Citation: *KM v Canada Employment Insurance Commission*, 2024 SST 16

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated August 15, 2023 (GE-23-1446)

Tribunal member:	Janet Lew
Decision date:	January 5, 2024
File number:	AD-23-915

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, K. M. (Claimant), is seeking (1) an extension of time for permission to appeal the General Division decision, and (2) permission to appeal. 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. As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant denies that she committed any misconduct. She argues that the General Division member made procedural, legal, and factual errors.

[5] When considering whether to grant an extension of time, I have to be satisfied that there is a reasonable explanation for the Claimant's delay when she filed her application to the Appeal Division. If the Claimant does not have a reasonable explanation, this ends the appeal.

[6] If I grant an extension of time, I still have to consider whether the appeal has a reasonable chance of success. This is the same thing as having an arguable case.[1] If the appeal does not have a reasonable chance of success, this also ends the matter.[2]

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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."

[7] I am satisfied that the Claimant has a reasonable explanation for her delay. But 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

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

a) Was the application to the Appeal Division late?

b) If so, should I extend the time for filing the application?

c) If I grant an extension of time, is there an arguable case that the General Division made any procedural, legal, or factual errors?

Analysis

The application was late

[9] The Claimant acknowledges that she was late when she fled her application to the Appeal Division.

[10] There is a 30-day deadline by which an applicant has to file their application to the Appeal Division. The Social Security Tribunal emailed the General Division decision to the Claimant on August 16, 2023. So, she should have filed an application to the Appeal Division by no later than September 15, 2023. She filed her application on October 4, 2023. This was more than two weeks late.

[11] Because the Claimant did not file her application on time, she has to get an extension of time. If the Appeal Division does not grant an extension of time, this means that the Appeal Division will not consider the Claimant's application for leave to appeal. This would also end the Claimant's appeal of the General Division decision.

I am extending the time for filing the application

[12] When deciding whether to grant an extension of time, I have to consider whether the Claimant has a reasonable explanation for why the application is late.[3]

[13] The Claimant says that she suffered a substantial injury on August 7, 2023 that left her with physical and mental impairments. She felt unable to file an application by the deadline. She claims that once she was better, she immediately filed her application.

[14] I accept that this reasonably explains the Claimant's delay. So, I am extending the time by which the Claimant may file an application to the Appeal Division.

I am not giving the Claimant permission to appeal

[15] The Appeal Division must grant permission to appeal unless 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.[4]

[16] 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.

– The Claimant does not have an arguable case that the General Division made a procedural error when it accepted hearsay evidence

[17] The Claimant does not have an arguable case that the General Division made a procedural error when it accepted hearsay evidence. As an administrative tribunal, the General Division is not bound by the strict rules of evidence. It is allowed to accept hearsay evidence. The General Division regularly accepts hearsay evidence. For instance, the General Division often accepts the Commission's notes of phone

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[3] It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure.*
[4] See section 58(1) of the DESD Act.

conversations its agents have with a claimant's employer. It then becomes a matter of weight to assign to that evidence.

[18] The Federal Court of Appeal examined this very argument in *Morris*. The Court of Appeal wrote:

> The respondent also contends that the Board's decision constitutes a denial of natural justice because of the Board's reliance on written statements of third parties. Those statements, which were addressed to the respondent's employer, served as the basis for the employer's decision to terminate the respondent's employment. Counsel for the respondent claims that the respondent's *viva voce* testimony refutes the "hearsay documentary evidence." This argument was rejected by the Umpire on the ground that the Board has jurisdiction to weigh the evidence and to make findings of credibility. We agree. Moreover, it is clear that a Board may hear and accept hearsay evidence: see C*anada v Mills* (1984), 60 N.R. 4 (Fed C.A.).[5]

[19] I am not satisfied that the Claimant has an arguable case that the General Division erred by accepting hearsay evidence.

– **The Claimant does not have an arguable case that the General Division made legal errors**

[20] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means or that it made legal errors when it did not apply the *Employment Standards Act*, the "KVP test"[6] or the principles set out in a case called *McKinley v BC Tel*.[7]

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

[21] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means when it did not consider the Claimant's

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[5] See *Canada (Attorney General) v Morris*, 1999 CarswellNat 576, 173 DLR (4th) 766, 251 N.R. 205 at para 4.
[6] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (ONLA).
[7] See *McKinley v BC Tel*, 2001 SCC 38 (CanLII), [2001] 2 SCR 161.

employment contract when assessing whether there was any misconduct. An employer's policies do not have to form part of the original employment contract.

[22] The Claimant denies that she committed any misconduct because she says that misconduct only arises if there is a breach of one's employment contract. Her employer introduced a new policy that was not part of her employment contract. She says that if her employer was going to introduce new terms, it should have offered her some consideration or compensation. Otherwise, she says the employment contract governs employer-employee relations.

[23] The Claimant argues that the General Division failed to follow *McKinley v BC Tel.* She says the Supreme Court of Canada determined in that case that "an employee's misconduct does not inherently justify dismissal … unless it is so grievous that it intimates the employee's abandonment of the intention to remain part of the employment relationship."[8]

[24] The Claimant, relying on *Belsito v 2220742 Ontario Ltd.*,[9] also argues that the courts have ruled that for misconduct to arise, it has to be the last available step and that

> … the misconduct must amount to a 'repudiation of the contract'; that the acts 'evince of intention to no longer be bound by the contract;' **that dismissal is an 'extreme measure'; and must not be resorted to in trifling [cases]**. As observed, just cause misconduct truly is the 'capital punishment of employment law.'[10]

[25] However, the *McKinley*, *Belsito*, and *Carscallen* cases are not applicable nor relevant to the Claimant's circumstances. These cases do not deal with misconduct

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[8] See Claimant's arguments, at AD 1-13.

[9] See *Belsito v 2220742 Ontario Ltd.*, 2017 ONSC 7207 (CanLII). The Ontario Superior Court cited Justice Lauwers, as he then was, in *Barton v Rona Ontario Inc.*, 2012 ONSC 3809 at paras 9, an 11 to 14. Justice Lauwers, as he then was, reviewed the cases that the plaintiff cited. In one of those cases, the court examined whether the alleged misconduct was sufficient to amount to just cause.

[10] See Claimant's arguments at AD 1-9. Her quotations are taken from *Carscallen v FRI Corp.*, 2005 CanLII 20815 at para 72 (ON SC).

under the *Employment Insurance Act*. These cases deal with whether the employer had just cause for dismissal.

[26] As for the issue regarding whether the Claimant's employer had alternatives to dismissing the Claimant, the courts have consistently said that this too is an irrelevant consideration.[11]

[27] As for the issue regarding the Claimant's employment contract, it has become well established that an employer's policies do not have to form part of an employee's employment contract for there to be misconduct.

[28] 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 required vaccination against COVID-19. Yet, the courts were prepared to accept that there had been misconduct when the employees did not comply with the vaccination policies.

[29] 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."[12]

[30] And in *Kuk*, 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 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.

[31] In *Cecchetto*[13] and in *Milovac*,[14] vaccination was not part of the collective agreement or contract of employment in those cases. The Federal Court found that,

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[11] See, for instance, *Canada (Attorney General) v Secours*, 1995 CarswellNat 122, [1995] F.C.J. No. 210.
[12] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[13] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[14] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.

even so, there was misconduct when the appellants did not comply with their employer's vaccination policies.

[32] 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 for there to be misconduct.[15]

- **The Claimant does not have an arguable case that the General Division failed to apply the "KVP test"**

[33] The Claimant does not have an arguable case that the General Division failed to apply the "KVP test." Under this test, an employer in a unionized setting may unilaterally bring in new policies or rules, even if the union disagrees. An employer can do this if the new rule or policy satisfies certain requirements. One of these requirements is that the new rule or policy cannot be unreasonable.

[34] The Claimant is essentially saying that the General Division failed to assess the legality or reasonableness of her employer's vaccination 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 because it was unlawful and unreasonable.

[35] However, arguments about the legality and reasonableness of an employer's vaccination policy are irrelevant to the misconduct issue. The Federal Court has held 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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[15] 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.

> 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."…
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> **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][16]
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> (My emphasis)

[36] 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."[17]

[37] I am not satisfied that there is an arguable case that the General Division failed to apply the "KVP test" or to consider the legality or reasonableness of the employer's vaccination policy.

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

[38] The Claimant does not have an arguable case that the General Division failed to apply the *Employment Standards Act* or principles of labour law. The *Employment Standards Act* and principles of labour law were irrelevant to whether the Claimant committed misconduct for the purposes of the *Employment Insurance Act*.

[39] The Claimant argues that her employer wrongfully terminated her without (just) cause. She says that she was on an authorized sick leave. On top of that, she says the dismissal was excessive. She says that the punishment has to be proportional to the misconduct in the context of the entire employment relationship.

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[16] See *Cecchetto*, at paras 46 to 48.
[17] See *Davidson v Canada (Attorney Genera)*, 2023 1555 at para 77.

[40] However, the courts have consistently said that, in the context of the Employment Insurance scheme, the issue of a wrongful dismissal is not relevant. The role of the General Division is narrow. The General Division should be focussed on whether the act or omission of an employee amounts to misconduct within the meaning of the *Employment Insurance Act*.[18]

[41] There are other avenues outside the Employment Insurance setting that employees can pursue for wrongful dismissal.

- **The Claimant does not have an arguable case that the General Division failed to apply section 49(2) of the *Employment Insurance Act***

[42] The Claimant does not have an arguable case that the General Division failed to apply section 49(2) of the *Employment Insurance Act*. Under that section, the Commission has to give the benefit of the doubt to a claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying or disentitling the claimant, if the evidence on each side of the issue is equally balanced.

[43] The section does not confer any powers on the General Division to give the benefit of the doubt to a claimant. Setting aside that consideration, the General Division clearly preferred the employer's and Commission's evidence. It did not suggest that it found the evidence equally balanced. I am not satisfied that the Claimant has an arguable case on this point.

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

[44] The Claimant does not have an arguable case that the General Division made factual errors. The Claimant says that the General Division "did not correctly weigh all pertinent factors."[19] She also argues that the General Division distorted or misapprehended the evidence. However, the Claimant did not clearly identify where the General Division might have made a factual error.

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[18] See, for instance, *Canada (Attorney General) v McNamara*, 2007 FCA 107 at para 22.
[19] See Claimant's arguments, at AD 1-22.

[45] The Claimant says the General Division distorted the facts "based on illegitimate hearsay and false evidence"[20] provided by her employer. I have already determined that the General Division can accept hearsay evidence.

[46] The Claimant says her employer gave false evidence. But, it was for the General Division to assess and weigh the evidence.

[47] It seems that the Claimant denies that she received any notice of her employer's vaccination policy or that she was aware of the consequences that she could face for not complying with the policy. In particular, she denies that she was aware or should have been aware that she could face dismissal from her position. She denies that she was aware or should have been aware because she was on a medical leave of absence starting September 18, 2021.

[48] The evidence is as follows:

- The employer issued a memo on August 19, 2021. The notice stated that failure to comply with the employer's COVID-19 program could result in discipline up to and including termination of employment.[21] At this point, vaccination was not required. Unvaccinated employees could provide proof of completion of an education session.

- By September 9, 2021, the employer required all staff to be fully vaccinated effective October 31, 2021.[22] The employer explained that this meant that the first dose had to be received by September 18, 2021. Staff that were not fully vaccinated by October 31, 2021, would be terminated. The employer issued a memorandum dated September 10, 2021 confirming that it required full

[20] See Claimant's arguments, at AD 1-4.
[21] See employer's memorandum, dated August 18, 2021, at GD 3-232 to 236. See also employer's vaccination policy dated August 25, 2021, at GD 3-237 to 241.
[22] See employer's policy / procedure / guideline, dated September 9, 2021, with Frequently Asked Questions, at GD 3-243 to 250.

vaccination of its staff effective October 31, 2021. Otherwise, those staff would have their employment terminated.[23]

- The Claimant signed a Declaration of her vaccination status on September 17, 2022. She declined to divulge her vaccination status as she considered that overly intrusive.[24]

- On September 27, 2021, the employer issued a written warning. The employer warned her that if any non-compliance continued, it would be taking further disciplinary action against her.[25] By this time, the Claimant was on a medical leave of absence.[26]

- On October 8, 2021, the employer notified the Claimant that her non-compliance with its policy meant that she would be subject to termination for cause effective November 1, 2021.[27] The employer proceeded with terminating the Claimant's employment on November 1, 2021.[28]

[49] The Claimant states that she was unaware that she could face consequences for non-compliance with her employer's vaccination policy while on a medical leave of absence. But, the evidence shows that the employer expected compliance before the Claimant began her medical leave of absence.

[50] The General Division found that the Claimant simply did not have any intention of getting vaccinated or obtaining a medical exemption before her employer's deadline of

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[23] See employer's memorandum and Frequently Asked Questions, dated September 10, 2021, at GD 3-251 to 258.
[24] See Declaration of COVID-19 Vaccination Status Clarification, dated September 17, 2021, at GD 3-259.
[25] See employer's warning letter dated September 27, 2021, at GD 3-261.
[26] Initially the Claimant told the Commission that she went on a medical leave of absence starting September 13, 2021 (see GD 3-220) but this is when she finished her four-day rotation (see GD 3-226). She clarified that her medical leave of absence officially began on September 18, 2021 (see GD 3-226).
[27] See employer's letter dated October 8, 2021, at GD 3-262.
[28] See termination letter dated November 1, 2021, at GD 3-263.

September 18, 2021–before she began her medical leave of absence. The Claimant does not challenge these findings.

[51] The General Division accepted that the Claimant may have been unable to think clearly or understand what was happening when she filled out paperwork on September 21, 2021, for her sick leave. But, it found that by this point, she was required but missed either receiving her first dose of a recognized vaccine or submitting a medical exemption.

[52] The General Division also addressed the Claimant's denials that she was ever aware of her employer's vaccination requirements. The General Division did not accept that the Claimant could not have been aware of the significant changes that the workplace was undergoing. The General Division found that she did not fulfill her duties to keep herself reasonably informed by checking communications from her employer.

[53] On top of that, the fact that the Claimant signed a second vaccination declaration form on September 17, 2021, suggests that she had to have received or been aware of her employer's updated vaccination requirements that was set out in its memorandum of September 10, 2021. The employer indicated that she had to complete the second declaration following the update to its policy.[29]

[54] The General Division's findings were consistent with the evidence before it. The General Division noted the evidence regarding when the employer informed the Claimant of its vaccination requirements.

[55] Given these considerations, I am not satisfied that the Claimant has an arguable case that the General Division made the factual errors that she alleges it made.

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[29] See employer's memorandum and Frequently Asked Questions, both dated September 10, 2021, at GD 3-251 to 258, and employer's letter dated September 27, 2021, at GD 3-261.

Conclusion

[56] An extension of time is granted. But, as 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