Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 1295

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 28, 2022 (GE-22-2222)

Tribunal member:	Janet Lew
Decision date:	September 27, 2023
File number:	AD-23-121

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, J. M. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Respondent, Canada Employment Insurance Commission (Commission), proved that the Claimant lost her job because of misconduct. In other words, it found that she had done something that caused her to be dismissed. The General Division found that the Claimant had not complied with her employer's mandatory vaccination policy.

[4] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant denies any misconduct. She argues that the General Division member made legal and factual errors. She argues that her contract of employment agreement did not require vaccination and that her employer was not allowed to unilaterally impose vaccination as a condition of employment without securing her consent. She says that she fulfilled all of the duties she owed to her employer under her contract of employment, so says misconduct did not arise.

[6] The Claimant agrees that for misconduct to arise, the conduct has to be wilful. But she argues that her conduct was not wilful because her faith prevents her from getting vaccinated. She further argues that the General Division should have recognized that she was entitled to a religious accommodation.

[7] The Claimant has filed copies of several labour arbitration cases and argues that the Social Security Tribunal should be following those cases. Workers were successful with their grievances against their employers.

[8] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] In other words, there has to be an arguable case. If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[9] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issues

[10] The issues are as follows:

(a) Is there an arguable case that the General Division misinterpreted what misconduct means?

(b) Is there an arguable case that the General Division failed to consider whether the Claimant was entitled to a religious accommodation?

I am not giving the Claimant permission to appeal

[11] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[12] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."
[3] See section 58(1) of the DESD Act.

Is there an arguable case that the General Division misinterpreted what misconduct means?

[13] The Claimant denies that she committed any misconduct. She says that the vaccination policy fell outside her employment contract. The Claimant argues that for misconduct to arise, there has to be a breach of a duty arising from the employment contract.

[14] The Claimant also argues that for misconduct to arise, the conduct has to be wilful. The Claimant denies that her conduct was wilful because she says that her religious faith prevented her from getting vaccinated.

- **Vaccination was not required under the Claimant's employment contract**

[15] The Claimant relies on *A.L. v Canada Employment Insurance Commission*,[4] a decision of the General Division. In *A.L.*, the General Division found that there was no misconduct because the employer had unilaterally imposed new conditions of employment when it introduced its vaccination policy. The General Division also found that A.L. had a right to refuse vaccination. So, if she had this right, the General Division questioned how that could be characterized as having done something "wrong" that it could support a finding of misconduct.

[16] The Appeal Division has since overturned the General Division's decision in *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 is no breach of the employment contract.[5]

[17] It has now become well-established law that an employer's policy does not have to form part of the employment contract for there to be misconduct:

[4] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[5] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).

- In *Kuk*,[6] Mr. Kuk chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. 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.

- In *Nelson*,[7] the appellant lost her job because of misconduct. She was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal found there was misconduct. It was irrelevant that the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *Nguyen*,[8] 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.

- In another case, called *Karelia*,[9] 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.

[18] In addition to *Kuk*, the Federal Court has issued two other decisions that address the misconduct issue in the context of vaccination policies. In *Cecchetto*[10] and in

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[6] *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[7] *Nelson v Canada (Attorney General)*, 2019 FC 222.
[8] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[9] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[10] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

Milovac,[11] vaccination was not part of the party's collective agreement or contract of employment. The Federal Court found that, even so, there was misconduct.

[19] So, contrary to what the Claimant suggests, the duties that arose out of her employer's vaccination policy did not have to be part of her employment contract.

- **The Claimant denies that her conduct was wilful**

[20] The Claimant denies that there was any misconduct because she says her conduct could not have been wilful if she was guided by her religious faith. She says that she did not have any choice about getting vaccinated because of her religious beliefs.

[21] The General Division found that the evidence did not support these claims. The General Division noted the pastor's letter that states the Claimant's religion did not prohibit the use of most vaccines and that it generally encouraged them to safeguard personal and public health.[12]

[22] Given the facts, the General Division found it unnecessary to address the legal issue about whether an employee's conduct was wilful if they felt bound by their religious beliefs. The General Division made a factual finding. The Claimant disagrees with the General Division member's conclusions on the facts of the case, but this is not a ground or reason that gives the Appeal Division any basis to reassess the evidence and come to a different conclusion.

- **Labour grievances**

[23] The Claimant relies on several labour arbitration cases, including *Public Health Sudbury & Districts v Ontario Nurses' Association*.[13] The Claimant says that the rest of the cases[14] that she is relying on establish that employers do not have just cause to terminate employees who have not complied with their employer's vaccination policies.

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[11] *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[12] General Division decision, at para 26.
[13] *Public Health Sudbury & Districts v Ontario Nurses' Association*, 2022 CanLII 48440 (ON LA).
[14] See AD1C.

More importantly, she says that these cases show that employers have a duty to accommodate employees with religious beliefs.

[24] These cases did not address the issue of misconduct under the *Employment Insurance Act*. They dealt with other issues, such as whether there was just cause for termination, whether employees were entitled to compensation for an unjust termination, and whether the employer breached its duty to accommodate the employees' requests for a religious exemption. These issues are not germane to the issues that were before the General Division and are of no consequence to the misconduct question.

[25] If anything, these labour arbitration cases illustrate the fact that the Claimant has options outside the Social Security Tribunal to pursue remedies for her dismissal or for her employer's lack of religious accommodation.

[26] But, as it stands, neither the General Division nor the Appeal Division have any authority to address the issue of whether the Claimant had been wrongfully or constructively dismissed or denied an appropriate accommodation. This would be done in a different forum.

- **Summary**

[27] 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.

[28] I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means. When the General Division defined misconduct, it was simply restating the law that the courts have been setting out.

Is there an arguable case that the General Division failed to consider whether the Claimant was entitled to a religious accommodation?

[29] The Claimant argues that misconduct does not arise if her employer failed to accommodate her.

[30] Given the nature of her position, the Claimant could have worked from home. She says that her employer could have readily offered working from home as an alternative, as this would have let her continue working. So, she questions how misconduct could have arisen simply by refusing to undergo vaccination when not being vaccinated would not have interfered with her usual duties.

[31] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,[15] an employer's lack of accommodations is not relevant to the misconduct issue.

[32] 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 her.

Conclusion

[33] I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

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