Citation: *MK v Canada Employment Insurance Commission*, 2023 SST 1719

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. K.
Representative:	D. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 3, 2023 (GE-23-1279)

Tribunal member:	Janet Lew
Decision date:	November 29, 2023
File number:	AD-23-876

Decision

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

Overview

[2] The Applicant, M. K. (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, the 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 lose her job. The Claimant had not complied with her employer's vaccination policy. She did not tell her employer her vaccination status.

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

[5] The Claimant argues that the General Division member made legal and factual errors. She says that it focused on her employer's policy, without considering her collective agreement. She says that her collective agreement gave her the right to refuse vaccinations. She also says that her employer was not allowed to unilaterally change the terms of her collective agreement. She also says that she was entitled to a religious accommodation.

[6] The Claimant filed a grievance against her employer. She sought reinstatement to her job but instead received a small severance. It covered living expenses over the two years that she did not work.

[7] 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.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[8] 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

[9] 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 the Claimant's collective agreement?

I am not giving the Claimant permission to appeal

[10] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[11] 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.[4]

The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means

[12] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means.

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[1] See *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.
[4] See section 58(1)(c) of the DESD Act.

[13] The Claimant denies that she committed any misconduct. She argues that the General Division misinterpreted what misconduct means. She says that it should have followed *A.L.*,[5] another General Division decision, which decided that for misconduct to arise, there has to be a breach of an express or implied duty arising out of one's collective agreement.

[14] The Claimant says that an employer cannot unilaterally change the terms and conditions of her collective agreement. And, in her case, she says that her collective agreement gave her the right to refuse any vaccinations. She denies that she breached any duties owing to her employer.

[15] She also argues that misconduct does not arise if her employer could have accommodated her.

– The General Division did not have to consider the Claimant's collective agreement

[16] The General Division did not have to consider the Claimant's collective agreement when assessing whether there was any misconduct. An employer's policies do not have to form part of the collective agreement for there to be misconduct.

[17] The Claimant says that the General Division should have looked at her collective agreement to determine whether she owed a duty to her employer to get vaccinated. If her collective agreement did not require vaccination, then she argues that her actions could not be viewed as misconduct. She says this is what the General Division had decided in *A.L.,* so it should have come to the same conclusion.

[18] However, *A.L.* has since been overturned. The Appeal Division found that the General Division in that case misinterpreted what misconduct means.[6] The Appeal Division found that A.L.'s collective agreement was irrelevant to determining whether there was misconduct.

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[5] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[6] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032. A.L. has filed an application for judicial review under A-217-23.

[19] The Appeal Division's decision in *A.L.* is consistent with the case law. The courts have said that there does not have to be a breach of a specific term of the collective agreement or contract of employment for misconduct to arise. It is enough for misconduct to arise if there is a violation of any policies that lie outside the collective agreement or employment contract.

[20] It has become well established that an employer's policies do not have to form part of the collective agreement or employment agreement for there to be misconduct. The following cases show this:

- In a recent case called *Matti*, the Federal Court determined that it was unnecessary for the employer's vaccination policy to be in the initial agreement, as "misconduct can be assessed in relation to policies that arise after the employment relationship begins."[7]

- In *Kuk*,[8] the appellant 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 Federal 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 *Lemire*,[9] the Court of Appeal found that there was misconduct even though the appellant did not breach any terms of his employment contract. He sold contraband cigarettes on his employer's work premises. He had breached a policy that was not part of his employment contract. This is confirmed where the Court wrote, "… The employer has a policy on this matter… The claimant was aware of the policy."[10] The Court of Appeal referred to the policy again, at

[7] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[8] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[9] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[10] See *Lemire, at para 3.*

paragraphs 17, 18, and 20. The Court noted that the employer had a policy that Mr. Lemire chose to disregard.

- In *Nelson*,[11] the appellant lost her job because of misconduct. The case did not involve vaccination. Ms. Nelson 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 that 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,*[12] the Federal Court of Appeal found that there was misconduct. Mr. Nguyen had 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 his employment agreement.

- In *Karelia*,[13] 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 Federal Court of Appeal determined that Mr. Karelia had to comply with them—even if the conditions were new—otherwise there was misconduct.

[21] In addition to *Matti* and *Kuk*, two other decisions address the misconduct issue. These two decisions are in the context of vaccination policies. In *Cecchetto*[14] and in *Milovac*,[15] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was

[11] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[12] See *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[13] See *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.
[14] See *Cecchetto*.
[15] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.

misconduct when the appellants did not comply with their employer's vaccination policies.

– The General Division did not have to consider whether the employer could change the terms and conditions of the collective agreement

[22] The General Division did not have to consider whether the Claimant's employer was allowed to unilaterally change the terms and conditions of the Claimant's employment by introducing new policies.

[23] The Claimant argues that if her collective agreement did not require vaccination, she would not have to get vaccinated.

[24] However, this issue simply was not relevant to the General Division's determination of whether the Claimant had committed any misconduct. As I have noted above, the issue regarding the Claimant's collective agreement was an irrelevant consideration. An employer may introduce new policies. Those policies do not have to be part of the collective agreement for misconduct to arise.

– The General Division did not have to consider whether the employer could have accommodated the Claimant

[25] The General Division did not have to consider whether the Claimant`s employer could have accommodated the Claimant.

[26] The Claimant argues that the General Division failed to consider whether her employer should have accommodated her, by providing options or alternatives to vaccination. If her employer had accommodated her, she would not have had to undergo vaccination or even disclose her vaccination status.

[27] I find that the General Division did not fail to consider this issue because an employer's duty to accommodate is irrelevant to deciding misconduct under the *Employment Insurance Act*.[16]

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[16] See *Kuk*, at para 36, citing *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 14.

The Claimant does not have an arguable case that the General Division failed to consider her collective agreement

[28] The Claimant does not have an arguable case that the General Division failed to consider her collective agreement.

[29] The Claimant argues that Article 24 of her collective agreement allowed her to refuse vaccinations.[17] She says the General Division failed to consider this part of her collective agreement.

[30] However, the collective agreement refers to vaccinations for influenza, so it is not particularly relevant to the COVID-19 vaccination. Apart from that, an employer may introduce new policies anyway.

The Claimant's settlement earnings likely would have been allocated

[31] Finally, the Claimant says that she filed a grievance against her employer. She settled the grievance and accepted a settlement although she would have preferred reinstatement. She says the settlement was for a nominal amount. It covered her living expenses for the two years that she was not working.

[32] This issue is not relevant to this application. But, even if there was no issue of misconduct, likely the settlement would have been offset or allocated against any Employment Insurance benefits. So, the allocation could have reduced any benefits that the Claimant might have received had there been no misconduct.

Conclusion

[33] The appeal does not have 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

[17] See Article 24 of Claimant's collective agreement, at AD1C-25.