Citation: *AS v Canada Employment Insurance Commission*, 2023 SST 323

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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

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| **Decision under appeal:** | General Division decision dated June 14, 2022 (GE-22-759) |

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| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | February 23, 2023 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | March 22, 2023 |
| **File number:** | AD-22-764 |

## Decision

[1] The appeal is dismissed. The General Division did not misinterpret what misconduct means and it did not fail to apply caw law.

[2] The General Division did not examine the employment agreement of the Appellant, A. S. (Claimant). Even so, it would not have changed the outcome.

## Overview

[3] The Claimant is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his job because of misconduct, in that he did something that caused him to lose his job. The Claimant did not comply with his employer's Covid 19 vaccination policy. Because he lost his job due to misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant denies that there was any misconduct in his case. He argues that the General Division misinterpreted the meaning of misconduct.

[5] The Claimant also argues that the General Division failed to consider the terms of his employment agreement. He says that his employment agreement restricted his employer from introducing any new terms or policies without his written consent. He did not consent to the vaccination policy, so says that he was not required to comply with the vaccination policy. If he did not have to comply, he says that misconduct did not arise.

[6] The Claimant asks the Appeal Division to allow his appeal and to give the decision that he says the General Division should have given. He argues that the evidence shows that there was no misconduct in his case. He argues that he should not be disqualified from receiving Employment Insurance benefits.

[7] The Commission argues that the General Division did not make any errors. In response to the Claimant's arguments, the Commission argues that the employment

agreement allowed the employer to introduce new policies and that it required the Claimant to comply with them. The Commission asks the Appeal Division to dismiss the appeal.

## Issues

[8] The issues in this appeal are:

a) Did the General Division misinterpret the meaning of misconduct?

b) Did the General Division fail to consider the terms of the Claimant's employment agreement?

c) Did the General Division fail to consider the case of *T.C.*?[1]

## Analysis

[9] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[2]

### General background facts

[10] The Claimant worked as a driver for a society that provides services for children and families. His employer introduced a vaccination policy. For various reasons, the Claimant did not comply with his employer's vaccination policy which required him to get vaccinated. As a result, his employer dismissed him from his employment on September 17, 2021.

[11] The Claimant applied for Employment Insurance benefits. The Commission denied his application, having determined that he lost his employment as a result of misconduct.

[12] The Claimant appealed the Commission's decision to the General Division. The General Division determined that the evidence showed that the Claimant's conduct

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[1] See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891.
[2] See section 58(1) of the *Department of Employment and Social Development Act*.

amounted to wilful conduct. The General Division noted that the Claimant had options to pursue his employer for wrongful dismissal and for any violations of his rights as these issues were beyond the scope of the General Division's inquiry.

## Did the General Division misinterpret the meaning of misconduct?

[13] The Claimant argues that the General Division misinterpreted the meaning of misconduct. He claims that the bar for proving misconduct is a high one. He relies on arguments that the Justice Centre for Constitutional Reforms made, as follows:

> … The Supreme Court of Canada determined that conduct must be "such as to undermine or seriously impair the trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship."[3] The misconduct must be a "wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."[4] In other words, misconduct can be found where there was a serious misconduct, a habitual neglect of duty, incompetence, or conduct incompatible with the duties, or prejudicial to the employer's business, of [*sic*] if the employee has been guilty of wilfulness disobedience.[5]
>
> An employee's refusal to undergo a particular medical treatment is not akin to refusing to perform an aspect of one's duties and responsibilities or refusing to attend work. Given the fact that the Covid 19 vaccination vaccines do not prevent infection or transmission, the decision of employees to decline to take these recently developed vaccines is not careless or negligent in nature to affect job performance. …
>
> Service Canada and the Commission are twisting the meaning of "misconduct" to deny Canadians unemployment benefits if they choose not to take the Covid-19 vaccines. They are implementing an arbitrary policy to promote a political agenda. This Policy is not in accordance with the jurisprudence, including from the Supreme Court of Canada. The bar for proving misconduct is a high one.[6]

[14] The Justice Centre quotes from the Supreme Court of Canada's decision of *McKinley v BC Tel*.[7] The decision deals with whether the employer had just cause to

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[3] Citing *McKinley v BC Tel,* 2001 SCC 38 at para 20.
[4] Citing *Canada (Attorney General) v Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 FCA 329, at para 4.
[5] Citing *Port Arthur Shipbuilding Co. v Arthurs et al.*, 1967 CanLII 30 at para 11 (ON CA).
[6] See Justice Centre for Constitutional Reforms letter dated June 6, 2022, addressed to the Minister of Employment, Workforce Development and Disability Inclusion, at AD 1-20.
[7] See *McKinley.*

dismiss the employee McKinley for dishonesty. The Court said that this required an assessment of the context of the alleged misconduct. However, the decision does not deal with misconduct in the Employment Insurance setting. Hence, the decision is of no relevance to the issue of misconduct for the purposes of the *Employment Insurance Act*.

[15] Similarly, *Port Arthur Shipbuilding Co. v Arthurs et al.*,[8] another decision that the Claimant and the Justice Centre rely on, *et al.* also does not address the definition of misconduct in the Employment Insurance context. This decision too is irrelevant.

[16] The courts have defined what misconduct means for the purposes of the *Employment Insurance Act*. It is very specific to the Employment Insurance setting. So while an employee's conduct might not qualify as misconduct in, say, a wrongful dismissal case, that same conduct could well qualify as misconduct in the Employment Insurance context.

[17] In *Canada (Attorney General) v Tucker*,[9] the Federal Court of Appeal examined misconduct under the *Unemployment Insurance Act.*[10] The majority of the Court agreed that misconduct under the *Employment Insurance Act*[11] involves an element of wilfulness.

[18] The General Division came to the same definition for misconduct as the Court of Appeal. The General Division defined misconduct as follows:

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[8] See *Port Arthur Shipbuilding Co. v Arthurs et al.*, 1967 CanLII 30 at para 11 (ON CA). The decision was overturned on appeal to the Supreme Court of Canada, at *Port Arthur Shipbuilding Co. v Arthurs et al.*, 1968 CanLII 29 (SCC), [1969] 2 SCR 85. The Supreme Court of Canada determined that the board of arbitration was limited to determining whether there was proper cause for the employer to dismiss three employees.

[9] See *Tucker*.

[10] The Justice Centre misattributed the quotation about misconduct to the Court of Appeal. In fact, the quotation belongs to the Umpire (the predecessor to the Appeal Division) and was referred to in the dissenting opinion of the Court of Appeal.

[11] Then named the *Unemployment Insurance* Act, 1971, S.C. 1970-71-72, c. 48. Subsection 41(1) of that Act disqualified a claimant from receiving benefits if he lost his employment by reason of his own misconduct or if he voluntarily left his employment without just cause. The subsection is the equivalent of section 30 of the *Employment Insurance Act*.

> [21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[12] Misconduct also includes conduct that is so reckless that it is almost wilful.[13]
>
> [22] The Claimant does not have to have wrongful intent (parentheses in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law. [Citation omitted]
>
> [23] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that. [Citation omitted]

[19] The General Division adopted the definition of misconduct from several Federal Court of Appeal decisions. The General Division's interpretation of misconduct under the *Employment Insurance Act* is consistent not only with these decisions, but also with *Tucker*, the decision on which both the Claimant and Justice Centre rely.

[20] The General Division did not misinterpret what misconduct means. It accepted that a claimant's conduct has to be wilful. The General Division found that the Claimant wilfully and consciously chose not to comply with his employer's policy. He made a deliberate choice not to comply with the policy. He did not have to have wrongful intent.

[21] Given the evidence before it, the General Division was entitled to conclude that the Claimant made a conscious decision and that it was wilful.

[22] As for the balance of the Claimant's arguments against vaccination or complying with his employer's policy, they are irrelevant to the misconduct question. In a recent case called *Cecchetto v Canada (Attorney General)*,[14] the Federal Court determined that considerations such as the merits, legitimacy, or legality of a vaccination policy fall outside the scope of the General Division's mandate.

[23] The Claimant argues that he should have been able to refuse vaccination because it offends his rights and freedoms, and because the vaccines are experimental and ineffective at preventing infection or transmission. But the Court makes it clear that

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[12] Citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] Citing *McKay-Eden v Her Majesty the Queen*, A-402-96.
[14] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

that these factors lie beyond the scope of consideration in an appeal to the General Division (and Appeal Division too). In other words, they are not relevant to the misconduct question.

[24] The Claimant also argues that his employer did not have just cause to dismiss him on the basis that he refused vaccination. As the Court also indicated, there are other avenues outside the Employment Insurance scheme by which the Claimant can pursue claims of this nature.[15]

## Did the General Division fail to consider the terms of the Claimant's employment agreement?

[25] The Claimant argues that the General Division failed to consider the terms of his employment agreement. He says that, under Article 8.01 of his employment agreement, his employer was prohibited from modifying the terms and conditions of his employment without his written consent. In other words, he says that his employer was not allowed to introduce and expect him to comply with its vaccination policy. For that reason, he denies that there was any misconduct when he did not comply with the policy.

[26] The General Division summarized the Claimant's arguments about his employment contract as follows: As vaccination did not form part of his original employment contract, his employer could not require him to get vaccinated. And, because he did not give his written consent to the vaccination policy, his employer could not change his employment agreement to require vaccination.

[27] The General Division did not consider the terms of the Claimant's employment contract. The member found that, if the employer had wrongfully dismissed the Claimant, his remedies lay elsewhere.

[28] Given the Claimant's arguments, the General Division should have addressed the Claimant's arguments about his employment agreement.

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[15] See *Cecchetto*, at para 49.

- **Articles 8.01 and 8.02 of the Claimant's employment agreement**

[29] The Claimant argues that nothing in his employment agreement required him to get vaccinated. He also argues that Articles 8.01 and 8.02 of his employment agreement restricted his employer from imposing its vaccination policy on him if he did not consent to it. In particular, he says that his contract stated that, if there were any changes to the contract, both parties had to sign off on any changes. Otherwise, the contract "would be null and void."[16]

[30] The General Division did not have a complete copy of the Claimant's employment agreement. The employment agreement in the General Division hearing file only went up to Article 5.01.[17] It did not include Articles 8.01 or 8.02.

[31] The Commission argues that I should not accept any evidence from the Claimant of Article 8.01 or 8.02 as the General Division did not have a copy of them. The Commission says that it is new evidence and that the Appeal Division cannot accept new evidence.

[32] However, the Claimant read out both Articles 8.01 and 8.02 at the General Division hearing. Articles 8.01 and 8.02 read:

> 8.01 This agreement constitutes the entire agreement between the parties hereto with respect to the employment of the employee and supersedes any and all prior agreements and understandings between the parties.
>
> This agreement may not be modified, changed, or altered by any promise or statement, nor will any modifications of it be binding upon the employer without the written approval of the Board of Directors.[18]
>
> 8.02 Except as expressly provided herein, any modifications of this agreement must be in writing and signed by both employee and employer or it will have no effect and will be void.[19]

[16] At approximately 36:35 to 36:54 of the audio recording of the General Division hearing.
[17] See Claimant's employment agreement, at GD 2-22 to GD 2-25.
[18] At approximately 38:04 to 38:28 of the audio recording of the General Division hearing
[19] At approximately 38:32 to 38:45 of the audio recording of the General Division hearing

[33] The General Division did not have a complete copy of the Claimant's employment agreement. But Articles 8.01 and 8.02 still formed part of the evidence, as the Claimant read them into the evidence. So, it is not a matter of me accepting new evidence. And, there does not appear to be any issue about whether the Claimant accurately read the two articles, so I will accept them as he presented them at the General Division.

- **Other Articles within the employment agreement**

[34] Articles 8.01 and 8.02 cannot be read in isolation.

[35] Articles 1.02 and 1.03 of the Claimant's employment agreement reads as follows:

> 1.02 … The Employee **agrees that the employment relationship will be governed by the standards and terms established by the Employer's policies as they are established and amended from time to time, and agrees to comply with the terms of such policies so long as they are not inconsistent with any provisions of this Agreement**. The Employer undertakes to inform the Employee of the details of such policies and amendments.
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> 1.03 The Employee will be required to review and sign the Job Description for their position and understand their responsibilities. **The Employee will also perform such duties and comply with all reasonable directions as may be prescribed or specified** by the Executive Director, Associate Director or Team Lead. **The Employer reserves the right to vary the Employee's duties in accordance with the changing needs**. It is understood that the terms and conditions of this Agreement will continue in force and effect notwithstanding that the compensation, position and/or duties performed may change from time to time, provided that such change in position or duties does not constitute constructive dismissal at law.[20]
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> (My emphasis)

[36] The Claimant argues that the employment prohibited his employer from modifying the employment agreement. But, at the same time, the agreement also let the employer establish and amend policies from time to time, and the Claimant agreed that he would be governed by those standards and terms as established and amended,

[20] See Articles 1.02 and 1.03 of the Claimant's Employment Agreement, at GD 2-23.

provided that they were not inconsistent with any provisions of the employment agreement. Further, the employment agreement also gave the employer the right to vary the Claimant's duties with changing needs.

[37] In spite of Articles 8.01 and 8.02 of the employment agreement, it is clear that the employment agreement gave wide latitude to the employer.

[38] The Commission argues that any limits to amending the employment contract under Articles 8.01 and 8.02 likely refer to matters such as hours of work, compensation and benefits (Article 3), to termination (Article 2), conflict of interest (Article 5), or the employer's property and confidentiality (Article 4). In other words, Article 8 did not limit the employer from establishing and amending workplace policies. This interpretation would be consistent with Articles 1.02 and 1.03 of the employment agreement.

## Did the General Division fail to consider the case of *T.C.?*

[39] Finally, the Claimant argues that the case of *T.C. v Canada Employment Insurance Commission*[21] should apply. He believes the facts in that case are similar to those in his case. So, he says the outcome should be the same.

[40] The General Division in that case found that there was no misconduct. The claimant T.C. was not disqualified from receiving Employment Insurance benefits.

[41] I already addressed this in my leave to appeal decision. The Claimant has not raised any new arguments that would cause me to reconsider my decision on *T.C.*

[42] As I indicated in my leave to appeal decision, the General Division found that misconduct did not arise, for three reasons:

(i) The employer verbally communicated its policy to T.C. without giving him a reasonable opportunity to be able to comply with it,

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

(ii) T.C. did not and could not have reasonably known the consequences of non-compliance with his employer's policy, and

(iii) There was no written policy or any written documentation relating to the employer's verbal directions.

[43] The facts in the Claimant's case are different from those in *T.C.* Here, the Claimant's employer had a written policy that it communicated to the Claimant. The Claimant was also aware that his employer could dismiss him if he did not comply, even if he expected that his employer would accommodate him.

[44] *T.C.* is not factually similar enough to the Claimant's case that the General Division should have even considered it.

## Conclusion

[45] The appeal is dismissed. The General Division did not misinterpret what misconduct means under the *Employment Insurance Act* and it did not fail to apply *T.C. v Canada Employment Insurance Commission*.

[46] The General Division did not consider whether Articles 8.01 and 8.02 of the employment agreement restricted the employer from changing the conditions of the Claimant's employment. However, it would not have changed the outcome. Articles 1.02 and 1.03 of the same employment agreement gave wide leeway to the employer to establish policies, and the Claimant agreed that his employment relationship would be governed by those policies.

Janet Lew
Member, Appeal Division