Citation: *KB v Canada Employment Insurance Commission*, 2024 SST 31

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated October 13, 2023 (GE-23-2099)

Tribunal member:	Janet Lew
Decision date:	January 10, 2024
File number:	AD-23-952

Decision

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

Overview

[2] The Applicant, K. B. (Claimant), is asking for permission to appeal the General Division decision of October 13, 2023.

[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, she had done something that caused her to lose her job.

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

[5] The Claimant denies that she committed any misconduct. She argues that the General Division made jurisdictional, legal, and factual errors when it concluded that she had committed misconduct.

[6] 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]

[7] 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.

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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."

Issues

[8] The issues are as follows:

a) Is there an arguable case that the General Division failed to apply the *Employment Standards Act* or principles of labour law?

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

c) Is there an arguable case that the General Division made an important factual error?

I am not giving the Claimant permission to appeal

[9] 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 may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[10] For this type of factual error, 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 failed to apply the *Employment Standards Act*

[11] The Claimant does not have an arguable case that the General Division failed to apply the *Employment Standards Act* or principles of labour law.

[12] The Claimant says she is entitled to severance for wrongful dismissal. She says the *Employment Standards Act* and principles of labour law apply.

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

[13] However, the *Employment Standards Act* and principles of labour law are irrelevant to whether a claimant has committed misconduct for the purposes of the *Employment Insurance Act*.

[14] The courts have consistently stated that, in the context of the Employment Insurance scheme, principles of labour law and the *Employment Standards Act* do not apply. The courts have said that the role of the General Division is narrow when it comes to assessing misconduct. The General Division has to focus on whether the act or omission of an employee amounts to misconduct within the meaning of the *Employment Insurance Act*.[5]

[15] There are other avenues outside the Employment Insurance setting that employees can pursue for any violations of any labour laws or the *Employment Standards Act*, including for wrongful dismissal.

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

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

[17] The Claimant denies that she committed any misconduct. The Claimant argues that the General Division misinterpreted what misconduct means. She says that misconduct does not arise in the following circumstances:

- If an employee is able to fulfill their job duties without having to get vaccinated. The Claimant says that the employer's vaccination requirements were unrelated to her work. She says that she was still able to perform her job without having to get vaccinated.

- When the employer's policy is unlawful, unconstitutional, or unreasonable. She says an employee should not be required to have to comply with an unlawful or

[5] See, for instance, *Canada (Attorney General) v McNamara*, 2007 FCA 107 at para 22.

unreasonable policy. She says that her employer was requiring her to do something highly personal against her body.

- When an employer can accommodate an employee. The Claimant says her employer's policy was draconian. She says her employer should have accommodated her, rather than expect her to do something with which she did not agree.

– **Misconduct can arise even if the employer introduces a new policy that is not part of an employee's original employment contract or job description**

[18] The Claimant says that vaccination was not part of her job duties. In essence, she says that her job duties were defined by her original contract and job description. She claims that if her employment contract and job description did not require vaccination, then she says there was no misconduct if she chose not to get vaccinated.

[19] However, it has become well established that an employer's policies and requirements do not have to form part of the employment contract or job description for there to be misconduct.

[20] Over the past year, the Federal Court and Federal Court of Appeal have issued several cases involving employees who did not comply with their respective employer's vaccination policies. In each case, none of the original employment contracts or job descriptions required vaccination against COVID-19. Yet, the courts were prepared to accept that there had been misconduct when the employees did not comply with their employer's vaccination policies.

[21] For instance, in *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."[6]

[22] In the case of *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

[6] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[7] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

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.

[23] In *Cecchetto*[8] and in *Milovac*,[9] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that, even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[24] There are also many cases outside of the context of vaccination policies that show that an employer's policies do not have to form part of the employment contract or a claimant's job description for there to be misconduct.[10] The vaccination policy introduced another requirement or duty that the employer expected of the Claimant.

– **The legality or reasonableness of a policy is irrelevant to the misconduct question**

[25] The Claimant says that her employer's vaccination policy was unlawful, unconstitutional, and unreasonable. For instance, she says her employer violated the *Occupational Health and Safety Act* with its vaccination policy. So, for that reason, she says that she did not have to comply with the policy.

[26] She says the General Division should have examined the legality and reasonableness of the policy. She says that, if it had done so, it would have concluded that her employer's policy was both unlawful and unreasonable. And, for that reason, she says that it would have determined that she did not have to comply with the policy.

[27] However, arguments about the legality and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has held

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[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[9] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[10] See, for instance, *Canada (Attorney General) v Lemire*, 2010 FCA 314, *Nelson v Canada (Attorney General)*, 2019 FC 222, *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5, and *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140.

that the General Division and the Appeal Division do not have the authority to address these types of arguments. In *Cecchetto*, the Court wrote:

> As noted earlier, it is likely that the Applicant [Cecchetto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
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> The SST-GD [Social Security Tribunal-General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant [Cecchetto] was dismissed from his employment, and whether that reason constituted "misconduct."…
>
> **Despite the Claimant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SSTGD**. [Citation omitted][11]
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> (My emphasis)

[28] The Federal Court has held that the General Division and Appeal Division, "are not the appropriate fora to determine whether the [employer's] policy or [the employee's] termination were reasonable."[12]

[29] I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means when it did not assess the legality or reasonableness of the employer's vaccination policy.

– **An employer's lack of accommodation is irrelevant to the misconduct question**

[30] The Claimant argues that her employer could have accommodated her, rather than dismissing her for not getting vaccinated.

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[11] See *Cecchetto*, at paras 46 to 48.
[12] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 77.

[31] However, the Federal Court of Appeal has found that an employer's duty to accommodate is irrelevant to whether there is misconduct under the *Employment Insurance Act*.[13]

[32] I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means if it did not assess whether the Claimant's employer could have accommodated instead of dismissing her.

The Claimant does not have an arguable case that the General Division made important factual errors

[33] The Claimant does not have an arguable case that the General Division made important factual errors about whether she should have been aware of the consequences for not complying with her employer's vaccination policy.

[34] The Claimant says the General Division made a factual error when it found that she was aware that her employer would dismiss her if she did not comply with its policy. She denies that she knew that her employer could dismiss her.

[35] The General Division wrote:

> .. the [Claimant] confirmed she was aware that if she didn't comply with the employer's vaccination policy she would be dismissed (GD3-31).[14]

[36] The General Division identified the evidence that showed the Claimant was aware that she faced dismissal.

[37] The General Division's findings are consistent with the evidence. In addition to the Commission's Supplementary Record of Claim (GD3-31), the Claimant's employer also reported to the Commission that it had informed the Claimant of its vaccination requirements. The employer reportedly told the Claimant that it would dismiss her from her employment if she did not comply with its vaccination policy.[15]

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[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.
[14] See General Division decision, at para 20.
[15] See Supplementary Record of Claim dated November 11, 2022, at GD 3-30.

[38] I find that the Claimant does not have an arguable case that the General Division made a factual error about whether she was aware that she could face dismissal for not complying with her employer's vaccination policy.

Conclusion

[39] Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division