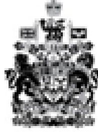

Citation: *RM v Canada Employment Insurance Commission*, 2024 SST 154

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated September 19, 2023 (GE-23-1142)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	February 7, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	February 19, 2024
File number:	AD-23-965

Decision

[1] The appeal is dismissed. The Appellant, R. M. (Claimant), is disentitled from receiving Employment Insurance benefits.

Overview

[2] The Claimant is appealing the General Division decision. The General Division decided that the Claimant was disentitled from receiving Employment Insurance benefits because she had been suspended from her employment due to misconduct.[1] In other words, it found that she had done something or had failed to do something that caused her to be suspended. The General Division found that she had not complied with her employer's vaccination policy.

[3] The Claimant denies that she committed any misconduct. She argues that the General Division made legal and factual errors. In particular, she says that the General Division misinterpreted what misconduct means. She also says that it failed to consider the reasonableness of her employer's vaccination policy, and that it failed to consider her collective agreement, which did not require vaccination.

[4] The Claimant says that if the General Division had considered the reasonableness of her employer's policy, as well as her collective agreement, it would have found that she did not have to comply with the policy. And, she says, it would have concluded that she did not commit any misconduct.

[5] The Claimant asks the Appeal Division to give the decision she says the General Division should have made. She asks the Appeal Division to find that she did not commit any misconduct. The Claimant also asks the Appeal Division to find that she is not disentitled from receiving Employment Insurance benefits.

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[1]The General Division wrote that the Claimant "lost her job" throughout its decision. "Losing one's job" is usually associated with being dismissed from one's employment, but the General Division clearly found that the Claimant had been suspended. At para 15, for instance, the General Division wrote that it found that the Claimant was suspended. The General Division explained that it relied on the employer's letter, which stated that the Claimant had been reinstated, "to show that she was suspended, not dismissed."

[6] The Commission argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

a) Did the General Division fail to consider the reasonableness of the Claimant's employer's vaccination policy?

b) Did the General Division fail to consider the Claimant's collective agreement?

Analysis

[8] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[2]

The General Division did not fail to consider the reasonableness of the Claimant's employer's vaccination policy

[9] The General Division did not fail to consider the reasonableness of the Claimant's employer's vaccination policy.

[10] The Claimant denies that she committed misconduct because she says that she did not have to comply with a policy that was unreasonable. She says data does not support her employer's vaccination policy. The Claimant also points to labour arbitration decisions. She says that arbitrators have found that vaccination policies are no longer reasonable.

[11] As well, the Claimant says that her employer could have accommodated her by allowing her to work from home. She was an excellent employe and dismissal could have been avoided.

[12] However, arguments about the reasonableness of an employer's vaccination policy and the possibility of accommodations are irrelevant to the misconduct issue. The

[2] See section 58 (1) of the *Department of Employment and Social Development Act*.

Federal Court has held that the General Division and the Appeal Division do not have the authority to address these types of arguments.

[13] In *Matti*,[3] the Federal Court determined:

> … This Court's jurisprudence confirms that the SST [the General and Appeal Divisions] does not have jurisdiction to, and therefore should not, consider the soundness of the Policy: *Cecchetto v Canada (Attorney General)*, 2023 FC 102 [*Cecchetto*] at paras 32, 48; *Milovac v Canada (Attorney General)*, 2023 FC 1120 at para 27; *Kuk*, above at para 45. In my view, the General and Appeal Divisions reasonably focused instead on the Applicant's behaviour and whether that amounted to misconduct in the legal sense in his situation.

[14] And in *Davidson*, the Federal Court 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."[4]

[15] The Federal Court of Appeal also addressed this issue recently, in *Sullivan*. There, the Court confirmed that "the law is that the Social Security Tribunal cannot delve into whether the dismissal was proper or the reasonableness of an employer's work policies that led to the dismissal." [5]

[16] Decisions of the Federal Court and Court of Appeal are binding on the Tribunal. This means that the General Division and the Appeal Division are required to follow these decisions. So, the General Division did not fail to consider the reasonableness of the Claimant's employer's vaccination policy. It simply fell outside its jurisdiction to do so.

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

[17] The General Division did not fail to consider the Claimant's collective agreement. The agreement was irrelevant to the misconduct question.

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[3] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 18.
[4] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 77.
[5] See *Sullivan v Canada (Attorney General)*, 2024 FCA 7.

[18] The Claimant argues that for misconduct to arise, there has to be a breach of a term or condition of one's collective agreement or contract of employment. In other words, she says the requirement to get vaccinated had to be in her collective agreement. Or, if her employer wanted to introduce a new condition, she says she had to agree with and consent to that new condition.

[19] The Claimant notes that her collective agreement did not stipulate that she needed to be vaccinated in order to perform her job. So, she says that misconduct did not arise. Further, she says that she fulfilled all of the duties required of her under her collective agreement.

[20] The Claimant relies on several labour arbitration decisions and *A.L.*,[6] a decision of the General Division. However, the labour arbitration decisions are not applicable. They do not deal with the issue of misconduct under the *Employment Insurance Act*.

[21] As for *A.L.,* the General Division found that A.L. had not committed misconduct because the employer had unilaterally introduced a vaccination policy without consulting employees and getting their consent.

[22] The Appeal Division has since overturned the General Division's decision.[7] The Appeal Division found that the General Division made jurisdictional and legal mistakes.

[23] The Appeal Division in that case found that the General Division overstepped its jurisdiction by examining A.L.'s contract. The Appeal Division also found that the General Division made a legal error when it declared that an employer could not impose new conditions to the collective agreement and that there had to be a breach of the employment contract for misconduct to arise. These were irrelevant considerations.

[24] The Appeal Division's decision in *A.L.* is consistent with the law. It is well established that there does not have to be a breach of the collective agreement or contract of employment for misconduct to arise. Or, put another way, an employer's

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[6] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[7] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1423. A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).

policies and requirements do not have to be in the collective agreement or contract of employment for misconduct to arise. As long as an employer has a policy or requirement, an employee will be expected to comply with that policy.[8]

[25] The courts have endorsed this approach in the COVID-19 vaccination context. Many collective agreements and employment contracts have not required vaccination. But the courts have determined that it does not matter that vaccination policies have not been part of a claimant's contract of employment.

[26] In *Matti*,[9] the Federal Court wrote:

> In addition, the Applicant argues that, as it relates to the definition of misconduct under the [*Employment Insurance Act*], a condition of employment must exist at the time the employment contract is formed. He did not provide any supporting authorities, however, for this assertion. I agree with the Respondent that, based on applicable jurisprudence, **it was not necessary for the Policy to be in the initial agreement; misconduct can be assessed in relation to policies that arise after the employment relationship begins**. (My emphasis)

[27] The Court cited *Karelia*, *Cecchetto*,[10] and *Kuk.*[11] In *Kuk*, the appellant chose not to comply with his employer's vaccination policy. The policy was not 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. This was the same situation in *Cecchetto*.

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[8] See, for instance, *Canada (Attorney General) v Lemire*, 2010 FCA 314 – Mr. Lemire breached a policy that lay outside his employment contract; *Nelson v Canada (Attorney General)*, 2019 FCA 222 – it was irrelevant that the employer's policy did not form part of Ms. Nelson's employment agreement. She was still expected to comply with the policy; *Canada (Attorney General) v Nguyen*, 2001 FCA 348 – there was misconduct even though the employer's harassment policy did not describe Mr. Nguyen's behaviour, and the policy lay outside the employment agreement; and *Karelia v Canada (Human Resources and Skills Development)*, 2012 FC 140 – the Federal Court of Appeal found that Mr. Karelia had to comply with new conditions of employment that did not previously exist.
[9] See *Matti v Canada (Attorney General)*, 2023 FC 1527 at para 19.
[10] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[11] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[28] The Federal Court came to the same conclusion in *Milovac*. The Federal Court found that there was misconduct when Mr. Milovac did not comply with a policy that was not part of his contract of employment.

[29] I am not satisfied that the General Division failed to consider the Claimant's collective agreement when deciding whether she had committed misconduct. As the Federal Court stated, "[M]isconduct can be assessed in relation to policies that arise after the employment relationship begins."[12]

Conclusion

[30] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal. The Claimant is disentitled from receiving Employment Insurance benefits.

Janet Lew
Member, Appeal Division

[12] See *Matti*, at para 19.