Citation: *DP v Canada Employment Insurance Commission*, 2024 SST 38

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated July 25, 2023 (GE-22-2149)

Tribunal member:	Janet Lew
Decision date:	January 11, 2024
File number:	AD-23-815

Decision

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

Overview

[2] The Applicant, D. P. (Claimant), is seeking permission to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Claimant had been suspended from his employment due to misconduct. He had not complied with his employer's mandatory COVID-19 vaccination policy. As a result of the misconduct, he was disentitled from receiving Employment Insurance benefits.

[4] The Claimant denies that he committed any misconduct. He argues that the General Division made jurisdictional and legal errors when it concluded that he had committed misconduct.

[5] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success.[1] In other words, there has to be an arguable case. If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[6] 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 his appeal.

Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division failed to decide something it should have decided?

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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.

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

I am not giving the Claimant permission to appeal

[8] 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]

The Claimant does not have an arguable case that the General Division failed to decide something that it should have decided

[9] The Claimant says the General Division should have decided the issue about whether his employer had committed misconduct. He claims his employer committed misconduct for failing to comply with Ontario's *Occupational Health and Safety Act* (OHSA) and then for requiring him to undergo vaccination. He says his employer simply cannot discard its obligations under the OHSA.

[10] There may be occasions when an employer's conduct is relevant to deciding whether an employee wilfully broke workplace rules. In a case called *Astolfi,*[4] Mr. Astolfi was expected to attend at his workplace. But he was concerned for his safety due to workplace harassment. He found that his employer was not offering a safe work environment. So, he did not attend work, choosing instead to work from home.

[11] The employer's harassment caused Mr. Astolfi to work from home when he was expected to attend at the workplace. That is unlike the Claimant's situation. Here, it was the policy itself that the Claimant chose to avoid, rather than any particular conduct of the employer. Clearly the Claimant disagreed with his employer's policy, but as I will address below, the courts have said that the lawfulness or reasonableness of an employer's policy is outside the scope of review by the General Division.

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[3] See section 58(1) of the DESD Act.
[4] See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

[12] In determining whether the Claimant had committed any misconduct, the General Division had to focus on the Claimant's actions (or omissions), not the employer's actions in implementing a policy with which he disagreed.

[13] As for the Claimant's concerns that his employer violated the OHSA, the Claimant has other avenues outside the Employment Insurance setting where he can pursue any complaints.

[14] I am not satisfied that the appeal has a reasonable chance of success on this point.

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

[15] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means. The General Division was following what the courts have been saying about misconduct.

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

[16] At its core, the Claimant is saying that he did not have to comply with his employer's vaccination policy because it was unlawful and unreasonable, what with the risks and hazards he saw with COVID-19 vaccination. Besides, he says that he has a right to refuse vaccination under the OHSA.

[17] 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 a case called *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.

> 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][5] (My emphasis)

[18] 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."[6]

[19] 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 first before deciding whether the Claimant committed misconduct.

[20] This is by no means saying that the Claimant did not have a right to refuse vaccination. But refusing vaccination came with consequences and the two should not be confused. When it comes to assessing misconduct under the *Employment Insurance Act*, 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*.[7]

[21] The courts have said that misconduct arises if an employee knowingly does not comply with their employer's policy and if they knew that there would be consequences if they did not comply.[8] This is what the General Division considered when it examined whether there was misconduct.

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[5] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paras 46 to 48.
[6] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 77.
[7] See, for instance, *Canada (Attorney General) v McNamara,* 2007 FCA 107 at para 22.
[8] See, for instance, *Kuk v Canada (Attorney General)*, 2023 FC 1134.

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

[22] The Claimant seems to be suggesting that he did not have to comply with his employer's vaccination policy because it did not form part of his original employment contract. He refers to the General Division's decision in *A.L.*[9] The General Division in that case found that there was no misconduct because the employer had unilaterally introduced a vaccination policy without consulting employees and getting their consent.

[23] However, the Appeal Division has since overturned the General Division's *A.L.* decision. The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract.

[24] The Appeal Division also found that the General Division made legal errors, including when it declared that an employer could not impose new conditions of employment. The Appeal Division also found that the General Division made an error when it said that there had to be a breach of an employment contract for misconduct to arise.[10]

[25] It is well established that an employer's policies and requirements do not have to form part of the employment contract for there to be misconduct.

[26] 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.

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[9] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[10] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032. A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).

[27] 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."[11]

[28] In *Kuk*,[12] 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.

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

[30] 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.[15]

Conclusion

[31] I am not satisfied that the Claimant has an arguable case that the General Division made the jurisdictional and legal errors he says that it did. Permission to appeal is refused. This means that the appeal will not be moving ahead.

Janet Lew
Member, Appeal Division

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[11] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[12] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.
[13] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[14] See *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[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.