Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 53

Social Security Tribunal of Canada
Appeal Division

Decision

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

Decision under appeal:	General Division decision dated June 1, 2022 (GE-22-750)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	November 16, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	January 23, 2023
File number:	AD-22-403

Decision

[1] The Appellant, J. B. (Claimant), did not get a fair hearing at the General Division. She declined to have this matter returned to the General Division for a redetermination. So, I decided the matter, as all the evidence was before me.

[2] My own assessment of the matter does not change the outcome. The Commission proved that the Claimant was suspended from her job because of misconduct, for the purposes of the *Employment Insurance Act*. The Claimant is disentitled from receiving Employment Insurance benefits.

Overview

[3] The Claimant is appealing the General Division decision. The General Division found that the Claimant was suspended because of misconduct. In other words, it found that she did something that caused her to be suspended. The Claimant had not complied with her employer's mandatory vaccination policy (and she did not qualify for one of her employer's exemptions).

[4] Having determined that there was misconduct, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division made procedural and legal errors. In particular, she argues that the General Division misinterpreted what misconduct means. She also claimed that she did not get a fair hearing because the General Division went ahead with the hearing even though she had received documents only 45 minutes before the hearing and did not have enough time to prepare. As well, the Claimant had expected that her representative would be attending the hearing.

[6] The Respondent, the Canada Employment Insurance Commission (Commission), argues that the General Division did not make any legal errors over the misconduct issue. However, the Commission agrees that, overall, the Claimant may not have had enough time to prepare for the hearing. The Commission also agrees that the Claimant did not expect to represent herself. In the interest of natural justice, the

Commission asks the Appeal Division to refer the matter to the General Division for reconsideration.

[7] The Claimant does not want to have the matter returned to the General Division, as this would prolong matters. She asks that the Appeal Division give the decision that she feels that the General Division should have made in the first place, even if this means that she cannot rely on new evidence that she filed with the Appeal Division. (It would not have changed matters anyway.)

[8] The Claimant denies that her employer suspended her for misconduct. She denies that noncompliance with her employer's vaccination policy amounts to misconduct. The Commission argues that there was misconduct.

Issues

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

a) Did the Claimant get a fair chance to present her case?

b) Did the General Division misinterpret what misconduct means?

c) If the General Division made any errors, how should the error(s) be fixed?

Analysis

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

Did the Claimant get a fair chance to present her case?

[11] The Claimant argues that she did not get a fair chance to present her case. For one, she received documents 45 minutes before the hearing, although she had first asked for them weeks ago. The documents were relevant to her appeal. And two, she

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

had expected her representative to attend the hearing and to act on her behalf. So, she was not quite ready to go ahead on her own.

[12] The Claimant says that she did not have enough time to adequately prepare for the hearing before the General Division. For instance, she claims that she would have researched misconduct and/or leave of absence claims.

[13] The General Division member provided the Claimant with the opportunity to review the documents. The member also offered to reschedule the hearing. The Claimant stated that she preferred to get the hearing over with instead of rescheduling.[2] She stated that she was ready to go ahead, even without her representative.

[14] The member said she would accommodate the Claimant and would start the hearing. But, if at any time, the Claimant felt she did not want to go ahead with the hearing without her representative, the member was prepared to consider what the Claimant had already said and would reschedule the hearing.[3]

[15] The hearing went ahead. At no time did the Claimant ever request an adjournment.

[16] There is now no issue regarding the Claimant's representative. The Claimant states that she tried to contact her representative several times after the General Division hearing. But she has not been able to contact her. She no longer expects to be represented. She is prepared to proceed on her own behalf.

[17] The General Division member acted fairly throughout this matter. The member gave the Claimant every opportunity to review the documents and seek an adjournment of the hearing. Even so, I am prepared to accept that the Claimant did not get a fair hearing because she received relevant documents so late that it hindered her ability to properly prepare for the hearing.

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[2] At approximately 25:30 of the audio recording of the General Division hearing.
[3] At approximately 25:59 of the audio recording of the General Division hearing.

Remedy

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

[19] In cases of a procedural breach where a claimant has been denied the chance to present their case, often, the remedy is to return the matter to the General Division for a redetermination. The Commission favours this remedy.

[20] However, the Claimant asks me to decide the matter based on the materials already on file. She says all the evidence is in the hearing file and that she does not have any further evidence or arguments to make.

[21] As all the materials are before me, and the Claimant prefers this route, I will decide the matter instead of returning it to the General Division for a redetermination.

– The Claimant's arguments

[22] The Claimant denies that there was any misconduct in her case, for the following reasons:

- Service Canada re-examined her file and determined that there was no misconduct, effective October 3, 2021.[4]

- Her employer did not express any interest in and did not ask to be added as a party to the proceedings. She argues that I should therefore disregard or give little weight to any statements from her employer.

- The Claimant denies that there was any suspension. She says that her employer placed her on an unpaid leave of absence. Her employer has not taken any disciplinary proceedings against her and she believes she will continue with her employer without any penalty or discrimination as a tenured employee.[5]

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[4] See Claimant's submissions filed September 12, 2022, at AD 3-6.
[5] See Claimant's submissions filed September 12, 2022, at AD 3-8.

- The Claimant fulfilled her duties. For instance, she attended an educational program and underwent testing. She suggests that vaccination falls outside of the duties expected of her as an employee.

- Her employer did not give adequate notice that she had to get vaccinated. She says there was not enough time to get vaccinated once she learned of her employer's policy.

- She also says that her employer did not say anything about being laid off due to misconduct. She was a long-standing employee and did not realize that she could be off work for this long. The length of the leave of absence has affected her and her family.

- She says she should not have had to consent to getting vaccinated anyway because she should have "freedom of choice." She does not feel the vaccine is safe and besides, she has already had COVID-19.

[23] The Claimant also relies on the arguments of the Justice Centre for Constitutional Freedoms (Justice Centre)[6].

[24] The Justice Centre argues that labelling the refusal to get a vaccination as misconduct is unconstitutional and inconsistent with the objectives of the enabling statute or the scope of the statutory mandate.

[25] The Justice Centre argues that, for misconduct to occur, the employee's actions had to have been so serious as to constitute a breach of the employment agreement. It argues that the employee must be guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with their duties.[7]

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[6] See Justice Centre for Constitutional Freedoms letter and briefing note, both dated June 6, 2022, at AD 7-24 to AD 7-32.
[7] See Justice Centre for Constitutional Freedoms letter and briefing note, both dated June 6, 2022, at AD 7-24 to AD 7-32, citing *R v Arthurs, Ex Parte Port Arthur Shipbuilding Co.* [1967] 2 O.R. 49 to 73.

– The Commission's arguments

[26] The Commission did not directly address the Justice Centre's arguments. However, the Commission argues that there was misconduct in the Claimant's case because the employer had implemented a policy, and the Claimant chose not to comply, even though she knew there would be consequences.

– Definition of misconduct

[27] As a starting point, it is necessary to understand when misconduct arises. Once a definition for misconduct is established, then I will examine each of the Claimant's arguments that her decision not to comply with her employer's vaccination policy did not amount to misconduct.

[28] 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 towards her employer and that there was a real possibility of being let go because of that. [Citation omitted][8]

[29] The Commission accepts the General Division's definition of misconduct.

[30] The Claimant, on the other hand, argues that the definition is overly broad. She says that misconduct only arises if there is "serious misconduct [such as when criminal behaviours involved], habitual neglect of duty, incompetence or conduct incompatible with her duties."[9]

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[8] See General Division decision, at paras 19 and 20.
[9] See Justice Centre for Constitutional Freedoms letter and briefing note, both dated June 6, 2022, at AD 7-24 to AD 7-32, citing *R v Arthurs, Ex Parte Port Arthur Shipbuilding Co.* [1967] 2 O.R. 49 to 73.

[31] The Claimant relies on two court cases: *Metropolitan Hotel and H.E.R.E., Local 75 (Bellan) (Re)*[10] and *R v Arthurs*, *Ex Parte Port Arthur Shipbuilding Co.*[11]

[32] In the *Metropolitan Hotel* case, the Arbitrator noted that the issue before it was whether the employer had just cause to discharge the employee, whereas the issue before the Board of Referees (the predecessor to the General Division) was whether the employee lost his job because of his own misconduct such as to disqualify him from employment insurance benefits.

[33] The Board of Referees found that the employee's conduct amounted to misconduct. The Arbitrator noted that the employee could have appealed the Board of Referees decision to an Umpire, but he did not appeal. The Arbitrator found that the decision of the Board of Referees was final. In other words, the Arbitrator did not make any findings on the issue of misconduct because the issue was not relevant and because a final decision had already been made.

[34] Although the Arbitrator did not make any rulings on the misconduct issue, it noted the Federal Court of Appeal's decision in *a case called Tucker*.[12] There, the Court held that for conduct to constitute misconduct, it "must be wilful or deliberate or so reckless as to approach wilfulness."

[35] The Claimant's second case, *Arthurs*, did not address the issue of misconduct in the employment insurance context, so it is not useful for my analysis.

[36] The case law does not support the Claimant's arguments that misconduct in the employment insurance setting only arises If there is serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with her duties. The General Division properly interpreted the case law and identified what misconduct is for the purposes of the *Employment Insurance Act*. I will also rely on the same case law and use the same definition for misconduct that the General Division set out.

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[10] See *Metropolitan Hotel and H.E.R.E., Local 75 (Bellan) (Re)*, 2002 CanLII 78919 (ON LA).
[11] See *R. v Arthurs, Ex Parte Port Arthur Shipbuilding Co.*, 1967 CanLII 30 (ON CA).
[12] See *Canada (Attorney General) v Tucker*, [1986] 2 F.C. 329 (C.A.)

[37] I will now address each of the Claimant's arguments and then determine whether the Claimant consciously did something, knowing that it could interfere with her duties and that it could result in consequences such as a suspension or dismissal.

– **Suspension versus a leave of absence**

[38] The Claimant denies that her employer suspended her from her employment. She notes that her employer described her separation from employment as a leave of absence in the vaccination policy, the notices of the policy, and Record of Employment.[13]

[39] An employer's determination or subjective assessment of whether a claimant engaged in misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.[14]

[40] Similarly, a claimant's expectations do not define misconduct. In a case called *Jolin*, the Federal Court of Appeal said that the fact that the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct.[15]

[41] It is clear from these authorities that I have to conduct my own objective analysis. My analysis must be independent of an employer's or employee's assessment. I cannot rely on their determination as to whether there was a leave of absence or a suspension.

[42] I have to look at what caused the Claimant's separation from her employment. If the employer placed the Claimant on a leave of absence for reasons unrelated to anything she did, this is considered a layoff. But, if the Claimant's conduct (or omission) led the employer to place her on leave, then this is effectively a suspension for the purposes of the *Employment Insurance Act*.[16]

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[13] See Record of Employment, at GD 3-19 to GD 3-20.
[14] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[15] See *Canada (Attorney General) v Jolin*, 2009 FCA 303.
[16] A suspension under the *Employment Insurance Act* does not necessarily mean a suspension from a disciplinary perspective.

[43] Here, the Claimant's non-compliance with her employer's vaccination policy directly led to 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.

– **Service Canada's position**

[44] The Claimant argues that Service Canada determined that there was no misconduct in her case. In her Notice of Appeal at the General Division, the Claimant referred to letters from the Commission that she says shows the Commission found there was no misconduct in her case.[17]

[45] The Claimant provided copies of letters January 14, 2022[18] and February 17, 2022[19] from Service Canada. Neither of these letters show that Service Canada or the Commission no longer considered the Claimant to have lost her employment because of misconduct.

[46] Besides, if the Commission had already determined that there was no misconduct, that the Claimant had not voluntarily left her employment, or that she had voluntarily left with just cause, there would have been no need for the Claimant to file an appeal with the General Division in the first place.

[47] Even if the Claimant had produced these documents, decisions by Service Canada or the Commission on the issue of misconduct are not binding on me. The Appeal Division is an independent body that acts at arm's length from Service Canada and the Commission. Their reasoning and analysis may be useful and of some guidance. But their decisions on misconduct are not final and decisive.

[48] Instead, I must consider the facts and the law to determine whether there was misconduct for the purposes of the *Employment Insurance Act*.

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[17] See Claimant's copy of Notice of Appeal – Employment Insurance, at GD 8-7.
[18] See Service Canada's letter dated January 14, 2022, at GD 8-12.
[19] See Service Canada's letter dated February 17, 2022, at GD 8-11.

– The employer did not participate in the General Division proceedings

[49] The employer was not added as a party to the proceedings at the General Division, and the employer did not attend the proceedings. (In other words, the Commission did not call the employer as a witness.) For this reason, the Claimant argues that any evidence from the employer should be struck from the record, or at the very least, given little weight.

[50] Strictly speaking, any documents in the hearing file at the General Division originated with either the Claimant or the Commission. So, the Claimant is essentially arguing that portions of the Commission's file should be excluded.

[51] The Commission did not attend the hearing at the General Division. The Commission relied on its written representations, along with its own file, which included documents from the employer.

[52] Proceedings at the Social Security Tribunal are generally informal. They do not follow the strict rules of evidence. It is up to the tribunal member to decide whether any documents or any evidence should form part of the record or what weight to assign to that evidence. If a member decides that a document is material to the outcome, likely the member would find it necessary to include that document as part of the evidence.

[53] If the Claimant in this case objected to the Commission's evidence, it was open to her to ask the Commission to produce an appropriate witness. That way, she could have cross-examined that witness. But she did not object to the Commission's evidence at the time.

[54] Despite the Claimant's arguments on this issue, I find that the parties agree on the underlying facts, namely, that the Claimant did not comply with her employer's vaccination policy.

[55] The parties disagree over whether the Claimant received adequate notice of her employer's vaccination policy. This does not mean that I should disregard or assign little weight to the employer's evidence on this issue. The employer's evidence would be

highly relevant. Rather, I must scrupulously examine the evidence on this issue, including any evidence from the employer.

– **Notice of vaccination**

[56] The Claimant argues that she did not get adequate notice of her employer's vaccination policy for her to get vaccinated on time. She argues that if she did not get adequate notice of vaccination, she could not have been expected to comply with her employer's vaccination policy. And, therefore, she says that misconduct did not arise.

[57] Evidence of the employer's notice is as follows:

- Employer's letter dated September 1, 2021- the letter reads:

  > [your employer] has joined with Canada's leading seniors' care providers to announce that we are making COVID-19 vaccination mandatory for our long-term care and retirement home team members across Canada. Team members who are not fully vaccinated by October 12, 2021 will be placed on an unpaid leave of absence until they are fully vaccinated.[20]

- Employer's letter dated September 20, 2021 – the letter reads:

  > You have not yet been fully vaccinated (and do not fall within an exemption) as per the requirements of our COVID-19 immunization Policy as communicated September 12, 2021. Accordingly, you will be placed on an unpaid leave of absence …[21]

- Employer's letters dated November 9, 2021[22] and January 20, 2022[23] also refer to September 12, 2021, as the date when the employer communicated its vaccination policy.

- The employer advised the Commission that it had given notice to employees in September and that there were company newsletters.[24] The employer provided copies of Staff Communication Weekly Updates, every week from

[20] See employer's letter dated September 1, 2021, at GD 3-25.
[21] See employer's letter dated September 20, 2021, at GD 3-26.
[22] See employer's letter dated November 9, 2021, at GD 2-13 and GD 3-28.
[23] See employer's letter dated November 9, 2021, at GD 3-33.
[24] See Supplementary Record of Claim, dated February 14, 2022, at GD 3-39.

> September 3, 2021 to October 8, 2021. Each update read, “MANDATORY VACCINATION EFFECTIVE OCTOBER 12, 2021”[25]

[58] It seems from this evidence that the employer notified employees as early as September 1, 2021 by letter, followed by company newsletters on September 3 and September 10, 2021, before giving formal notice on September 12, 2021.

[59] There is no evidence in the hearing file at the General Division that shows when the Claimant learned of her employer’s vaccination policy, and, upon learning of the policy, evidence that shows when and what efforts she took to try to get vaccinated, and how long it took to secure appointments for vaccination.

[60] There is no evidence that shows whether four to six weeks left the Claimant with inadequate time to get vaccinated, or that the Claimant’s employer did not give adequate notice of its policy.

[61] The employer gave employees a “heads up” of about six weeks that it would be introducing a mandatory vaccination policy, and then gave four weeks’ formal notice of the policy. This left four weeks within which the Claimant could have gotten vaccinated. This was enough time for her to get vaccinated. That said, I note that the Claimant never intended to get vaccinated anyway, so the notice issue might have been a moot consideration altogether.

– **Notice of consequences**

[62] The Claimant argues that she was unaware of the consequences. She denies that she knew her employer could place her on a lengthy unpaid leave of absence. She says that her employer did not give proper notice of the consequences.

[63] The employer’s letters make it clear that any employees who remained unvaccinated by October 12, 2021 would be placed on an unpaid leave of absence.

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[25] See Staff Communication Weekly Updates dated September 3, 10, 17, 14, and October 1 and 8, 2021, at GD 3-40 to GD 3-45.

These terms were clear. I find that the employer gave proper notice of the consequences if any employees did not get vaccinated.

[64] The employer also stated in its notice that employees would remain on an unpaid leave of absence "until they are fully vaccinated." While there is no end date or timeframe, it is clear from the employer's notices that the leave of absence could potentially have been lengthy. The length of the leave of absence would be dependent upon either a change in the employer's policy, or upon whether employees got vaccinated.

– **The Claimant's duties**

[65] The Claimant argues that even though she did not get vaccinated, that did not interfere with carrying out her duties. She claims that she fulfilled her duties and responsibilities. She says that for misconduct to exist, her conduct had to get in the way of carrying out her duties towards her employer. She denies that vaccination is related to any part of her duties. So, she says that there was no misconduct.

[66] However, it is clear from the employer's vaccination policy that unvaccinated employees would not be permitted to access the workplace. The employer announced that vaccination was mandatory for its long-term care and retirement homes. So, if the Claimant could not access her workplace, then she could not possibly have fulfilled her duties as a nurse's aide.

– **Interference with freedom of choice**

[67] The Claimant argues that she should not have to get vaccinated because she should be allowed to exercise her freedom of choice and be able to refuse a vaccine that she feels is unsafe. She already caught COVID-19 at work anyway.

[68] In a case called *Parmar*,[26] the Court looked at whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. The Court wrote:

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[26] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

> [154] Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed 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.
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> [155] I note that in *Maddock v British Columbia*, 2022 BCSC 1065, Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para. 78, Hinkson C.J. wrote that such policies "[do] not compel or prohibit subjection to any form of medical treatment": para. 78. **Rather, individuals remain free to make choices within the bounds of the policy. The MVP did not, in the words of *Maddock*, "[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment**": paras. 78–79. Ms. Parmar retained the choice to remain on unpaid leave.
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> (My emphasis)

[69] In short, the Court found that the Ms. Parmar did have a choice: she could get vaccinated and continue to earn an income, or remain unvaccinated, and lose her income.

[70] The *Lewis*[27]case involved a patient in the transplant program at an Albertan hospital. The program required patients to get vaccinated against COVID-19 before getting a transplant. Ms. Lewis was unable to get an organ transplant because she refused to be vaccinated against COVID-19. Ms. Lewis argued that the vaccine requirement violated her *Charter* rights.

[71] The Alberta Court of Appeal agreed that Ms. Lewis had a right to refuse to be vaccinated against COVID-19. As a competent adult, she was entitled to decide what to put into her body. But exercising that choice came with consequences.[28]

[72] In a case called *McNamara*,[29] the Federal Court of Appeal said the focus has to be on the behaviour of the employee. The Court of Appeal noted that section 30 of the

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[27] See *Lewis v Alberta Health Services*, 2022 ABCA 359.
[28] See *Lewis v Alberta Health Services*, 2022 ABCA 359.
[29] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Employment Insurance Act reads, “if the claimant lost any employment because of their misconduct.”

[73] There have been other cases (of differing circumstances), mostly in the context of labour arbitration awards, in which it has been determined that the issue is not forcible vaccination but the consequences of one’s choice to remain unvaccinated.[30] That is the issue here too.

[74] The employer’s vaccination policy required vaccination as a condition for continued employment. Employees, including the Claimant, were left with a choice. They could choose to remain unvaccinated, even if that meant being placed on an unpaid leave of absence.

– **Lack of disciplinary measures**

[75] The Claimant further argues that there was no suspension or any misconduct because her employer characterized her separation from work as an unpaid leave of absence. She has not and does not expect to ever face any discipline or discrimination for not complying with her employer’s vaccination policy.

[76] The courts have held that there is a distinction between suspension for disciplinary purposes and suspension for the purposes of the *Employment Insurance Act*. So, while an employee’s conduct may not be subject to discipline, it may nevertheless be misconduct for the purposes of the *Employment Insurance Act*. In other words, an employer’s or employee’s determination or subjective assessment of whether a claimant engaged in misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.[31]

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[30] See, for instance, *Costa, Love, Badowich and Mandekic v Seneca College of*, 2022 ONSC 5111; *Hawke v Western University*, 2022 ONSC 5243; and *Amalgamated Transit Union Local 113 et al. v Toronto Transit Commission and National Organized Workers Union v Sinai Health System*, 2021 ONSC 7658.

[31] See *Nelson v Canada (Attorney General)*, 2019 FCA 222 and *Canada (Attorney General) v Nguyen*, 2001 FCA 348.

[77] Instead of relying on an employer's or employee's determination as to whether misconduct occurred for the purposes of the Employment Insurance Act, I have to conduct my own objective analysis.[32]

Did the Claimant's conduct amount to misconduct?

[78] The Commission proved that there was misconduct because the Claimant knew or should have known that if she did not comply with her employer's vaccination policy that she faced being placed on an unpaid leave of absence. The employer sent the Claimant notices in September 2021. The employer posted weekly updates too. The employer told employees that they had to get fully vaccinated by October 12, 2021. If they did not get fully vaccinated by that date, the employer would put them on an unpaid leave of absence until they were fully vaccinated.

[79] The Claimant decided against getting vaccinated. She did not agree with her employer's policy. She had asked for an exemption, but her employer did not provide one. She argued that her employer overreached, much like the employer had in a labour arbitration case,[33] and that her freedom to choose was breached. So, she says that there is no misconduct under these circumstances.

[80] However, the employer's management rights are irrelevant to the misconduct question. And, as I have said above, the Claimant was free to choose to remain unvaccinated.

[81] There was sufficient time for the Claimant to get vaccinated. The Claimant chose not to get vaccinated, which was required of her to be able to access her workplace after October 12, 2021. In choosing not to get vaccinated, the Claimant consciously chose not to comply. As unvaccinated employees were not allowed into the workplace, the Claimant could not fulfill her duties as a nurse aide. This led to her being placed on a leave of absence.

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[32] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[33] See *Electrical Safety Authority v Power Workers' Union* (November 11, 2021), at AD 1C-2 to 1C-15.

Conclusion

[82] The appeal is allowed in part to reflect the fact that the Claimant did not get a fair chance to present her case at the General Division. But that does not change the overall outcome.

Janet Lew
Member, Appeal Division