



Citation: *CK v Canada Employment Insurance Commission*, 2023 SST 1359

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. K.

Respondent: Canada Employment Insurance Commission
Representative: Angèle Fricker

Decision under appeal: General Division decision dated May 12, 2023
(GE-23-606)

Tribunal member: Melanie Petrunia

Type of hearing: In person

Hearing date: September 12, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: October 9, 2023

File number: AD-23-616

Decision

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

Overview

[2] The Appellant, C. K. (Claimant) was suspended from her job because she did not comply with her employer's vaccination policy. She applied for employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the reason for the Claimant's suspension amounted to misconduct, and she was disentitled from receiving benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division found that the Commission had proven that the Claimant was suspended due to her misconduct. It found that she was disqualified from receiving benefits and dismissed her appeal.

[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 acknowledge the government's violation of the Nuremberg Code?

- b) Did the General Division err by failing to properly spell Queen Romana Didulo's name in the decision or follow her royal decrees?
- c) Did the General Division base its decision on an important factual error by not considering the Claimant's doctor's note and the fact that she was on sick leave?

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.

The General Division did not make any reviewable errors

– The General Division decision

[9] The Claimant's employer introduced a COVID-19 vaccination policy in October 2021, requiring employees to be fully vaccinated by December 17, 2021.²

[10] The Claimant applied for employment insurance sickness benefits. In her application, she said that her last day worked was December 3, 2021 and that she stopped working due to illness.³ The Claimant's record of employment showed that the

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).

² GD3-18

³ GD3-3 to GD3-13

last day that she was paid for was December 16, 2021 and that she was on a leave of absence.⁴

[11] The Claimant clarified that she was put on a leave of absence while she was off on sick leave. Her employer told her that she was being placed on a leave of absence because she did not comply with the vaccination policy.⁵

[12] The Commission initially decided that the Claimant was not entitled to benefits because she voluntarily left her job without just cause.⁶ On reconsideration, it changed its decision and decided that she was disentitled because she was suspended due to her own misconduct.⁷

[13] The Claimant appealed this decision to the General Division. The General Division had to decide why the Claimant stopped working and whether this reason amounted to misconduct under the law.

[14] The General Division decided that the reason that the Claimant was suspended was because she didn't comply with her employer's vaccination policy.⁸ It found that the Commission had proven that this reason amounted to misconduct under the EI Act. It based its decision on the following:

- The Claimant was aware of the policy requiring all employees to be fully vaccinated by December 17, 2021.⁹
- The Claimant was aware of the consequences of not complying with the policy.¹⁰

⁴ GD3-14

⁵ GD3-16

⁶ GD3-19

⁷ GD3-27

⁸ General Division decision at para 9.

⁹ General Division decision at para 28.

¹⁰ General Division decision at para 37.

- The Claimant did not apply for an exemption to the requirement to be vaccinated.¹¹
- The Claimant made a wilful decision not to comply with the policy.¹²

[15] The General Division also acknowledged that the Claimant made additional arguments concerning the following:

- The vaccine policy was not legal because it violated her collective agreement;¹³
- Her concerns regarding the safety of the vaccine were never addressed by her employer;¹⁴
- Her employer provided other employees with laptops so they could work from home, but not unvaccinated employees,¹⁵ and
- that the Claimant is a sovereign being, not subject to the laws of Canada.¹⁶

[16] The General Division found that it was not within its jurisdiction to decide whether the employer's policy violated the collective agreement or was mandated by legislation.¹⁷ It cited a recent decision from the Federal Court which confirmed that the Tribunal does not have the jurisdiction to make decisions about bodily autonomy or the safety and efficacy of the vaccine.¹⁸

¹¹ General Division decision at para 28.

¹² General Division decision at para 70.

¹³ General Division decision at para 46.

¹⁴ General Division decision at para 42.

¹⁵ General Division decision at para 44.

¹⁶ General Division decision at para 41.

¹⁷ General Division decision at para 49.

¹⁸ General Division decision at para 57.

[17] The General Division rejected the Claimant's arguments that she is not subject to the laws of Canada. It found that it is required to interpret and apply the Employment Insurance Act and would not consider Queen Romana Didulo's Royal Decrees.¹⁹

[18] The Claimant was granted leave to appeal on the basis that the General Division may have made an error of law by referring to the Claimant being disqualified, rather than disentitled to benefits.

– **The General Division did not make any errors of law**

[19] The General Division did refer to the Claimant as being disqualified from receiving benefits; however the issue was a disentitlement, not a disqualification.

[20] The Commission argues, and I agree, that the General Division properly referred to a disentitlement elsewhere in the decision and recognized that it was a suspension, and not a termination, at issue. I find that the reference to disqualification was a clerical error and not a legal error on the part of the General Division.

[21] The Claimant argues that the General Division failed to consider that government actions have violated the Nuremburg Code. She says that the vaccine is a bioweapon and refers to an incident of a doctor being put to death in Malaysia under the Nuremburg Code. The Claimant says that this set a precedent.²⁰

[22] The General Division properly recognized that its job is to apply the Employment Insurance Act and determine whether the Claimant's actions constituted misconduct. It referenced case law in support of its finding that it does not have the jurisdiction to consider questions about the legality or efficacy of the vaccine policy.

[23] The General Division did not make an error of law by failing to consider and apply the Nuremburg Code.

¹⁹ General Division decision at paras 10 to 13.

²⁰ ADN6-2

[24] The Claimant also argues that the General Division erred in law by failing to follow Queen Romana Didulo's Royal Decrees. She also points to the General Division misspelling this individual's name in its decision.²¹

[25] As discussed above, the Claimant properly set out its jurisdiction and what issues it was required to decide. The General Division did not err by not following the decrees that the Claimant argued were applicable. The General Division properly applied the law.

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

[26] The Claimant argues that the General Division failed to consider that she was on sick leave when she was suspended. The Claimant had provided two doctor's notes, one indicating that she could not work due to illness from December 6 to 17, 2021²² and the other dated December 14, 2021, extending the leave period to January 7, 2022.²³

[27] The General Division did not refer to these notes in its decision. However, it acknowledged that the Claimant had been on a leave of absence before she was suspended.

[28] The General Division had to look at the reasons for the Claimant's suspension and determine whether there had been misconduct. It was not required to look at the actions of the employer in suspending the Claimant while she was sick. The Federal Court of Appeal has said that it is not the employer's conduct which is in issue in a misconduct analysis.²⁴

[29] The General Division accurately set out and applied the key principles established in case law from the Federal Court and the Federal Court of Appeal.²⁵ The courts have said that misconduct is conduct that is willful, which means that the conduct

²¹ ADN1-2

²² GD3-23

²³ GD3-24

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁵ General Division decision at paras 14-16.

was conscious, deliberate or intentional.²⁶ It also includes conduct that is so reckless that it is almost willful. It is not necessary that a claimant have a wrongful intent.²⁷

[30] The Courts have also said that there is misconduct when a claimant knew or should have known that the conduct could get in the way of carrying out their duty to their employer and dismissal was a real possibility.²⁸ The question is not whether the suspension or dismissal was justified in a labour law context, but whether the claimant could foresee that they would be suspended or dismissed.²⁹

[31] A recent decision from the Federal Court, *Cecchetto v. Canada (Attorney General)*, considered the issue of misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.³⁰

[32] 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.³¹

[33] 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.³² The Court agreed that an employee who made a deliberate decision not to follow his employer's vaccination policy had lost his job due to misconduct.

²⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁹ See *Lemire* at para 15 and *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at paragraph 2.

³⁰ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

³¹ See *Cecchetto* at paragraph 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

³² See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

[34] The General Division explained why it found that the Claimant's conduct was wilful and why it amounted to misconduct. The General Division cited the definition of misconduct from several Federal Court of Appeal cases. It applied the law to the facts. Its findings were consistent with the law and based on the evidence before it. The General Division did not overlook any relevant evidence.

[35] The Claimant has not identified any reviewable errors by the General Division.

Conclusion

[36] 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.

[37] The appeal is dismissed.

Melanie Petrunia
Member, Appeal Division