part of the employment contract?

ii) Does misconduct arise if an employer does not accommodate an employee?

Analysis

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

Did the General Division misinterpret what misconduct means?

[11] The Claimant argues that the General Division misinterpreted what misconduct means. He denies that there was any misconduct in his case. He was an outstanding employee who fulfilled all of the terms and conditions of his employment agreement.

– The Claimant says the General Division failed to review his employment contract

[12] The Claimant argues that for misconduct to arise, there has to be an action that would impair the performance of the duties owed to an employer. He argues that to prove misconduct, the Commission had to show that not complying with his employer's vaccination policy breached an express or implied duty of his employment contract.

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

[13] The Claimant argues that there was no term or condition of his employment contract that required vaccination. Hence, he denies that he could have breached an express or implied duty of his employment contract.[2]

[14] The Claimant argues that reviewing his employment contract was relevant to determining whether he breached any of his duties. So, he says the General Division should have reviewed his employment contract.

[15] The Claimant distinguishes his case from *Cecchetto v Canada (Attorney General)*.[3] Mr. Cecchetto had not complied with his employer's vaccination policy regarding vaccinations and testing. The vaccination policy did not form part of his employment contract.

[16] Ultimately, the Federal Court found that there was no reason to overturn the Appeal Division's decision in that case. So, Mr. Cecchetto was found to have committed misconduct.

[17] The Claimant argues that his case is different from the *Cecchetto* case because of how the vaccination policies were introduced. In *Cecchetto*, there was a provincial mandate, whereas in his own case, there was no provincial mandate or any law that required his employer to implement a vaccination policy.

– **The General Division's definition of misconduct**

[18] The *Employment Insurance Act* does not define what misconduct is. So, the General Division looked to various legal authorities, including the Federal Court of Appeal. The General Division cited the definition of misconduct that has emerged from the Court of Appeal.

---

[2] The General Division did not have a copy of the employment contract, but I accept that it did not require vaccination.
[3] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[19] The General Division defined what misconduct means for the purposes of the *Employment Insurance Act* as follows:

> [17] To be misconduct, the conduct has to be wilful. This means that the Appellant's conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted]
>
> [18] The Appellant 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 [*Employment Insurance Act*]. [Citation omitted]
>
> [19] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out the duties toward his employer and there was a real possibility of being dismissed or let go because of that. [Citation omitted]

[20] Under the *Employment Insurance Act*, misconduct does not necessarily involve doing something criminal, unethical, or immoral. As long as an employee does or fails to do something that represents a breach of a duty owed to their employer, and they are aware of the consequences that could result, that will be sufficient to be labelled as misconduct under the *Employment Insurance Act*.

[21] The General Division restated the definition of misconduct from the case law.

– **The Claimant says that the vaccination requirements were outside his employment contract**

[22] The Claimant argues that there was no misconduct because the vaccination policy fell outside the terms and conditions of his employment agreement. So, he denies that he could have breached any express or implied duties that arose out of the employment agreement. He says that he was able to fulfill all of his duties without having to undergo vaccination. He says the General Division should have decided this issue in his favour.

[23] The Claimant relies on a decision issued by the General Division, a case called *A.L.*[4] The General Division found that there was no misconduct because the employer

---

[4] *A.L. v Canada Employment Insurance Commission*, 2022 SST

had unilaterally imposed new conditions of employment when it introduced its vaccination policy.

[24] The Appeal Division has since overturned *A.L.* The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract. The Appeal Division also found that the General Division made legal errors, including declaring that an employer could not impose new conditions to the collective agreement and that there was no misconduct if there was no breach of the employment contract.[5]

[25] The Federal Court examined this issue in a recent case called *Kuk v Canada (Attorney General).*[6] The Federal Court issued this decision after the hearing in this matter.

[26] Mr. Kuk chose not to comply with his employer's vaccination policy. The General Division found that the Commission had proven misconduct. The Appeal Division found that the General Division had not made any reviewable errors.

[27] Mr. Kuk made an application for judicial review of the Appeal Division's decision. He argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated.

[28] 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.

---

[5] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).

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

. . .

> [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**.
>
> (My emphasis)

[29] The Federal Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Court found that there was misconduct because Mr. Kuk knowingly did not comply with his employer's vaccination policy, and knew what the consequences would be if he did not comply. The Federal Court dismissed Mr. Kuk's application for judicial review.

[30] In another case, called *Nelson*,[7] 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.

[31] 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. She 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.

[32] 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 …"[8]

---

[7] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[8] *Nelson*, at para 25.

[33] Similarly, in a case called *Nguyen*,[9] 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 did not form part of the employment agreement.

[34] In another case, called *Karelia*,[10] 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, otherwise there was misconduct.

[35] It is clear from these authorities that an employer's policy does not have to form part of the employment agreement for there to be misconduct. It is also clear that it is irrelevant whether federal or provincial mandates required the employer to implement a policy.

[36] As the courts have consistently stated, 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.

[37] Here, once the Claimant's employer introduced its vaccination policy, that became part of the Claimant's requirements of his employment—even if the Claimant was otherwise able to fulfil his usual duties otherwise. The employer required vaccination of its employees, so vaccination became an essential condition of his employment.

[38] As the Commission states, employers are responsible for managing the day-to-day operations of the workplace. They do not have to justify every policy designed for that purpose with specific legislation.[11]

---

[9] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[10] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[11] Commission's supplementary representations, September 8, 2023, at AD10, citing *Dubeau v Canada (Attorney General)* 2019 FC 725, *Canada (Attorney General) v McNamara*, 2007 FCA 107, *Canada (Attorney General) v Caul*, 2006 FCA 251, and *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[39] Hence, the Claimant was expected to comply with his employer's vaccination policy. The Claimant's voluntary decision not to comply with his employer's policy constituted misconduct for the purposes of the *Employment Insurance Act*.

[40] The General Division did not commit a legal error when it focused on the Claimant's actions and whether he should have foreseen that they would likely result in suspension and dismissal, to determine whether there was misconduct.

– The Claimant says there was no misconduct if his employer did not accommodate him

[41] The Claimant argues that misconduct does not arise if his employer failed to accommodate him. The Claimant notes that other employers in his province provided accommodations and options, whereas his employer did not.

[42] The Claimant could have performed his usual duties from home. He says his employer could have readily offered working from home as an alternative, as this would have enabled him to continue working. So, he questions how misconduct could have arisen simply by refusing to undergo vaccination when not being vaccinated would not have interfered with his usual duties.

[43] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,[12] an employer's lack of accommodations is not relevant to the misconduct issue.

[44] The General Division did not make a legal error when it determined that it could not consider whether the Claimant's employer should have made reasonable accommodations or arrangements for him.

– The Claimant denies that he was aware that he would face consequences

[45] The Claimant questions how he could have possibly known that he would face any consequences for disagreeing with his employer's vaccination policy. While he was

[12] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

aware of his employer's vaccination policy and that there could be consequences, he denies that he knew that his employer would follow through with those consequences.

[46] The Claimant also says there are numerous cases of employees who have received Employment Insurance benefits, although they did not get exemptions from their employer's vaccination policies and chose not to comply with the policies.

[47] For misconduct to arise, it is sufficient if a claimant was aware that their decision not to get vaccinated *might* result in dismissal. A policy does not have to state with any certainty that dismissal is imminent. The General Division did not make a legal error when it found that the Claimant was aware that his employer would put him on an unpaid leave and that he could be subject to dismissal after that if he did not comply with its vaccination policy. Additionally, its findings were supported by the evidence before it.

[48] The Claimant claims that his employer constructively dismissed him.[13] However, as the Federal court pointed out in *Kuk*, a constructive dismissal claim is an entirely separate matter from misconduct under the *Employment Insurance Act*. If the Claimant wishes to pursue a constructive dismissal claim, his options for any recourse lie elsewhere.[14]

Conclusion

[49] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal. The General Division properly determined that its focus was on whether the Claimant's action or inaction constituted misconduct under the *Employment Insurance Act*.

Janet Lew
Member, Appeal Division

---

[13] Claimant's submissions, at AD9.
[14] *Kuk*, at para 35.