Citation: *LB v Canada Employment Insurance Commission*, 2023 SST 25

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. B.
Representative:	E. B.
Respondent:	Canada Employment Insurance Commission
Representative:	Anick Dumoulin

Decision under appeal:	General Division decision dated April 7, 2022 (GE-22-618)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	September 7, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 4, 2023
File number:	AD-22-237

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, L. B. (Claimant), is appealing the General Division decision. The General Division found that the Claimant lost her job because of misconduct. In other words, it found that she did something that caused her to lose her job. She did not comply with her employer's policy that required her to be vaccinated unless she had a valid medical or religious reason against vaccination. Having determined that there was misconduct, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant does not dispute the basic facts. She did not comply with her employer's vaccination policy because she did not agree with it. However, she argues that the General Division made a legal error. She argues that the General Division misinterpreted what misconduct means. She denies that there was any misconduct. She asks the Appeal Division to allow her appeal and find that there was no misconduct on her part.

[4] The Respondent, the Canada Employment Insurance Commission (Commission) argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issue

[5] The issue in this appeal is: Did the General Division misinterpret what misconduct means?

Analysis

[6] 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?

[7] The Claimant argues that the General Division misinterpreted what misconduct means. So, she says that it made a mistake in finding that there was misconduct.

– Background facts

[8] The Claimant had been with her employer since May 2003. Her employer introduced a COVID-19 vaccination policy in September 2021. The policy required employees to be fully vaccinated or to comply with alternate measures. This included unvaccinated employees providing proof of negative tests twice per week, at the employees' own cost and on their own time.[2]

[9] The Claimant disagreed with the policy for religious and other reasons. She believes the vaccine is dangerous and has caused widespread death. She sought an exemption on religious grounds, but her employer refused the request, finding her request unsubstantiated.

[10] The employer terminated the Claimant's employment because she did not comply with its vaccination policy.[3]

– The General Division decision

[11] 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

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[1] Section 58(1) of the *Department of Employment and Social Development Act*.
[2] Employer's COVID-19 immunization (vaccination) disclosure policy, revised September 3, 2021, at GD3-27 to GD3-31.
[3] Employer's termination letter dated September 27, 2021, at GD2-788 to GD2-789 (and at GD3-650 and GD3-652).

> words, she doesn't have to be doing something wrong) for her behaviour to be misconduct under the law. [Citation omitted]
>
> 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 employer and that there was a real possibility of being let go because of that. [Citation omitted]

[12] The General Division concluded that the Commission had proven that there was misconduct because it proved what it described as "the four elements of misconduct

i. Interference with carrying out the duties the Claimant owed to the employer;

ii. Wilfulness;

iii. Awareness that non-compliance with the employer's policy could lead to loss of the job; and

iv. The termination of the employment was caused by the non-compliance.

– **The Claimant's position**

[13] The Claimant argues that there was no misconduct because the employer introduced a new policy. She says that the new policy did not form part of her employment contract. She did not agree with nor consent to the new policy. And, she certainly did not agree that the new policy would form part of her employment contract. She did not sign any amendments to the employment contract.

[14] The Claimant denies that the terms of the vaccination policy represented an implied term of her employment contract. The Claimant explains that the vaccination policy could not have been an implied term of her employment contract because the policy required putting something foreign in her body. She says that she would never agree to any terms that affects her safety, health, or life.

[15] Because the employer's vaccination policy did not form part of her employment contract, the Claimant denies that there could have been any misconduct on her part. She says her employer should have accommodated her by granting a religious exemption.

[16] At most, she says that there simply was a disagreement with her employer. She says her employer could still terminate her employment, but that did not mean there was misconduct.

– **The Commission's position**

[17] In response to the Claimant's arguments, the Commission argues that, in fact, the vaccination policy fell within the Claimant's terms of employment. So, she had to comply with the employer's vaccination policy.

- **The terms of the Claimant's employment agreement**

[18] The Commission argues that the vaccination policy fell within the Claimant's terms of employment, for the following reasons:

- The Employment Agreement said the Claimant's duties and responsibilities were in the job description. The Agreement read, in part, "The Employee's duties and responsibilities will be as set out in the attached job description, as well as such other functions, projects or duties as may be assigned to the Employee or required of the Employee from time to time".[4] Both the employer and the Claimant signed the Employment Agreement.

- Point 19 of the Employment Agreement defines the entire agreement between the Claimant and her employer. It reads, "This Agreement and the job description attached hereto contain the entire agreement of the parties relative to the employment of the Employee by the Employer and no modifications therefor shall be binding upon the parties unless the same is in writing, signed by the respective parties thereto…"[5] In other words, the job description was part of the Agreement.

  Job description:

[4] Employment Agreement, made July 11, 2017, point 5 at GD6-4.
[5] Employment Agreement, made July 11, 2017, point 19 at GD6-9.

- Point 1 of the Claimant's job duties were "to ensure the health, welfare and safety of the children remain the first priority of the centre". This duty included ensuring that the employer's Health Policy was followed.[6]

- Point 7 of the job description states that each employee has to keep abreast of any changes related to the employer's Health and Safety Program Manual. The claimant also had to keep herself updated with the health and safety board information. She also had to follow health and safety policies and procedures.[7]

  Health and Safety Program Manual

- The employer's vaccination policy was part of its Health and Safety Program Manual. This is apparent from the top right hand page of the vaccination policy, which says "Health and Safety Program Manual".

- The stated purpose behind the employer's vaccination policy was to protect the health and well-being of those that they served (including children) who are or could not be vaccinated, as well as the employees, and to keep the workplace a safe place to work.[8]

[19] The Commission argues that the vaccination policy was not a "new policy" nor a change in the Claimant's contract of employment. Rather, the Commission argues, the vaccination policy was a change related to the Health and Safety Manual. The Commission says that, according to the Claimant's job description, she was responsible for keeping updated on any changes related to the Health and Safety Manual and for complying with it.

[20] The Commission submits that, since the Claimant violated the employer's policy, there was misconduct within the meaning of the *Employment Insurance Act*.

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[6] Claimant's Job Description, at GD6-11.
[7] Claimant's Job Description, at GD6-13.
[8] Employer's COVID-19 immunization (vaccination) disclosure policy, revised September 3, 2021, at GD3-27.

– My findings

[21] I do not have to consider whether the employer's vaccination policy represented an implied term of the employment agreement. The employment agreement did not specifically require vaccination when the Claimant signed the agreement. But, the terms were broad enough to include the vaccination policy when the employer introduced it years later. The agreement specifically included the job description, and the job description in turn required adherence to the Health and Safety Program Manual, as updated from time to time.

[22] The Claimant did not abide by the terms and conditions of her employer's vaccination policy or her employment agreement. The General Division did not make an error when it concluded that the Claimant breached the duties that she owed to her employer.

[23] The General Division found that the Commission proved that the remaining elements existed to establish that there was misconduct. The Claimant does not challenge these other findings.

[24] Finally, the Claimant argues that her employer should have accommodated her request for a religious exemption. But, as the Federal Court of Appeal ruled in *Mishibinijima*,[9] the issue of whether an employer has a duty to accommodate an employee is an irrelevant consideration.

Conclusion

[25] The appeal is dismissed. The General Division did not make an error when it concluded that the Claimant lost her job because of misconduct. The Claimant is disqualified from receiving Employment Insurance benefits.

Janet Lew
Member, Appeal Division

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