Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 1292

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 6, 2023 (GE-22-2627)

Tribunal member:	Janet Lew
Decision date:	September 26, 2023
File number:	AD-23-119

Decision

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

Overview

[2] The Applicant, A. B. (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, proved that the Claimant had been suspended from her job because of misconduct.[1] In other words, it found that she had done something that caused her to be suspended. The General Division found that the Claimant had not followed her employer's mandatory vaccination policy.

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

[5] The Claimant denies any misconduct. She argues that the General Division member made procedural, legal, and factual errors. She argues, for instance, that the General Division failed to consider that her collective agreement did not require vaccination. She says that she fulfilled all of the duties she owed to her employer under the collective agreement, so says misconduct did not arise.

[6] The Claimant also argues that the General Division failed to consider that the policy was unreasonable and therefore, she says she should not have been expected to have had to follow it.

[1] The Claimant's employer administratively dismissed the Claimant from her employment on November 25, 2022 (see GD 6-3). The employer had asked the Claimant to attest as to her vaccination status by November 16, 2022; otherwise, it would consider her to have abandoned her employment. The employer advised that it would administratively terminate the employment relationship (see GD 6-2).

[7] The Claimant also argues that the evidence does not support the General Division's findings that she should have known the consequences for not following her employer's vaccination policy.

[8] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.[3]

[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 made a procedural error by failing to contact the Claimant's manager?

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

(c) Is there an arguable case that the General Division failed to consider the reasonableness of the employer's vaccination policy?

(d) Is there an arguable case that the General Division made findings that are not supported by the evidence?

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

[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] 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."

Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[4]

[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.

Is there an arguable case that the General Division made a procedural error by failing to contact the Claimant's manager?

[13] The Claimant argues that the General Division should have contacted her manager at some point during the appeals process.

[14] I am not satisfied that the Claimant has an arguable case on this point. The General Division is an independent and impartial decision-maker. It does not contact the parties or any witnesses for the purposes of collecting or clarifying any of the evidence. That role is left for the parties.

[15] If there was any evidence that the Claimant needed to get from her manager, she should have contacted her manager. Even if there were It would have been highly inappropriate for the General Division to contact any witnesses.

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

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

[17] The Claimant relies on *A.L. v Canada Employment Insurance Commission*,[5] 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

[4] See section 58(1) of the DESD Act.
[5] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

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.

[18] 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.[6]

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

- In *Kuk*,[7] 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*,[8] 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

[6] A.L. filed an application for judicial review of the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23), on August 30, 2023.
[7] *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[8] *Nelson v Canada (Attorney General)*, 2019 FCA 222.

the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *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.

- 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—even if they were new—otherwise there was misconduct.

[20] In addition to *Kuk*, the Courts have issued two other decisions that address the misconduct issue in the context of vaccination policies. In *Cecchetto*[11] and in *Milovac*,[12] vaccination was not part of the party's collective agreement or contract of employment. The Court found that, even so, there was misconduct.

[21] 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.

[22] 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.[13]

[23] As for the point that the Claimant did not do anything "wrong" and that, not having done anything wrong, her conduct should not qualify as misconduct for the

[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] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[12] *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[13] *Kuk* and also *Cecchetto*.

purposes of the *Employment Insurance Act*, the Courts have consistently said there does not have to be wrongful intent.[14]

[24] I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means. When the General Division defined misconduct,[15] 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 the reasonableness of the employer's vaccination policy?

[25] The Claimant suggests that the General Division failed to consider whether her employer's vaccination was reasonable. She says that if it had considered this issue, it would have decided that the policy was unreasonable and that she did not have to comply with it.

[26] However, in both *Kuk* and in *Cecchetto*, the Federal Court said that it was beyond the jurisdiction of the General Division and the Appeal Division to assess an employer's policies. The Court said that their role is limited. The Court said that, when considering misconduct under the *Employment Insurance Act*, their role is to focus on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.

[27] So, the General Division did not have any authority to consider the reasonableness of the employer's vaccination policy. I am not satisfied that the Claimant has an arguable case that the General Division failed to decide whether her employer's vaccination policy was reasonable.

Is there an arguable case that the General Division made findings that are not supported by the evidence?

[28] The Claimant argues that the General Division made findings that are not supported by the evidence. She says that the evidence shows that her employer failed to provide clear communications about its vaccination requirements and any

[14] See, for instance, *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[15] General Division decision, at paras 12 and 13.

consequences for not following its policy. She also says the evidence shows that there was "mass confusion" about deadlines and whether there would be any consequences for not attesting as to her vaccination status.[16]

[29] The General Division addressed the Claimant's arguments. The General Division noted the Claimant's evidence, along with the documents on file.[17] The Claimant stated that her employer updated its policy twice, on October 13, 2021 and two months later, on December 6, 2021.[18]

[30] There were different deadlines or dates: One deadline for being fully vaccinated, another for attestation, and yet another when consequences would start.

[31] Initially, employees were required to be fully vaccinated by October 1, 2021 with an attestation deadline of October 15, 2021. The updated policy of October 13, 2021 extended the deadline to be fully vaccinated to November 1, 2021.[19] The attestation deadline did not change, but employees were required to update any changes. After December 31, 2021, anyone who remained unvaccinated or did not have an approved exemption, would be placed on an unpaid leave for being in contravention of the policy.[20]

[32] In its most recent update on December 6, 2021, the deadline for compliance with the employers' vaccination policy remained unchanged. It was still November 1, 2021.[21] After January 10, 2022, anyone who remained unvaccinated or did not have an approved exemption, would be placed on an unpaid leave for being in contravention of the policy.[22]

---

[16] Application to the Appeal Division - Employment Insurance, at AD 1-8.
[17] The Claimant did not keep copies of any letters or memoranda that her employer posted or sent to her. She was able to get copies from her co-workers. The General Division accepted that the letters were copies of letters that the Claimant had also received from her employer.
[18] Notice of Appeal – Employment Insurance - General Division, at GD 2-10.
[19] Employer's COVID-19 Safer Workplaces Policy issued October 13, 2021, at GD 2-16, section 5.1.
[20] Employer's COVID-19 Safer Workplaces Policy issued October 13, 2021, at GD 2-17, section 5.3.
[21] Employer's updated policy was issued on December 6, 2021, at GD 2-14 and 3-29.
[22] Employer's updated policy was issued on December 6, 2021, at GD 2-14 and 3-29.

[33] A letter addressed to the Claimant's co-worker indicated that all employees had to be vaccinated by no later than December 31, 2021.[23] The employer would place that employee on an unpaid leave of absence on January 10, 2022, until they met the requirements under the policy.

[34] An update to the policy dated January 4, 2022, indicated that employees who had attested that they were not fully vaccinated would be on an unpaid leave of absence effective January 10, 2022.[24]

[35] Yet, the evidence in the hearing file shows that the Claimant wished to protect her privacy regarding her medial information. She did not wish to share her medical information with anyone.[25] So, the matter of any confusion she might have had over deadlines for getting fully vaccinated and attesting as to her status was irrelevant in the circumstances. She was not going to meet the deadlines because she did not agree with the policy. So, it did not matter what the deadlines were.

[36] As for the Claimant's denials that she was unaware that she would face any consequences, the General Division found that the evidence showed that the Claimant should have known that she could be suspended as of January 10, 2022.[26] The General Division pointed to the evidence that supported its findings:

- Letter dated December 6, 2021,
- Letter dated December 10, 2021, and
- Employee information bulletin dated January 4, 2022.[27]

[23] Employer's letter dated December 10, 2021, at GD 3-29.
[24] Employee Information Bulletin dated January 4, 2022, at GD 2-21.
[25] Supplementary Record of Claim dated May 13, 2022, at GD 3-24; Request for Reconsideration, at GD 3-25, and Supplementary Record of Claim dated July 20, 2022, at GD 3-33; and Notice of Appeal – Employment Insurance - General Division, at GD 2-10.
[26] General Division decision, at para 40.
[27] General Division decision, at para 34. The General Division pointed to documents at pages GD 3-29, GD 2-3, and GD 3-30.

[37] Each of these documents stated that employees who were not fully vaccinated or attested that they were not fully vaccinated would be placed on an unpaid leave of absence as of January 10, 2022.

[38] There were no other communications from the employer between December 6, 2021 and January 4, 2022, to suggest that either there would be no consequences or other consequences if an employee remained unvaccinated by January 10, 2022. By this point, there was nothing that could have led the Claimant to believe that she would not face any consequences.

[39] The General Division's findings were consistent with the evidence before it. For that reason, I am not satisfied that the Claimant has an arguable case on this point.

Conclusion

[40] 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