Citation: *KZ v Canada Employment Insurance Commission*, 2023 SST 1360

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. Z.
Respondent:	Canada Employment Insurance Commission
Representative:	A. Fricker

Decision under appeal:	General Division decision dated May 19, 2023 (GE-22-2735)

Tribunal member:	Melanie Petrunia
Type of hearing:	In Writing
Decision date:	October 9, 2023
File number:	AD-23-625

Decision

[1] The appeal is dismissed. The General Division did not make any reviewable errors.

Overview

[2] The Appellant, K. Z. (Claimant), was suspended from her job. Her employer implemented a COVID-19 vaccination policy that required employees to disclose their vaccination status. The Claimant did not tell the employer whether she was vaccinated and the employer suspended her.

[3] The Claimant applied for employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was suspended from her job due to her own misconduct and could not be paid benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Commission had proven that the reason for the Claimant's suspension is considered misconduct under the *Employment Insurance Act* (EI Act).

[5] The Claimant is now appealing the General Division decision. She argues that the General Division made errors of law and based its decision on an important factual error.

[6] I am dismissing the Claimant's appeal. The General Division did not make any reviewable errors in its decision. The Claimant was suspended due to misconduct and cannot be paid EI benefits.

Issues

[7] The issues in this appeal are:

a) Did the General Division make an error of law by failing to apply the proper test for misconduct?

b) Did the General Division make an error of law by failing to consider whether the Claimant was discriminated against?

c) Did the General Division base its decision on an important factual error by failing to consider that the Claimant's collective agreement and employment contract did not require vaccination?

Analysis

[8] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[1]

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

[1] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division did not make any reviewable errors

– The General Division decision

[9] The General Division considered the reasons for the Claimant's suspension. It noted that the employer sent the Claimant an email indicating that she had to attest to her vaccination status by October 30, 2021 or she would be suspended.[2]

[10] The Claimant replied to her employer that she would not provide her personal health information. The Claimant was suspended on November 15, 2021.[3] The General Division found that she was suspended for non-compliance with the policy.[4]

[11] The General Division considered whether this reason for the Claimant's suspension is considered misconduct according to the EI Act. It set out the legal test for misconduct as established by case law from the Federal Court and the Federal Court of Appeal.[5]

[12] The General Division then applied the legal test, as established in the case law, to the Claimant's circumstances. It found that the Commission had proven that the Claimant was suspended due to misconduct for the following reasons:

- The employer had a policy requiring employees to attest to their vaccination status by certain deadlines.
- The Claimant was aware of the policy.
- The Claimant knew the consequences of not complying, specifically that she would be suspended if she did not comply.

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[2] General Division decision at para 12.
[3] General Division decision at para 14.
[4] General Division decision at para 10.
[5] General Division decision at paras 18 to 25.

- The Claimant intentionally did not provide her vaccination status as required by the policy and was suspended.[6]

– The General Division did not make any errors of law

[13] The Claimant argues that the General Division made an error of law by not properly applying the legal test for misconduct. Specifically, the Claimant says that misconduct requires that there be a breach of an express or implied duty arising out of an employment contract. She argues that the General Division made no mention of this aspect of the test for misconduct. [7]

[14] The Claimant argues that she has a legal right to ensure that her medical history is confidential, and her privacy protected. She says that she was just exercising her legal rights and that it is the employer that committed misconduct.[8]

[15] The Claimant also argues that the General Division erred by failing to consider that her employer's treatment of her was discriminatory. She says that the law protects her from discrimination and her employer should not be permitted to make her employment conditional based on discriminatory criteria.[9]

[16] I find that the General Division did not make an error of law by failing to apply the proper test for misconduct. The General Division set out the test for misconduct as established by case law. It did not refer to the case relied on by the Claimant, but it set out the same principle from another Federal Court of Appeal decision.

[17] The General Division stated that there will be misconduct if a claimant knew or should have known that her conduct could get in the way of carrying out her duties to her employer and there was a real possibility of being suspended.[10]

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[6] General Division decision at paras 36 and 37.
[7] AD1-3
[8] AD5-2
[9] AD5-2
[10] General Division decision at para 19, referencing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[18] The General Division stated that it cannot consider whether the employer was right to create, implement and enforce a policy.[11] It found that the vaccination policy became an express condition of the Claimant's employment once it was implemented.[12]

[19] The General Division properly relied on the general principles from these cases that are relevant to determining whether an employee is dismissed or suspended due to misconduct.

[20] The General Division considered and addressed the arguments that the Claimant is making in her appeal concerning the employer violating her rights and discriminating against her. It explained, with reference to binding case law, why it did not agree with the Claimant.[13] I find that these arguments do not amount to any errors by the General Division.

[21] The General Division discussed a recent decision of the Federal Court, *Cecchetto v. Canada (Attorney General),* in its reasons. This decision considered the issue of misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.[14] The Court agreed that an employee who made a deliberate decision not to follow's his employer's vaccination policy had lost his job due to misconduct.[15]

[22] The claimant in *Cecchetto* argued that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct and that it was not proven that the vaccine was safe and efficient. The claimant felt discriminated against because of his personal medical choice. He argued that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.[16]

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[11] General Division decision at para 52.
[12] General Division decision at para 62.
[13] General Division decision at paras 28 and 35.
[14] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[15] See *Cecchetto* at para 32.
[16] See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

[23] The Court confirmed that these are not issues that the Tribunal is permitted, by law, to address. It confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.[17] The Court agreed that an employee who made a deliberate decision not to follow's his employer's vaccination policy had lost his job due to misconduct.

– **The General Division did not base its decision on any factual errors**

[24] The Claimant argues that the General Division failed to consider that her employment contract and collective bargaining agreement do not mention mandatory vaccination or attestation to vaccination. She says that her employer cannot introduce policies that conflict with her employment contract.[18]

[25] The General Division did not err in fact or law by failing to consider the legality of the employer's policy. The Federal Court of Appeal has said that the question of whether an employer breached a collective agreement is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and these issues can be dealt with in other forums.[19]

[26] The Federal Court issued another recent decision, *Kuk v Canada (Attorney General),* about whether misconduct can arise in factual circumstances similar to those of the Claimant.[20] Mr. Kuk chose not to comply with his employer's vaccination policy, which was not set out in his employment agreement.

[27] The General Divis found that the Commission had proven misconduct. The Appeal Division found that the General Division had not made any reviewable errors. 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.

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[17] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.
[18] AD5-2
[19] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[20] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[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.
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> […]
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> [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.

[29] The Federal Court found that, for misconduct to arise, it was unnecessary that there was a breach of the employment contract. Misconduct could arise even if there was a breach of a policy that did not form part of the original employment contract.

[30] The Claimant's employer implemented a policy which provided for suspension for non-compliance. The policy became a condition of her employment. When the Claimant chose not to comply, her conduct interfered with her ability to perform her job because she would not be able to continue working.

[31] The Claimant has not established that the General Division made any reviewable errors in its decision.

Conclusion

[32] The General Division properly cited and applied the law concerning misconduct. It supported its findings with evidence and explained the reasons for its decision. It did

not make any reviewable errors when it determined that the Claimant was suspended because of misconduct.

[33] The appeal is dismissed.

Melanie Petrunia
Member, Appeal Division