Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 903

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. P.
Respondent:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts

Decision under appeal:	General Division decision dated April 5, 2023 (GE-22-2076)

Tribunal member:	Janet Lew
Type of hearing:	In person
Hearing date:	August 22, 2023
Hearing participants:	Appellant Respondent's representative
~~**Decision date:**~~	~~September 26, 2023~~
CORRIGENDUM DATE:	October 5, 2023
File number:	AD-23-397

Decision

[1] The appeal is ~~dismissed.~~ allowed in part.

Overview

[2] The Appellant, J. P. (Claimant), a radiation technologist with provincial health services, 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 both factual and legal errors. He says the General Division made a mistake when it found that he lost his employment. His employer placed him on a leave of absence but did not dismiss him.

[5] For legal errors, the Claimant denies that there was any misconduct. For one, his employer never described his actions as misconduct. And two, his employment agreement did not require vaccination. His employer unilaterally introduced a vaccination policy to which he did not consent. So, he says that there is no misconduct if he did not fully comply with a new policy with which he did not agree.

[6] 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.

[7] The Commission agrees that the General Division made a factual error. However, the Commission argues that, despite the error, the Claimant's conduct still amounts to misconduct. The Commission asks the Appeal Division to correct the General Division's factual finding that he was dismissed from his employment.

[8] The Commission asks the Appeal Division to find that the Claimant had been suspended from his employment, for the purposes of the *Employment Insurance Act*, and to find that he is disentitled from receiving Employment Insurance benefits.

Issues

[9] The issues in this appeal are as follows:

a) Did the General Division make any factual errors?

b) Did the General Division misinterpret what misconduct means?

c) If the answer is "yes" to any of the above, how should the error be fixed?

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 make any factual errors?

[11] The Claimant argues that the General Division made factual errors upon which it based its decision.

– The Claimant did not lose his employment

[12] The parties agree that the General Division made a factual error about whether the Claimant lost his employment.

[13] The evidence did not support the General Division's finding. The General Division found that the Claimant lost his employment and that this meant that he was disqualified from receiving Employment Insurance benefits. All of the evidence on file shows that the Claimant's employer placed him on a leave of absence. For instance, the record of employment lists "leave of absence."[2]

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[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] Records of Employment dated December 29, 2021, and January 17, 2022, at GD 3-20 and GD3-22.

[14] The General Division made an error. As the Claimant's employer did not dismiss him from his employment, this meant that he was not subject to a disqualification from receiving Employment Insurance benefits.

[15] However, if he had been placed on a leave of absence, this still involves determining whether the leave of absence was due to misconduct. If so, this would mean a disentitlement to Employment Insurance benefits. I will address the issue relating to the Claimant's leave of absence below.

– **The Claimant received one dose of the vaccine**

[16] The Claimant also argues that the General Division made a factual error about whether he had been vaccinated. He points to paragraph 5 of the decision. There, the General Division wrote:

> The Appellant's employer says that he was let go because he went against the vaccination policy: he didn't get vaccinated.

[17] Paragraph 5 does not actually represent the General Division's actual findings as to whether the Claimant was vaccinated at all. It was restating what it understood was the employer's position.

[18] Indeed, the General Division noted the Claimant's evidence that he had received one dose but, due to an adverse reaction and his own medical condition, decided against taking a second dose. The Claimant felt that getting a second dose put his life at risk. The General Division was aware that the Claimant had received one dose.[3] So, it did not make an error on this point.

Did the General Division misinterpret what misconduct means?

[19] The Claimant argues that the General Division misinterpreted what misconduct means. He denies that there was any misconduct in his case, even if his employer had placed him on a leave of absence.

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[3] General Division decision at paras 18, 29, and 31.

[20] He was an outstanding employee. His employer praised his performance. He willingly and tirelessly worked on the frontlines, covered the shifts of sick co-workers, never took a sick and day and followed all protective personal equipment recommendations to protect himself and patients.[4]

– The Claimant says there was no misconduct because the vaccination policy did not form part of his employment contract

[21] The Claimant denies that there was misconduct even if his employer had placed him on a leave of absence. He denies that there was misconduct because his employer's vaccination policy did not form part of his employment contract. The Claimant argues that there was no term or condition of his employment contract that required vaccination.

[22] The Claimant relies on *A.L. v Canada Employment Insurance Commission*,[5] a decision by the General Division. *A.L.* involved a claimant who did not get vaccinated because of her concerns over vaccination. The General Division found that there was no misconduct in *A.L.* because there was no breach of a duty arising out of the employment agreement.

[23] The Appeal Division has since overturned the General Division's decision in *A.L.*[6] 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.

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[4] Claimant's submissions, at AD 1-8.

[5] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

[6] A.L. filed an application for judicial review with the Federal Court of Appeal, under file number A-217-23, on August 30, 2023.

[24] More importantly, the Federal Court recently issued a decision about whether misconduct can arise in factual circumstances similar to those of the Claimant. The Federal Court issued *Kuk v Canada (Attorney General)*[7] after the hearing in this matter. I have to follow decisions from the courts.

[25] Mr. Kuk chose not to comply with his employer's vaccination policy. The vaccination policy lay outside his employment agreement.

[26] The General Division 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.

[27] 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**.
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> (My emphasis)

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

[28] 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.

[29] The Federal Court found that it was reasonable for the Appeal Division to conclude that Mr. Kuk's arguments relating to his employment contract had no reasonable chance of success. The Federal Court dismissed Mr. Kuk's application for judicial review.

[30] In another case, called *Nelson*,[8] 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 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 …"[9]

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

[33] In a case called *Nguyen*,[10] 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. The policy did not form part of Mr. Nguyen's employment agreement either. Even so, the Court of Appeal found that Mr. Nguyen had engaged in misconduct.

[34] In another case, called *Karelia*,[11] 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] Another case, called *Cecchetto*,[12] also involved vaccination. Mr. Cecchetto had argued that it was not misconduct to refuse to abide by a vaccine policy that did not previously exist, which his employer unilaterally imposed and with which he did not agree.

[36] The Federal Court was aware of the evidence and Mr. Cecchetto's argument. There was no dispute that the employer's vaccination policy had not formed part of Mr. Cecchetto's employment agreement. (In fact, the employer did not have its own vaccination policy but followed the rules set out by a provincial health directive.)

[37] The Federal Court found that Mr. Cecchetto's arguments did not give a basis to overturn the Appeal Division's decision in that case. In other words, the Court accepted that the employer could introduce a policy that required vaccination even if it did not form part of the original contract. It found that there was misconduct if employees knowingly failed to abide by that policy and were aware of the consequences that would result.

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[10] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[11] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[12] *Cecchetto v (Attorney General)*, 2023 FC 102.

[38] 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. 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 for determining whether misconduct arose.

[39] So, in the Claimant's case, it did not matter then that the vaccination policy did not form part of his employment agreement. Even if he had already taken one dose, he was still expected to fully comply with the policy by getting two doses. The Claimant's voluntary decision not to comply with his employer's policy constituted misconduct for the purposes of the *Employment Insurance Act*.

– **The Claimant says there was no misconduct -- his employer did not label his actions as misconduct**

[40] The Claimant argues that there was no misconduct because his employer did not consider his actions to be misconduct. In fact, his employer described the reason for his separation from his employment as a "non-disciplinary leave of absence."

[41] However, an employer's characterization of the separation is not determinative as to whether misconduct occurred. An objective assessment has to take place.

[42] The General Division had to objectively assess the circumstances and consider whether "the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."[13]

[43] The General Division did not commit an error when it did not rely on the employer's determination that there was a "non-disciplinary leave of absence." Although the General Division erred in finding that the employer had dismissed the Claimant, it nevertheless conducted the proper test to determine whether there was misconduct.

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[13] *Nelson*, at paras 20 to 22, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.

Conclusion

[44] The appeal is allowed in part.

[45] The General Division made a factual error when it determined that the Claimant lost his job. The evidence shows that the Claimant's employer placed him on a leave of absence. So, he was not subject to disqualification from receiving Employment Insurance benefits.

[46] However, the Claimant's employer placed him on a leave of absence because he had not fully complied with its vaccination policy. For the purposes of the *Employment Insurance Act*, this constituted misconduct. This means that the Claimant was disentitled from receiving Employment Insurance benefits for the duration of his suspension.

Janet Lew
Member, Appeal Division