



Citation: *CK v Canada Employment Insurance Commission*, 2025 SST 211

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:

C. K.

Respondent:

Canada Employment Insurance Commission

Representative:

Kevin Goodwin

Decision under appeal:

General Division decision dated September 22, 2023
(GE-23-1462)

Tribunal member:

Pierre Lafontaine

Type of hearing:

Videoconference

Hearing date:

February 28, 2025

Hearing participants:

Appellant
Respondent's representative

Decision date:

March 10, 2025

File number:

AD-23-979

Decision

[1] The appeal is allowed in part. The Appellant (Claimant) was suspended because of her misconduct from December 3, 2021.

Overview

[2] The Claimant was placed on a leave of absence. The employer said the Claimant was placed on a leave of absence because she did not comply with the employer's COVID-19 vaccination policy (Policy). The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Respondent (Commission) determined that the Claimant was suspended from her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division of the Tribunal.

[4] The General Division found that the Claimant was put on a leave of absence following her refusal to follow the employer's Policy. She was not granted a religious exemption. It found that the Claimant knew that the employer was likely to place her on unpaid leave in these circumstances. The General Division concluded that the Claimant was placed on unpaid leave because of her misconduct.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division made its decision without regard for the material before it and erred in law when deciding she had been suspended for misconduct.

[6] I must decide whether the General Division made its decision without regard for the material before it and whether it made an error of law when making its decision.

[7] I am allowing the Claimant's appeal in part.

Issue

[8] Did the General Division make its decision without regard for the material before it and err in law when it concluded that the Claimant had been suspended because of misconduct?

Preliminary matters

[9] It is well-established that I must decide the present appeal based on the evidence presented to the General Division. The Appeal Division does not accept new evidence. The powers of the Appeal Division are limited.¹

[10] The Claimant was granted leave to appeal on December 8, 2023. She requested that her appeal be put in abeyance pending a decision from the Federal Court.² I allowed the Claimant's request. Following the Federal Court decision, the Claimant expressed the desire to proceed with her appeal. A hearing date was scheduled for January 31, 2025. Before the hearing, the Claimant requested an adjournment following an injury. I granted the adjournment. The hearing date was rescheduled to February 28, 2025. The Claimant agreed to proceed by videoconference.

[11] On February 25, 2025, the Claimant expressed the desire to file an application for access to information. She wanted the Commission's complete file. At the start of the hearing, I offered the Claimant the opportunity to present a request for an adjournment. The Claimant elected to proceed with the hearing.

Analysis

-Did the General Division make its decision without regard for the material before it and err in law when it concluded that the Claimant was suspended because of misconduct?

¹ Save and except a few exceptions that do not apply in this case: See *Sibbald v Canada (Attorney General)* 2022 FCA 157.

² *Murphy c Canada (Attorney General)*, 2024 CF 1356.

Position of the parties

[12] The Claimant submits that the General Division made its decision without regard for the material before it. The Claimant submits that she did comply with the employer's Policy and was denied an exemption after she was placed on an unpaid leave of absence. She submits that she acted in good faith all along, and there was absolutely no way for her to know or even fathom that the employer would forcibly put her on an unrequested leave of absence before rendering its decision to deny her religious accommodation. The Claimant submits that the General Division made an error in law when it concluded she had been suspended because of misconduct.

[13] The Commission submits that the Claimant made her request for an exemption after regular business hours, on the date of the deadline for suspension. There was no opportunity for the employer to consider the request before October 31, 2021, when she was no longer able to enter her workplace. The Commission submits that the Claimant chose to submit her request beyond the timeframes where suspension could have been avoided. As such, the Claimant's request for a religious exemption, made after the deadline, does not show compliance with the employer's Policy, as she was already suspended.

[14] The Commission submits that the vaccination Policy emphasizes how the employer requires "sufficient time" to make any necessary assessments prior to the government mandated deadlines, and as such all timeframes "should be considered firm." As the exemption request was made after the fact of suspension, the General Division did not err in its assessment of willfulness, or in its assessment that Claimant's refusal to comply with the employer's Policy resulted in her suspension.

The General Division decision

[15] The General Division found that the Claimant was advised on August 25, 2021, by her employer that she had to be fully vaccinated against COVID-19. She had to be vaccinated and report her vaccination status by October 30, 2021.

[16] The General Division found that the Claimant knew she had to be vaccinated by October 30, 2021, and report it, or she would be placed on an unpaid leave of absence. It found that the Claimant deliberately chose not to follow her employer's mandatory Policy. This was why she was placed on an unpaid leave of absence.

[17] The General Division concluded that the Claimant was placed on a leave of absence because of her misconduct.

[18] The Claimant's evidence shows that she requested a religious exemption on October 30, 2021. The Policy says that until her employer directs otherwise, employees requesting accommodation do not need to be vaccinated or record their status via our Vaccination Status reporting tool. The employer refused the Claimant's request on December 3, 2021.

[19] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[20] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it; it must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.³

[21] After reading the General Division decision, I find that it did not consider the contradictory evidence before it. The General Division disregarded it. It did not explain why the Claimant's evidence in support of her position that she did comply with the employer's Policy should be dismissed or assigned little or no weight at all. This is an error of law.

[22] I am therefore justified to intervene.

³ *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

There are two ways to fix the General Division's error

[23] When the General Division makes an error, the Appeal Division can fix it in one of two ways:

- 1) It can send the matter back to the General Division for a new hearing;
- 2) It can give the decision that the General Division should have given.

The record is complete, and I can decide this case on its merits

[24] I find the record is complete. The parties had the opportunity to fully present their case before the General Division. I can give the decision that the General Division should have given.

Misconduct

[25] I must decide whether the Claimant was suspended from her job because of misconduct under the *Employment Insurance Act* (EI Act).⁴

[26] I must apply the narrow test of misconduct under EI law. To do so, I must determine the following:

- whether she was aware of her employer's Policy.
- whether she willfully ignored her employer's Policy.
- whether she knew or ought to have known the consequences of ignoring his employer's Policy.

[27] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, to constitute misconduct, the act complained of

⁴ It is not my role to review the Commission's conduct. It is also important that I reiterate that the *Digest of Benefit Entitlement Principles* is an interpretive guide that is not legally binding on the Tribunal. It simply reflects the opinion of the administrator who acts under the law. See *Canada (Attorney General) v Greey*, 2009 FCA 296, *Canada (Attorney General) v Savard*, 2006 FCA 327.

must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects their actions would have on their performance.

[28] It is not my role to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending the Claimant in such a way that her suspension was unjustified, but rather of deciding whether the Claimant was suspended from her job because of her misconduct under EI law.

[29] The evidence shows that the Claimant was advised on August 25, 2021, by her employer that she had to be fully vaccinated against COVID-19. She had to be vaccinated and report her vaccination status by October 30, 2021. The Claimant requested a religious exemption on October 30, 2021.

[30] The Policy clearly says that until the employer "...*directs otherwise, employees requesting accommodation do not need to be vaccinated or record their status via our Vaccination Status reporting tool.*"

[31] The Commission submits that the Claimant made her request for an exemption after regular business hours, on the date of the deadline for suspension. There was no opportunity for the employer to consider the request before October 31, 2021, when she was no longer able to enter her workplace. She was therefore late and in violation of the employer's Policy.

[32] With great respect, I cannot follow the Commission's reasoning which goes beyond the terms of the Policy.

[33] I understand that the Claimant's request was received by the employer at 11:24 p.m. on October 30, 2021. However, the Policy does not indicate a specific deadline to file a request for accommodation other than by October 30, 2021. Furthermore, the employer did not consider the Claimant's request to be late because it proceeded to acknowledge and process her request. The employer also did not dismiss the Claimant's request because it was late.

[34] As such, the Claimant's request for a religious exemption made on October 30, 2021, shows compliance with the employer's Policy. Therefore, the evidence does not support a conclusion that, at that time, she knew or ought to have known the consequences of ignoring her employer's Policy.

[35] However, on December 3, 2021, the employer refused the Claimant's request.

[36] The employer wrote:

*"You request has been reviewed along with the supporting documentation you provided on November 12, 2021. Please be advised that after review of the information you provided, your request is respectfully **denied**. A such, you are in non-compliance with the Vaccination Policy. You are strongly encouraged to make arrangements to receive the vaccine..."*

(underlined by the undersigned)

[37] As of December 3, 2021, the Claimant knew or ought to have known that she was suspended by her employer for non-compliance with the Policy, after which their continuing employment relationship would be reassessed.

[38] Based on this evidence, I find that the Claimant was suspended for misconduct under the EI Act from December 3, 2021, because she did not follow the employer's Policy. Her request for accommodation was denied. By that time, she had been informed of the employer's Policy and was given time to comply. The Claimant knew or ought to have known that as of December 3, 2021, her refusal to comply with the Policy would result in her suspension.⁵ The Claimant refused intentionally; this refusal was willful. This was the direct cause of her suspension.

[39] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.

⁵ The subsequent filing of a grievance does not change the fact that the Claimant knew or should have known as of December 3, 2021, that the employer considered her, in non-compliance with its vaccination Policy.

[40] I must reiterate that I cannot focus on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. I must focus on the Claimant's conduct.

[41] During the term of employment, the employer may try to impose policies that encroach on their employees' rights. If they believe that a new policy violates their employment contract or collective agreement, they can sue their employer for wrongful dismissal or file a grievance. If they believe that a new policy violates their bodily integrity or freedom of speech, they can take their employer to court or to a human rights tribunal. However, the EI claims process is not the way to litigate such disputes.

[42] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."

[43] The question of whether the employer violated the law and/or her collective agreement, or whether the employer's Policy violated her human and constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.

[44] The Federal Courts have rendered a string of decisions regarding vaccination cases, *Lance* (FCA), *Zagol*, (FCA), *Dagget*, *Brown*, *Laurence*, *Kuk*, *Milovac*, *Francis*, *Matti*, *Davidson*, *Sullivan*, *Abdo*, *Spears*, *Wong*, *Boskovic*, *Hazaparu*, *Murphy*, and *Cecchetto* (FCA).⁶ These decisions all say that by making a personal and deliberate choice not to follow their employer's vaccination policy, the claimants had breached their duties owed to their employer and had lost their job because of misconduct under

⁶ *Lance v Canada (Attorney General)*, 2025 FCA 41, *Zagol v Canada (Attorney General)*, 2025 FCA 40, *Dagget v Canada (Attorney General)*, 2025 FC 114, *Brown v Canada (Attorney General)*, 2024 FC 1544, *Laurence v Canada (Attorney General)*, 2024 FC 1498, *Cecchetto v Canada (Attorney General)*, 2024 FCA 102, *Hazaparu v Canada (Attorney General)*, 2024 FC 928, *Murphy v Canada (Attorney General)*, 2024 CF 1356, *Boskovic v Canada (Attorney General)*, 2024 FC 841, *Wong v Canada (Attorney General)*, 2024 FC 686, *Spears v Canada (Attorney General)*, 2024 FC 329, *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; *Abdo v Canada (Attorney General)*, 2023 FC 1764.

the EI Act. The Federal Courts reiterated several times that this Tribunal does not have the authority to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

[45] The preponderant evidence before the General Division shows that the Claimant made a personal and deliberate choice not to follow the employer's Policy after her request for accommodation was denied and this resulted in her being suspended from work, in accordance with the Policy.

[46] I have no choice but to decide the issue of misconduct within the parameters set out by the Federal Courts, which has defined misconduct under the EI Act.

[47] I note that the Claimant's employer did eventually call her back to work. This fact does not change the nature of the misconduct, which initially led to her suspension.

[48] I am fully aware that the Claimant may seek relief before another forum if a violation is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was suspended because of her misconduct from December 3, 2021.

Conclusion

[49] The appeal is allowed in part. The Claimant was suspended from her job from December 3, 2021, because of her misconduct.

Pierre Lafontaine
Member, Appeal Division