Citation: *SS v Canada Employment Insurance Commission*, 2023 SST 31

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated April 28, 2022 (GE-22-632)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	September 27, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	January 10, 2023
File number:	AD-22-315

Decision

[1] The appeal is dismissed. The General Division erred by failing to consider some of the arguments that the Appellant, S. S. (Claimant) made. However, this does not change the outcome.

Overview

[2] The Claimant is appealing the General Division decision.

[3] The General Division found that the Claimant's employer suspended her from her employment because of misconduct. The General Division found that the Claimant had not complied with her employer's COVID-19 vaccination policy and that she was aware of the consequences from non-compliance.

[4] The Claimant argues that the General Division made legal and factual errors. In particular, she says that the General division misinterpreted what misconduct means. She denies that there was any misconduct in her case. In particular, she claims that there was no misconduct even if she did not comply with her employer's vaccination policy. This is because she says the policy was new and did not form part of her employment contact.

[5] The Claimant also says that the General Division made a factual error when it found that she was aware that her employer would suspend her for not getting vaccinated. She denies that she knew there could be any consequences for not complying with a new condition of her employment.

[6] The Claimant says she is entitled to Employment Insurance benefits under section 32 of the *Employment Insurance Act* and the Digest of Benefit Entitlement Principles (Digest). She asks the Appeal Division to find that she was entitled to receive Employment Insurance benefits.

[7] The Respondent, the Canada Employment Insurance Commission (Commission), denies that the General Division made any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issues

[8] The issues are as follows:

a) Did the General Division misinterpret what misconduct means?

b) Did the General Division make a factual error when it found that the Claimant knew that there could be consequences if she did not comply with her employer's policy?

c) Did the General Division fail to apply section 32 of the *Employment Insurance Act* and the Digest of Benefit Entitlement Principles?

Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[1]

Did the General Division misinterpret what misconduct means?

[10] The Claimant argues that the General Division misinterpreted what misconduct means. The General Division found that there was misconduct because the Claimant chose not to comply with her employer's vaccination policy, knowing what the consequences would be. The Claimant argues that misconduct did not arise in her case because:

a) There was a material change in the terms and conditions of her employment to which she did not consent, and

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

b) Her employer did not have any legal basis to implement a vaccination policy that allowed for suspension or dismissal of employees, and

c) The policy itself was discriminatory and did not reasonably accommodate her medical condition.

– General Background

[11] The Claimant worked as an information desk assistant at a hospital in Ontario for over 20 years.

[12] In 2021, the Claimant's employer introduced a COVID-19 vaccination policy. Her employer explained that the Chief Medical Officer of Health for the province had issued Directive 6. The Directive required hospitals to have a vaccination policy by no later than September 7, 2021. There were minimum requirements for the policy.

[13] The employer's policy required employees such as the Claimant to provide:

a) Proof of full vaccination, or

b) Written proof of a medical reason that set out a documented medical reason for not being fully vaccinated against COVID-19 and the effective time period for the medical reason.

[14] The policy also let employees seek accommodations under the *Ontario Human Rights Code*. The manager and human resources would work with the employee to determine the appropriate accommodation, if required.

[15] Employees who did not provide proof of full vaccination or who had a valid exemption were required to perform regular antigen point of care testing.

[16] The Claimant has rheumatoid arthritis. She believes that the vaccines will exacerbate her medical condition. She tried to obtain a medical note, but her doctor

would not issue one because she does not have any heart problems and is not allergic to any of the vaccines.[2]

– General Division decision

[17] The General Division defined misconduct as follows:

> To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [citation omitted] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law. [citation omitted]
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> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employee and that there was a real possibility of being suspended or dismissed because of that. [citation omitted][3]

[18] The General Division found that the evidence showed that the Claimant made the conscious, deliberate, and wilful decision not to comply with her employer's policy when she was aware that not complying could lead to suspension.[4] The General Division found that this established that there was misconduct.

– The Claimant's arguments

[19] The Claimant argues that there was no misconduct. Although she acknowledges that she did not get fully vaccinated as required by her employer, she denies that there was any misconduct because:

a) The employer's vaccination policy represented a material change in the terms and conditions of her employment,

b) Her employer did not have any authority to implement a vaccination policy that allowed for suspension or dismissal of employees. She points to the province's Chief Medical Officer of Health's directive. She says the directive

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[2] See Supplementary Record of Claim, dated October 21, 2021, at GD 3-15.
[3] See General Division decision, at paras 35 and 36.
[4] See General Division decision, at paras 45 and 49.

did not say employers should suspend or dismiss employees for non-compliance. She says employers had other reasonable alternatives to suspending or dismissing employees.

c) The policy was discriminatory and did not reasonably accommodate her medical condition.

[20] From this, I understand that the Claimant is essentially arguing that the General Division either failed to consider these arguments or came to the wrong conclusion on these issues.

– The Commission's arguments

[21] The Commission argues that the General Division did not make any errors, let alone misinterpret what misconduct means.

– My findings

[22] At the General Division, the Claimant argued that misconduct did not arise because (1) she did not have to comply with a new condition of her employment, (2) her employer had no authority to bring in a new policy, and (3) the policy was discriminatory and did not reasonably accommodate her.

[23] The General Division acknowledged the Claimant's argument that her contract of employment did not require her to be vaccinated against COVID-19.[5] However, the General Division did not address the Claimant's argument that, if her employment contract did not require her to be vaccinated, that remaining unvaccinated would not be misconduct.

[24] Similarly, the General Division also did not address the Claimant's arguments that her employer did not have a legal basis to implement a vaccination policy, or that the policy was discriminatory and did not reasonably accommodate her medical condition.

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[5] See General Division decision, at para 43.

[25] The General Division ultimately decided that, when assessing whether there is misconduct, the focus necessarily must be on the Claimant's conduct (or omission), and whether that qualifies as misconduct. However, the General Division did not explain nor address the Claimant's arguments that misconduct did not arise in her case.

[26] The Claimant raised numerous issues at the General Division. Some of the arguments may not have been apparent to the General Division. Even so, the General Division was aware of at least one of the Claimant's arguments that, as the vaccination policy was not part of her original employment contract, she did not have to comply with it. The General Division should have addressed these arguments. This represents a shortcoming in the General Division's decision.

[27] I can now consider how to fix the General Division's shortcoming. But before doing so, I will comment on the rest of the Claimant's arguments about the General Division decision, as they are important to the outcome.

Did the General Division make a factual error when it found that the Claimant knew her employer could suspend her if she did not comply with her employer's vaccination policy?

[28] The Claimant argues that the General Division made a factual error when it found that she knew her employer could suspend her if she did not comply with her employer's vaccination policy.

[29] The Claimant denies that she was aware that she would face any consequences if she did not get vaccinated. She questions how she could have known, as she expected her employer would give her some medical accommodation and recognize that she was an invaluable longstanding employee.

[30] The General Division found that the Claimant knew that she could be suspended because:

- Her employer emailed her on October 12, 2021, that if she did not receive a first dose by October 14, 2021, that she would be immediately placed on an unpaid leave of absence.[6]

- When the Claimant responded to her employer on October 14, 2021, she wrote, "I do understand not taking the vaccine, as of today, Thursday October 14 I will be placed on a temporary unpaid leave of absence."[7]

[31] However, I find that the General Division somewhat misconstrued or mischaracterized the evidence. This is because at the end of the Claimant's her email of October 14, 2021, she added, "Is this correct?" This suggested that she questioned or had doubts about whether her employer would place her on a temporary unpaid leave of absence.

[32] Despite the General Division's characterization of the evidence, I find that the Claimant knew or should have known that she could face suspension or be placed on an unpaid leave of absence.

[33] The Claimant does not deny that she had received a copy of her employer's vaccination policy. The policy provided that the employer would "assess and communicate whether an alternate accommodation can be provided, including but not limited to, an unpaid leave of absence."[8]

[34] Even if it is unclear from the evidence when the employer communicated its policy to the Claimant, the Claimant had advised the Commission that she was aware of the employer's policy and the consequences of not being vaccinated.[9]

[35] So, while the General Division mischaracterized the evidence, overall, I find that the General Division could conclude from the evidence that the Claimant knew or

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[6] See General Division decision, at para 47. The employer's email is at GD 3-46.
[7] See General Division decision, at para 48. The Claimant's email is at GD 3-46.
[8] See employer's COVID-19 vaccination policy, at GD 3-59.
[9] See Supplementary Record of Claim dated February 2, 2022, at GD 3-49.

should have known that her employer could suspend her if she did not comply with the vaccination policy.

Did the General Division fail to apply section 32 of the *Employment Insurance Act* and the Digest of Benefit Entitlement Principles?

[36] The Claimant argues that the General Division failed to apply both section 32 of the *Employment Insurance Act* and the Digest of Benefit Entitlement Principles. The Claimant argues that because her employer imposed an unpaid leave of absence, she is entitled to benefits under both the section and the Digest.

– The General Division decision

[37] The General Division referred to the Digest. The General Division found that the Digest represented the Commission's policy and was not law. The General Division determined that it was not required to follow it.

[38] The General Division rejected the Claimant's arguments that her employer laid her off from her employment, or that she voluntarily took a period of leave. The General Division concluded that the Claimant had been suspended "because it was her actions that led to her not working".[10] For this reason, the General Division found that section 31 of the *Employment Insurance Act* applied, which meant the Claimant was disentitled from receiving benefits.

– Section 32 of the *Employment Insurance Act*

[39] Section 32 of the *Employment Insurance Act* deals with disentitlement arising from a voluntary leave without just cause. The section reads:

> **32. (1) Disentitlement – period of leave without just cause –** A claimant who voluntarily takes a period of leave from their employment without just cause is not entitled to receive benefits if, before or after the beginning of the period of leave,
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> (a) the period of leave was authorized by the employer; and

[10] See General Division decision, at para 24.

> (b) the claimant and employer agreed as to the day on which the claimant would resume employment.

[40] The section does not describe the Claimant's factual circumstances as the Claimant did not voluntarily take a period of leave from her employment.

[41] But the Claimant relies on the section because she says it must be read with the Digest. She says that the Digest provides that a disentitlement will not be imposed under section 32.

– **Digest of Benefit Entitlement Principles**

[42] Section 6.6.2 of the Digest reads, in part, as follows:

> **6.6.2 Authorized period of leave- section 32**
>
> . . . If imposed by the employer or set out in the employee's contract that the claimant must take leave (without pay or with reduced pay), then this is considered to be a lay-off. Even if the claimant was able to choose the period in which such imposed leave could be taken, this would not change the fact that the leave was not taken voluntarily. In such circumstances, a disentitlement will not be imposed.

[43] The Claimant says she did not take a voluntary leave, so a disentitlement should not have been imposed.

[44] The Social Security Tribunal can use the Digest as a guide to interpret the *Employment Insurance Act* and the *Employment Insurance Regulations*.[11] But, the court cases say that the Digest is not binding and does not replace the law.[12]

[45] The Claimant focused on section 6.6.2 of Chapter 6 of the Digest. It deals with voluntarily leaving employment.

[46] Section 6.3.1 of the Digest compares voluntary leaving to misconduct. The section states that, in both cases, the claimant has "acted in such a manner that loss of employment resulted. These two notions are rationally linked together because they

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[11] See *Canada (Attorney General) v Greey*, 2009 FCA 296 at para 28.
[12] See *Sennikova v Canada (Attorney General)*, 2021 FC 982.

both refer to situations where loss of employment results from a deliberate action of the employee."[13]

[47] The section says that any final decision must reflect the facts and be able to justify which is more valid: misconduct or voluntary separation without just cause. The section states that this would involve examining who initiated the act of severing the employment relationship or causing the separation.

[48] The section does not directly deal with involuntary separation. But it is clear from the section and in applying the Digest principles that, in deciding whether there is involuntary leave or misconduct, one must look at who initiated the act of severing the employment. This involves looking at whether:

- There were external factors unrelated to the employee that caused the employer to place the employee on leave, or
- There was any conduct or omission by the employee that caused the employer to place the employee on leave.

[49] This approach is consistent with the case law. In *MacDonald,*[14] for instance, the Federal Court of Appeal stated that one must determine the real cause of a claimant's separation from employment. That way, one can properly characterize what happened.

[50] In both cases, there is an involuntary leave. The difference between the two cases lies in whether the employee's conduct triggers the employer to place the employee on leave. If the employee's conduct (or omission) leads the employer to place the employee on leave, then this is effectively a suspension for the purposes of the *Employment Insurance Act*.[15]

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[13] See section 6.31. Voluntary leaving versus misconduct of the Digest of Benefit Entitlement Principles.
[14] *MacDonald*, A-152-196.
[15] A suspension under the *Employment Insurance Act* does not necessarily mean a suspension from a disciplinary perspective.

– **Who initiated the act of severing the employment?**

[51] What was the real cause of the Claimant's separation from her employment, or who initiated the act of severing the employment?

[52] Here, there can be no doubt that the Claimant's non-compliance with her employer's vaccination policy triggered the separation from her employment. Although the policy indicated that the employer would place unvaccinated employees on an unpaid leave of absence, from the perspective of the *Employment Insurance Act*, *the* employer suspended the Claimant because she remained unvaccinated.

Fixing the error

[53] Unless the outcome remains the same, the Appeal Division has two options to fix errors: It can return the matter to the General Division for a redetermination, or it can give the decision that the General Division should have given in the first place.

[54] Generally, it is appropriate to substitute one's own decision for the General Division decision if the underlying facts are not in dispute, the evidentiary record is complete, and the parties received a fair hearing at the General Division and had a full and fair opportunity to present their case at the General Division.

[55] The parties agree on the basic underlying facts. There were no procedural irregularities or issues at the General Division. For this reason, I find it appropriate in this case to give the decision that the General Division should have given. This involves addressing the Claimant's primary argument, that there was no misconduct because she should not have been required to comply with a new policy that was not part of the collective agreement.

[56] The Claimant also argues that there was no misconduct because her employer did not have any authority to bring in a new policy that allowed for suspension or dismissal of employees. The Claimant also argues that the policy was discriminatory and did not accommodate her. So, she says that she did not have to comply with the policy and, for that reason, argues that there was no misconduct.

- **The employer's new policy**

[57] The Claimant argues that there was no misconduct because she was expected to comply with a new policy that did not form part of the terms and conditions of her employment. The vaccination policy was not included in her collective agreement.

[58] The Claimant argues that her employer is neither allowed to introduce new terms and conditions to her employment nor unilaterally change the collective agreement. So, she says that she did not have to comply with the new policy. She further argues that, if she did not have to comply with the new policy, then there could have been no misconduct. If anything, she says that she was constructively dismissed.

[59] The Claimant was otherwise fully compliant with the terms and conditions of her collective agreement.

- **The Claimant's arguments and cases**
  - **The Claimant's co-workers' cases**

[60] The Claimant relies on three co-workers' cases. She says their cases are the same as hers. The Claimant says that, in those three cases, the Commission tried calling their employer to get more information about why the employees were dismissed from their jobs. But the employer did not speak with the Commission in any of those three cases. So, she says the Commission determined that there was no misconduct.

[61] The Claimant says that her employer did not speak with the Commission in her case either. So, she argues the Commission (and the General Division) should treat her the same way it treated her co-workers and find that there was no misconduct in her case either.

[62] But, in fact, there is a telephone log note that shows that the employer spoke with the Commission in December 2021.[16] The employer told the Commission that it required employees to get vaccinated, otherwise they were placed on leave.

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[16] See Supplementary Record of Claim, dated December 6, 2021, at GD 3-19.

[63] Even if the Claimant's employer had not spoken with the Commission, I cannot rely on anecdotal evidence about what might have happened in other cases. Those cases were not court cases, and they did not come before the Social Security Tribunal either. They were decisions of the Commission. Whatever may have happened in those three cases is not binding.

- ***T.C. v Canada Employment Insurance Commission***

[64] The Claimant also relies on *T.C.*,[17] a decision in which the General Division found that T.C. was entitled to receive benefits. The Claimant argues that her case is like T.C.'s case because she also has a medical condition, and her employer did not accommodate her. So, she says that she should also get benefits.

[65] T.C. had argued that his employer knew he had high blood pressure but did not accommodate him. T.C. had also argued that his employer changed the terms of his contract, and that he should not have to undergo vaccination, what he considered was an experimental medical procedure.

[66] However, the General Division in the *T.C.* case did not make any findings about T.C.'s medical conditions. The General Division found that there was no misconduct in *T.C.* because the employer in that case simply did not give enough notice of its vaccination policy to T.C. Indeed, the employer did not even give T.C. a written copy of the policy and gave him only two days to get vaccinated. This was not enough time for him to get vaccinated, even if he had had notice of the policy.

[67] On top of that, T.C. did not and could not know that if he did not comply with the policy, that the employer would dismiss him.

[68] The facts in *T.C.* are distinguishable. The Claimant in this case does not suggest that she did not receive a copy of the policy nor that her employer did not tell her it would put her on a leave of absence.

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[17] See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891.

- ***Toronto Professional Fire Fighters' Association v Toronto***

[69] The Claimant also relies on the "fire fighters' case"[18] to show that her employer's vaccination policy was unreasonable. In that case, the Toronto Professional Fire Fighters' Association (Association) argued that the City of Toronto's (City) policy on vaccination and enforcement of the vacation policy was unreasonable, arbitrary, and discriminatory.

[70] I will address the Claimant's arguments involving the "fire fighters' case" below.

- ***Luckman v Bell Canada***

[71] The Claimant also relies on *Luckman*[19], a decision of the Canadian Human Rights Tribunal (CHRT). The Claimant says the *Luckman* case is like hers.

[72] Mr. Luckman's employer dismissed him from his employment. The CHRT found that the complainant's employer discriminated against him because of his disability. This was contrary to section 7 of the *Canadian Human Rights Act* (CHRA). The CHRT awarded compensatory and special damages under the CHRA.

[73] The Claimant says that her employer discriminated against her. So, she argues that I should rule in her favour too and find that she is entitled to receive Employment Insurance benefits.

[74] As the Courts have consistently set out, the focus should not be on an employer's conduct in misconduct cases. Rather, the focus should be on whether the applicant was guilty of misconduct and whether that resulted in the applicant's suspension or dismissal from employment.[20]

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[18] See *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City)*, 2022 CanLII 78809 (ON LA).
[19] See *Luckman v Bell Canada*, 2022 CHRT 18.
[20] See, for instance, Canada (Attorney General) v McNamara, 2007 FCA 107 and *Fleming v Canada (Attorney Genera)*, 2006 FCA 16.

[75] The Courts have made it clear that this is not the appropriate forum to decide whether discrimination arose and, if so, what the appropriate remedies should be.[21] The Claimant's remedies for discrimination, if any, lie elsewhere.

- ***The U.S. experience***

[76] The Claimant also relies on U.S. authorities.[22] In one case, a DC Superior Court judge ruled that the mayor's COVID-19 mandate was illegal. And, in another case, a judge ruled that New York City's Department of Health and Mental Hygiene Commissioner lacked the power to institute the measures it used to enforce its vaccine mandate.

[77] Those decisions are not binding and of little relevance, if any, to the Claimant's case and to the misconduct issue. Canadian legal authorities and the underlying statutory framework on which the cases are built are vastly different from those of the U.S. experience.

- **The Commission's arguments**

[78] The Commission argues that the General Division did not make any errors, let alone misinterpret what misconduct means.

[79] In response to the Claimant's arguments, the Commission argues that the vaccination policy did not represent a material change in the terms and conditions of the Claimant's employment. The Commission argues that there is an implied term of the employment agreement that both parties agree to take reasonable and necessary steps to ensure the health and safety of the workplace.

[80] The Commission also argues that, under the policy, the employer did in fact address employees' medical issues. The employer offered medical exemptions, although an employee had to given written proof of the medical reason(s) provided by a physician or registered nurse. The Commission notes that in the Claimant's case, her

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[21] See *McNamara*, at para 23 and *Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 34.
[22] See Claimant's extracts from various sources, at AD 4-5 to 4-6, AD 4-11, and AD 4-12.

own physician did not support her request for a medical exemption, as she did not have any heart issues or have any allergies to any of the vaccines.

[81] The Commission argues that, if the vaccination policy was lawful, the Claimant had to comply with it. The Commission says the General Division established the proper legal test for misconduct and its findings of fact are consistent with the evidence.

- **Whether there was a material change in the terms and condition of the Claimant's employment**

[82] The Claimant argues that there was no misconduct in her case because her employer's vaccination policy represented a new condition of her employment. She says that she was not required to comply with conditions that were not part of her employment agreement. So, she says that there was no misconduct.

- **The *KVP* test**

[83] But in what is generally known as the "*KVP* test," any rule or policy can be unilaterally introduced by an employer, even if the union disagrees with it. The test arises out of Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[23] The Supreme Court of Canada has endorsed the *KVP* test.[24]

[84] The *KVP* test has been used in numerous labour arbitration awards, as well as in at least one recent court decision[25] in deciding whether an employer can unilaterally introduce a rule or policy. The discussions in those cases have been helpful.

[85] Under the *KVP* test, the rule or policy must satisfy the following requirements:

i. It must not be inconsistent with the collective agreement.

ii. It must not be unreasonable.

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[23] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.*, (1695), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (O.N.L.A.).
[24] See *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458.
[25] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

iii. It must be clear and unequivocal.

iv. It must be brought to the attention of the employee affected before the company can act on it.

v. The employee must be notified that a breach of such rule could result in discharge if the rule is used as a foundation for discharge.

vi. Such rule should have been consistently enforced by the company from the time it was introduced.

[86] The Claimant did not address aspects of the *KVP* test.

[87] The Claimant does not say that her employer's vaccination policy is inconsistent with the terms and conditions of her collective agreement. At most, the Claimant says her collective agreement does not contain anything about vaccination. In any event, the Claimant did not produce a copy of the collective agreement at the General Division.

[88] The Claimant does not suggest that her employer's vaccination policy was unclear or vague. She also does not suggest that her employer did not bring it to her attention before acting on it, or that it did not consistently enforce the policy.

[89] The Claimant says that her employer failed to notify her that breaching the policy could lead to dismissal. For reasons that I will set out below, the evidence does not support her claim that her employer failed to notify her that breaching the policy could lead to dismissal.

- **The *KVP* test: Reasonableness of the Claimant's employer's policy**

[90] The Claimant contests the reasonableness of the policy because she says her employer had alternatives to suspending or dismissing employees. She says, for instance, that her employer could have allowed employees to work alone without coming into contact with others, as she had done for the first two years of the pandemic. Or, she says her employer could have required employees to work behind partitions, or to be masked.

- ***The fire fighters' case***

[91] The Claimant relies on the "fire fighters' case"[26] to show that her employer's vaccination policy was unreasonable.

[92] There, the arbitrator determined that the enforcement mechanisms of disciplinary suspensions and discharge for non-compliance were unreasonable. The arbitrator noted that the Association "did not expand its submissions on *KVP* principles beyond the consideration of the requirement that the City's unilaterally imposed mandatory vaccination rule be objectively reasonable".[27]

[93] However, the arbitrator found that the policy requiring fully vaccinated status as a condition for a fire fighter's continuing to report for work was and continued to be reasonable.[28] The arbitrator explained that the employer (the City of Toronto) had an obligation to adopt an approach that promised the most effective protections for its employees and the public that they serve.

[94] The fire fighters' case does not help the Claimant establish that her employer's policy was unreasonable.

- ***Parmar v Tribe Management***

[95] In a case called *Parmar* case, the Court considered whether an employer is entitled to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy.

[96] The Court assessed the reasonableness of the employer's vaccination policy. The Court said that the policy had to be considered based on the state of knowledge about COVID-19 at the time it was implemented. The Court determined that the policy also had to be considered in light of the employer's obligation to protect the health and

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[26] See *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City)*, 2022 CanLII 78809 (ON LA).
[27] See *Toronto Professional Fire Fighters' Association,* at para 238.
[28] See *Toronto Professional Fire Fighters' Association,* at para 262.

safety of its employees, its clients, and the residents of the buildings to which it provided property management services.[29]

[97] The Court examined what was known about COVID-19. It noted that unprecedented health orders had been made. The Court noted that, as a condition of continued employment, all BC employees in the healthcare sector, irrespective of their position or the nature of their employment and whether they could work from home, had to be vaccinated against COVID-19 by October 2021.

[98] The Court noted that courts are entitled to take judicial notice of facts that are so notorious as not to require proof. The Court then took judicial notice of the fact that COVID-19 is a potentially deadly virus that is easily transmissible. The Court also took notice of other facts relating to COVID-19.[30]

[99] The Court also took judicial notice of the fact that vaccines work, noting that, while they do not prevent infection, reinfection, or transmission, they reduce the severity of symptoms and bad outcomes.[31]

[100] The Court stated that each case must be assessed on its facts. The Court noted arbitration cases in which arbitrators have approved vaccination policies. In yet other cases, arbitrators found terms unreasonable. These included cases in which disciplinary measures were taken against employees who remained unvaccinated, or to those who worked exclusively outside.

[101] The Court concluded that mandatory vaccination policies were a reasonable policy choice for employers, including the employer Tribe. The Court found that the vaccination policy struck an appropriate balance between the employer's business interests, the rights of its employees to a safe work environment, its clients' interests, and the interests of the residents in the properties it serviced. The Court found that the policy also fulfilled the employer's responsibilities as a corporate citizen. And the policy

[29] See *Parmar*, at paras 101 and 102.
[30] See *Parmar*, at paras 107 and 108.
[31] See *Parmar*, at para 109.

also respected Ms. Parmar's principled stance against vaccination. It was her choice to remain unvaccinated.

[102] The Court wrote:

> [132] … Individual views of the appropriateness of Tribe's MVP [mandatory vaccination policy] do not undermine the reasonableness of the policy, and an employee's personal belief must give way to the health and safety concerns that form the basis for the MVP.
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> [133] I accept that Ms. Parmar was faced with a difficult choice. She apparently held strong beliefs about the safety of the vaccine, and it is not my role to question those beliefs. However, any extraordinary circumstances of the pandemic in the winter of 2021 and January 2022, implementing an MVP was a reasonable policy choice for employers, including Tribe.[32]

[103] The Court concluded as follows:

> [154] Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impact's an employee's bodily integrity, but in the context of the extraordinary health challenges imposed by the global COVID-19 pandemic, such policies are reasonable. They do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income. Ms. Parmar made her choice based on what appears to have been speculative information about potential risks.[33]

- **My findings on the reasonableness of the employer's policy**

[104] I adopt the reasoning and approach of the Court in *Parmar* in assessing the reasonableness of the employer's vaccination policy.

[105] The Claimant's employer faced the same or similar situation and timeline as the one in the *Parmar* case. The employer explained what it was trying to accomplish with its policy. The employer explained that it prioritized the safety and well-being of patients and everyone who provided service to the organization. The policy reads:

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[32] See *Parmar*, at paras 132 and 133.
[33] See *Parmar*, at para 154.

> Utilizing the best available evidence, we are committed to ensuring the highest standard of care for the patients and communities we serve. We are further committed to taking every precaution reasonable in the circumstances for the protection of the health and safety of all Covered Individuals from the hazards of COVID-19. Vaccination is a key element in the protection of Covered Individuals against the hazard of COVID-19. This policy is designed to maximize COVID-19 vaccination rates among … Covered Individuals as one of the critical control measures to prevent serious disease, hospitalization, morbidity resulting from COVID-19 for patients, families, employees, physicians, volunteers and learners.[34]

[106] At the same time, the employer's policy respected the Claimant's choice to remain unvaccinated, even if it resulted in being placed on an unpaid leave of absence.

[107] Given the evidence that was before the General Division, the employer's vaccination policy was reasonable. It may be that some of the terms of the policy may have been unreasonable as it applied to some employees, but that does not render the policy overall unreasonable.

[108] The vaccination requirements did not form part of the Claimant's collective agreement. But, on top of the fact that the employer was under a provincial directive to implement a vaccination policy, I find that the employer satisfied the requirements under the *KVP* test. Having met the *KVP* test, the employer could unilaterally introduce the policy in any event.

– **Whether the Claimant's employer had any authority to implement a vaccination policy that allowed for suspension or dismissal**

[109] The Claimant argues that her employer did not have any authority to implement a vaccination policy that allowed for suspension or dismissal. She points to Directive 6 and argues that it does not say anything about suspending or dismissing employees for non-compliance with any vaccination policy that the employer might have been required to implement.

[34] See employer's COVID-19 vaccination policy, at GD 3-56.

[110] The Chief Medical Officer of Health for the Province of Ontario issued a directive affecting public hospitals. (The Claimant was an employee at a public hospital, so the directive affected her.) The Chief Medical Officer of Health issued Directive 6 under section 77.7 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7.

[111] Section 77.7(1) of the HPP Act states that, where the Chief Medical officer of Health is of the opinion that there exists or may exist an immediate health risk to the health of anyone in Ontario, he or she may issue a directive to any health care provider, including a public hospital.

[112] Section 77.7(3) of the HPP Act requires a health care provider that is served with such a directive to comply with it. As a public hospital, the Claimant's employer was required by law to comply with Directive 6.

[113] The directive required the Claimant's employer to establish, implement, and ensure compliance with a COVID-19 vaccination policy requiring its employees, staff, contractors, volunteers, and students to provide proof of full vaccination against COVID-19, written proof of a medical exemption, or proof of completing an educational session. The directive let organizations remove this last option and to require employees to provide either proof of full vaccination or written proof of a medical exemption.

[114] The Claimant's employer established and implemented a COVID-19 vaccination policy.[35] The preamble to the policy reads:

> On August 17, 2021, the Chief Medical Officer of Health issued Directive 6. The Directive makes it mandatory for hospitals to have a vaccination policy by no later than September 7, 2021 and sets out minimum requirements.

[115] The Claimant's employer clearly had the legal authority to implement a vaccination policy. The directive set out minimum requirements, which meant that the

[35] See employer's vaccination policy, at GD 3-55 to GD 3-62.

employer was permitted to include other measures within its policy. In other words, the employer could include measures to try to ensure compliance with the policy.

[116] The Claimant also argues that once the government removed any requirements for employers to implement vaccination policies, employers could no longer impose any vaccination requirements on employees.

[117] The Claimant has not provided any authorities to support this argument. As well, her argument overlooks the fact that, at the same time, the government encouraged employers to integrate COVID-19 vaccination policies into their existing occupational health and safety policies and procedures.

– **Whether the employer's vaccination policy was discriminatory and did not reasonably accommodate her medical condition**

[118] The Claimant argues that there was no misconduct because she should not have been expected to comply with a policy that she says is discriminatory and did not reasonably accommodate her medical condition.

[119] But, as the Federal Court of Appeal ruled in *Mishibinijima*,[36] the issue of whether an employer has a duty to accommodate an employee is an irrelevant consideration in misconduct cases.

Conclusion

[120] The Claimant's employer introduced a new condition to the Claimant's employment that did not exist before. The Claimant argued that she did not have to comply with a new condition as it did not form part of her original employment contract. For that reason, she argues that there was no misconduct. She also argues that misconduct did not exist for other reasons. The General Division should have addressed these arguments. This represented an error.

[36] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.

[121] The General Division did not make a factual error about whether the Claimant was aware of what the consequences would be if she did not comply with her employer's vaccination policy. The evidence supported the General Division's findings.

[122] The General Division did not fail to apply section 32 of the *Employment Insurance Act* or the Digest of Benefit Entitlement Principles. As the General Division noted, the Claimant's factual circumstances were not relevant to section 32 or to the Digest.

[123] Although the General Division did not address all the Claimant's arguments, it would not have changed the outcome. The employer was required to introduce a vaccination policy under a provincial health directive. On top of that, it was permitted to introduce its COVID-19 vaccination policy because it met the *KVP* test.

[124] The appeal is dismissed.

Janet Lew
Member, Appeal Division