Citation: *KK v Canada Employment Insurance Commission*, 2024 SST 406

Social Security Tribunal of Canada
Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant:	K. K.
Representative:	Ian Perry
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 23, 2023 (GE-22-1805)

Tribunal member:	Solange Losier
Decision date:	April 22, 2024
File number:	AD-24-84

Decision

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

Overview

[2] K. K. is the Claimant in this case. When she stopped working, she applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits because she was suspended and dismissed from her job due to her own misconduct. [1]

[4] The General Division came to the same conclusion.[2] It decided that the Claimant was put on an unpaid leave (suspended) and then dismissed from her job due to misconduct because she didn't comply with the employer's mandatory Covid-19 vaccination policy.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] She argues that the General Division made an error of law and important error of fact when it decided the issue of misconduct.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

Issues

[7] The issues in this appeal are:

a) Was the application to the Appeal Division late?

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[1] See Commission's initial decision at page GD3-37 and reconsideration decision at pages GD3-46 to GD3-47.
[2] See General Division decision at pages AD1-250 to AD1-258.
[3] See application to the Appeal Division at pages AD1-1 to AD1-259.

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

c) Is there an arguable case that the General Division made an error of law or an important error of fact?

Analysis

The application to the Appeal Division was late

[8] The General Division issued its decision on January 22, 2023.

[9] The Claimant wrote that the General Division decision was communicated to her on January 26, 2023.[4]

[10] The deadline to file an application to the Appeal Division in the prescribed form and manner is 30 days after the day on which the General Division decision was communicated to her in writing.[5]

[11] Since the Claimant says that the General Division decision was communicated to her on January 26, 2023, then the 30 days starts counting from the following day on January 27, 2023.

[12] This means that the 30 day deadline to file her application to the Appeal Division was February 26, 2023. The one year deadline was January 27, 2024.

[13] The Claimant filed her application to the Appeal Division on January 22, 2024.[6]

[14] I find that the Claimant filed her application to the Appeal Division on January 22, 2024. She filed it late because it was more than 30 days after the General Division decision was communicated to her, but it was less than one year.

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[4] See page AD1-2.
[5] See section 57(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).
[6] See application to the Appeal Division at pages AD1-1 to AD1-259.

I am extending the time for filing the application

[15] I can give more time to appeal if the Claimant provides a reasonable explanation for why she was late.[7]

[16] The application to the Appeal Division provides a spot so that a party can identify the reasons for filing an appeal late. The following reasons were provided by the Claimant to explain the delay:[8]

- The Claimant retained legal counsel on January 26, 2023.
- Her counsel was out of the country at the time and this file was delegated to another member of the law firm to complete the application to the Appeal Division.
- However, the application did not get filed and it was only discovered in January 2024 during the firm's annual review of outstanding matters.
- The application was then filed promptly with the Tribunal.
- It has been filed within the one year deadline and there is no prejudice to any party if the extension of time is granted.
- This issue involves the economic security of the Claimant.

[17] I find that the Claimant has provided a reasonable explanation for why her appeal was late, so I am granting the Claimant an extension of time to file her appeal. She has provided detailed reasons, and through no fault of her own, her application was not filed on time. As well, I have considered that it was filed within the one year deadline from the date it was communicated to her.[9]

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[7] See sections 27(1) and 27(2) of the *Social Security Tribunal Rules of Procedure (*SST Rules).
[8] See page AD1-5.
[9] See section 52(2) of the DESD Act.

Analysis

[18] An appeal can only proceed if the Appeal Division gives permission to appeal.[10]

[19] I must be satisfied that the appeal has a reasonable chance of success.[11] This means that there must be some arguable ground upon which the appeal might succeed.[12]

[20] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (this is called the "grounds of appeal").[13]

[21] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:[14]

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error in law
- based its decision on an important error of fact

[22] For the appeal to proceed to the next step, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

– The Claimant argues that the General division made an error of law and an important error of fact

[23] The Claimant says that the General Division made an error of law by failing to apply the appropriate test for misconduct as set out in a decision called *Lemire*.[15]

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[10] See section 56(1) of the DESD Act.
[11] See section 58(2) of the DESD Act.
[12] See *Osaj v Canada (Attorney General)*, 2016 FC 115.
[13] See grounds of appeal in section 58(1) of the DESD Act.
[14] See section 58(1) of the DESD Act.
[15] See *Canada (Attorney General) v Lemire*, 2010 FCA 13.

[24] The Claimant also says the General Division made an error of fact by failing to consider the express terms of the Claimant's contract of employment even though this evidence was before the General Division.

– **There is no arguable case that the General Division made an error of law**

[25] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[16]

[26] Misconduct is not defined in the *Employment Insurance Act* (EI Act) but the Courts have provided a definition.

[27] The Federal Court of Appeal defines "misconduct" to be conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[17] Misconduct also includes conduct that is so reckless that it is almost wilful.[18]

[28] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[19]

[29] The General Division had to decide whether the Commission had proven that the Claimant was suspended and later dismissed for misconduct.[20]

[30] The General Division decided that the Claimant was put on leave without pay (suspended) and then dismissed her on November 1, 2021 because she did not comply with the employer's Covid-19 vaccination policy.[21] This was not disputed between the parties.

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[16] See section 58(1)(b) of the DESD Act.
[17] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[18] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[19] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[20] See section 30(1) of the *Employment Insurance Act* (EI Act).
[21] See paragraphs 17 and 25 of the General Division decision.

[31] The General Division decided that the Claimant was suspended and dismissed due to misconduct for the following reasons.[22] It said that the Claimant was advised of the employer's vaccination policy and requirement to be vaccinated for Covid-19 by a specific deadline. She applied for a religious exemption from the policy, but it was denied by the employer. It found that she acted deliberately and knew the consequences of non-compliance would lead to her dismissal.

[32] The General Division also noted the Claimant did not dispute that her actions were wilful, or that she knew or ought to have known the consequences. [23]

[33] The Claimant argues that the General Division made an error of law because it didn't apply the test set out in the *Lemire* decision.[24] But, there is no arguable case that the General Division made an error of law for the following reasons.

[34] The General Division identified the correct law and relied on the Court's definition of misconduct in its decision.[25] It applied the above legal test for misconduct based on the EI Act and relevant jurisprudence.

[35] The Claimant referred to paragraph 14 of the *Lemire* decision in its appeal, but it missed part of it.[26]

[36] Paragraph 14 of the *Lemire* decision says the following:

> "To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a **breach of an express or implied duty** resulting from the contract of employment." (emphasis added)

[37] The Court says that an express or implied term of employment may be concrete or a more abstract requirement.[27] In *Nelson* and *Kuk*, the Court found that an

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[22] See paragraphs 34-38 of the General Division decision.
[23] See paragraph 19 of the General Division decision.
[24] See *Canada (Attorney General) v Lemire*, 2010 FCA 13.
[25] See paragraphs 15, 16, 20-23 of the General Division decision.
[26] See page AD1-10.
[27] See *Canada (Attorney General) v Brissette*, 1993 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684.

employer's written policy need not be included in an employee's original contract to ground a finding of misconduct.[28]

[38] In this case, the Claimant's employer was a hospital and it implemented a vaccination policy to reduce the risk of infection and transmission of Covid-19. It required the Claimant to be vaccinated for Covid-19 in order to be able to work. So, complying with the policy was clearly an essential duty of the Claimant's employment, regardless of whether it was stated in her employment contract.

[39] Similarly, the Court found misconduct in *Cecchetto* where another applicant who also worked at a hospital was terminated for misconduct.[29] He also refused to get a Covid-19 vaccine, which was contrary to his employer's vaccination policy. He did not have an approved exemption. He made a voluntary decision to not comply with the employer's vaccination policy, so it was considered misconduct and he was not entitled to receive EI benefits.

[40] The Court also underlined the Tribunal's limited jurisdiction in the *Cecchetto* decision, at paragraph 32:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[41] In *Butu,* the Court explains that the test in *Lemire* for misconduct is different under the *EI Act* compared to a labour law context. Referring to *Lemire,* the Court said that the question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the

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[28] See *Nelson v Canada (Attorney General),* 2019 FC 222 at paragraphs 23-26 and *Kuk v Canada (Attorney General),* 2023 FC 1134, at paragraph 34.
[29] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.

evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal.[30]

[42] In particular, the Court says that the General Division did not need to determine whether she could not perform her specific job duties without being vaccinated, but rather, whether she could not fulfill her duty to her employer to be able to show up for work, which required that all employees comply with the policy.[31]

[43] The Claimant also referred to another General Division decision with similar facts.[32] However, the General Division correctly stated that it does not have to follow other Tribunal decisions and it explained why in its decision.[33]

[44] Lastly, the General Division correctly focused its analysis on the Claimant's conduct and not the employer's conduct. This is what the case law says to do and the General Division has to follow decisions from the Court.

[45] There is no arguable case that the General Division made an error of law.[34] It correctly identified the law and applied it based on relevant jurisprudence. Further, there is recent case law that is applicable.

– **There is no arguable case that the General Division made an important error of fact**

[46] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[35]

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[30] See *Butu v Canada (Attorney General),* 2024 FC 321, at paragraphs 77 and 78.
[31] See *Butu v Canada (Attorney General),* 2024 FC 321, at paragraph 83.
[32] See *AL v Canada (Attorney General),* 2022 SST 1428. Also, see *Canada v AL, 2023 SST 1032*. The Appeal Division found an error made by the General Division in its interpretation of misconduct. It substituted its decision disqualifying the Claimant from EI benefits due to misconduct.
[33] See paragraphs 27-29 of the General Division decision.
[34] See section 58(1)(b) of the DESD Act.
[35] See section 58(1)(c) of the DESD Act.

[47] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:[36]

a) Does the evidence squarely contradict one of the General Division's key findings?

b) Is there no evidence that could rationally support one of the General Division's key findings?

c) Did the General Division overlook critical evidence that contradicts one of its key findings?

[48] The Claimant says that the General Division failed to consider the express terms of her employment contract even though this evidence was before it.

[49] The General Division did not ignore the fact that the Claimant had an employment contract and that it did not include an expressed provision requiring Covid-19 vaccination, it simply disagreed with her.[37] Instead, it found that vaccination for Covid-19 was an essential condition of her continued employment.[38]

[50] As noted above, an express or implied term of employment may be concrete or a more abstract requirement.[39] An employer's written policy need not be included in an employee's original contract to ground a finding of misconduct.

[51] The General Division decided that the Claimant was informed about the employer's vaccination policy. She was given time to comply, but did not so do by the deadline. She was also told about the consequences for non-compliance.[40] It found that she acted deliberately and chose not to comply with the employer's Covid-19 vaccination policy, which is what led to her dismissal.[41]

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[36] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[37] See paragraph 33 of the General Division decision.
[38] See paragraph 36 of the General Division decision.
[39] See above in paragraph 37 of this decision.
[40] See paragraph 34 of the General Division decision.
[41] See paragraph 35 of the General Division decision.

[52] An appeal to the Appeal Division is not a new hearing. I cannot reweigh the evidence in order to come to a different conclusion that is more favourable for the Claimant.[42]

[53] There is no arguable case that the General Division made an important error of fact.[43] It did not ignore or overlook the employment contract. It found that vaccination for Covid-19 was a condition of her continued employment.

– **There are no other reasons for giving the Claimant permission to appeal**

[54] There is no arguable case that the General Division made any other reviewable errors.[44] I reviewed the file and examined the General Division decision.[45] I did not find any relevant evidence that the General Division might have ignored or misinterpreted.

Conclusion

[55] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

[42] See G*arvey* v *Canada (Attorney General)*, 2018 FCA 118, at paragraph 11.
[43] See section 58(1)(c) of the DESD Act.
[44] See section 58(1) of the DESD Act.
[45] The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.