Citation: *MV v Canada Employment Insurance Commission*, 2023 SST 671

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. V.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated July 5, 2022 (GE-22-879)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	November 7, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	May 31, 2023
File number:	AD-22-451

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, M. V. (Claimant), is appealing the General Division decision.

[3] The General Division found that the Claimant had been placed on an unpaid leave of absence because she refused to comply with her employer's vaccination practice, despite knowing that there would be consequences for non-compliance. The General Division found that this amounted to misconduct. As a result, the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made several legal and factual errors. She denies that her conduct amounted to misconduct. She argues that she was not subject to a mandatory vaccination practice, that she had fulfilled all of her duties, that she could not have foreseen that she would be placed on a leave of absence (as her employer granted her leaves in past), that she had not been given enough time to get vaccinated, and that her employer's policy was ineffective and unreasonable.

[5] The Claimant asks the Appeal Division to allow the appeal and find that she is entitled to benefits.

[6] 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.

Preliminary matters: new evidence

[7] The Claimant made an access to information privacy (ATIP) request for records from her employer. She states that she has finally received a response to her request. The Claimant indicates that some of the records that she received from her ATIP supports her claim. The Claimant suggests that the ATIP response shows that she has a religious exemption from having to comply with her employer's vaccination practice.

[8] Some of the records that the Claimant received from her ATIP request constitutes new evidence.

[9] The Claimant also prepared a 30-second video, which she shared during the Appeal Division hearing. Portions of the video introduced new evidence. This new evidence showed the awards and recognition that the Claimant received from her employer. Her employer clearly regarded the Claimant as an outstanding employee.

[10] The Claimant also referred to her collective agreement (Agreement). However, the Claimant did not provide a copy of the entire Agreement to the General Division. She referred to portions of it. The parties agree that the evidence at the General Division showed that the Agreement did not require vaccination and that the Agreement stated that it covered the entire employer-employee relationship.

[11] The Commission says the Appeal Division should not be considering any new evidence.

[12] The Appeal Division generally does not consider new evidence. It would be inappropriate to accept new evidence for the purposes of reassessing and reweighing the evidence that was before the General Division. As the Federal Court of Appeal set out, the Appeal Division may allow fresh evidence if it helps provide background information or "perhaps exceptionally"[1] in cases where both parties have agreed that the Appeal Division should consider an important document. But that is not the case here. So, I will be unable to consider this new evidence.

Issues

[13] The issues in this appeal are:

a) Did the General Division misinterpret what misconduct means?

b) Did the General Division make any factual errors?

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[1] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

Analysis

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

[15] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

Did the General Division misinterpret what misconduct means?

[16] The Claimant argues that the General Division misinterpreted what misconduct means. The Claimant says that the bar for misconduct is a high one. She also says that misconduct only arises when there is a breach of the duties one owes to their employer, and if the employee is aware of the consequences that may flow from a breach of those duties.

[17] The Claimant denies that she breached her duties. She claimed that she fulfilled all of the duties required under the terms of her Agreement.

[18] The Claimant also says that she could not have been aware that she could face a suspension or being placed on a leave of absence if she had been non-compliant with her employer's vaccination practice (The Claimant denies that she was non-compliant, as she said she had a religious exemption, but I will address this in the below section.)

[19] The Claimant says she was unaware that she could face a suspension or a leave of absence because, if there had been any misconduct, she would have gone through a progressive disciplinary process.

- **Definition of misconduct**

[20] The Claimant argues that the General Division used the wrong definition for misconduct.

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

[21] The General Division found that for misconduct to arise, the conduct has to be wilful, in that it has to be conscious, deliberate, or intentional. It could also include conduct that is so reckless that it is almost wilful. The General Division found that there did not have to be wrongful intent.[3]

[22] The General Division found that misconduct exists if a claimant knew or should have known that their conduct could get in the way of performing their duties toward their employer and that there was a real possibility that this could then lead to suspension or dismissal.[4]

[23] The General Division referred to several decisions of the Federal Court of Appeal.

[24] While the Claimant does not say the Court of Appeal's definition of misconduct is wrong, she says that there has to be serious misconduct, a habitual neglect of duty, incompetence, conduct incompatible with the duties, or something prejudicial to the employer's business.[5] She says that there has to be a high threshold for misconduct to arise. She cites the dissenting opinion from the Ontario Court of Appeal's decision of *Port Arthur Shipbuilding Co. v Arthurs et al.*[6]

[25] However, this decision does not deal with misconduct in the employment insurance setting. The decision deals with whether the employer had just cause to dismiss three employees. The decision is of no relevance to the issue of misconduct for the purposes of the *Employment Insurance Act*.

[26] The Claimant also cites *McKinley v BC Tel*,[7] where the Supreme Court of Canada referred to the trial judge's charge to the jury. The judge's instructions were that

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[3] See General Division decision, at paras 31 and 32.
[4] See General Division decision, at para 33.
[5] See Claimant's Application to the Appeal Division—Employment Insurance, at AD 1-4.
[6] *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.
[7] *McKinley v BC Tel*, 2001 SCC 38 at para 20.

the employee's conduct had to 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." However, the judge's charge was on the issue of dismissal for just cause on the basis of an employee's dishonesty. The decision also did not deal with misconduct in the employment insurance setting, so is of no assistance.

[27] The Claimant also relies on *Canada (Attorney General) v Tucker*,[8] a case that dealt with misconduct under the *Employment Insurance Act*. The Federal Court reviewed the decision of the Umpire (the predecessor of the Appeal Division).

[28] The Umpire stated that there was no misconduct by Ms. Tucker, as she had become impaired unintentionally. The Umpire determined that:

> … in order to constitute misconduct the act complained of must have been 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.

[29] The majority of the Court approved of this definition. But it is not inconsistent with the General Division's definition for misconduct. I find that the General Division did not make an error when it defined misconduct as it relied on the definition for misconduct that the courts have long established.

[30] It seems that, if anything, the Claimant disputes how the General Division applied the definition or the law to the facts of her case.

[31] As the Federal Court of Appeal set out in a case called *Quadir*,[9] the application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. The Appeal Division does not have any jurisdiction to interfere with General Division decisions on matters of mixed fact and law.

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[8] *Canada (Attorney General) v Tucker,* [1986] 2 FC 329 at para 4.
[9] *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9. Affirmed at *Stavropoulos v Canada Attorney General)*, 2020 FCA 109.

- **The Claimant says that the Agreement did not require vaccination**

[32] The Claimant argues that misconduct arises only if she did something or failed to do something that was required under her Agreement.

[33] The Claimant agrees that she remained unvaccinated and did not comply with her employer's vaccination practice. However, she says that her employer could not force her to get vaccinated because vaccination was not covered by her Agreement.

[34] The Claimant argues that the Agreement covered the entire employer-employee relationship, so if the Agreement did not say anything about having to get vaccinated, then she did not have to get vaccinated.

[35] The Claimant also argues that her employer simply could not change or introduce new terms of that relationship, such as by introducing a new vaccine practice or policy.

[36] So, the Claimant argues that she did not have to comply with the vaccination policy because it was not already included in her Agreement. She argues that her employer was not allowed to introduce a new policy without her consent. She further argues that, if did not have to comply with the new policy, then there could have been no misconduct, as she was otherwise fully compliant with terms and conditions of her Agreement.

[37] This was the same argument that was raised in a case called *Cecchetto v Canada (Attorney General)*.[10] Mr. Cecchetto's employment agreement did not require vaccination. He began working for his employer in 2017, well before the pandemic began. His employer later adopted the provincial health directive that required it to implement vaccination or regular testing. The employer adopted the policy unilaterally, without Mr. Cecchetto's consent.

[38] The Court noted this evidence. It was aware when Mr. Cecchetto started working and was aware that his employer adopted the provincial health directive. Mr. Cecchetto

[10] See *Canada (Attorney General) v Cecchetto*, 2023 FC 102.

opposed the policy. The Court accepted that, even if vaccination did not form part of Mr. Cecchetto's original employment agreement, his employer could subsequently introduce a policy that required vaccination. The Court did not examine the reasonableness of the employer's vaccination policy, nor examine whether it was consistent with the employment agreement.

[39] The Court found that the General Division had reasonably determined that Mr. Cecchetto had committed misconduct based on his non-compliance with a policy that did not form part of his original employment agreement.

[40] So, while the Claimant's original employment agreement did not require vaccination, it is clear from the *Cecchetto* case that an employer may introduce a new policy, practice, or rule, even if an employee disagrees with it and does not consent to it.

[41] As an aside, it has become well established that, in a unionized setting, an employer may unilaterally bring in new policies or rules, even if the union disagrees. An employer can do this if it meets what is generally known as the "KVP test." The test arises out of Arbitrator Robinson's decision in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*.[11]

[42] Under the "KVP test," the new rule or policy has to satisfy certain requirements. One of these requirements is that the new rule or policy cannot be unreasonable.

[43] In *Cecchetto*, the Court did not consider nor address the "KVP test." The Court held that it was beyond the jurisdiction or authority of the General Division (and Appeal Division) to address the merits, legitimacy, and legality of an employer's policy. So, if the Court determined that the General Division could not consider the legality of a

[11] *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.). The new rule or policy has to satisfy certain requirements. For instance, it must not be inconsistent with the collective agreement, must not be unreasonable, must be clear and unequivocal, must be brought to the attention of the employee affected before the company can act on it, the employee must have been notified that a breach of the new rule could result in their dismissal if the rule is used as a basis for dismissal, and the company should have consistently enforced the rule.

policy, it would make little sense that the General Division would have the authority to consider its reasonableness.

[44] The Court briefly addressed *A.L.*, a decision issued by the General Division. In that case, the General Division found that A.L.'s employer had unilaterally introduced a vaccine policy. A.L. did not comply with the vaccine policy. Even so, the General Division found that there was no misconduct. Among other things, the General Division found that the collective agreement in that case expressly allowed A.L. to opt out of vaccination.

[45] The Court distinguished *A.L.* on its facts. It noted that the General Division found that there were specific provisions within A.L.'s collective agreement regarding vaccination.

[46] Here, the General Division did not have a complete copy of the Claimant's Agreement to determine whether there were any provisions regarding vaccination or other. So, even if I were to agree with the reasoning set out in *A.L.*, the evidence falls short of being able to claim *A.L.* to be applicable.

- **The Claimant says that she fulfilled all of the duties under her Agreement**

[47] The Claimant argues that misconduct arises only if there is a breach of the terms and conditions of her employment. The Claimant says that she fulfilled all of the duties and responsibilities expected of her, so there was no misconduct.

[48] The General Division determined that misconduct arises if a claimant knew or should have known that "their conduct could get in the way of **carrying out [their] duties** toward [their] employer and that there was a real possibility of being let go (or suspended) because of that [citation omitted]"[12] (my emphasis).

[49] The Claimant argues that her non-compliance with her employer's vaccination policy did not get in the way of performing her duties toward her employer. She says

[12] General Division decision at para 33.

that she fulfilled all of the duties that were required of her under her Agreement. So, she argues that, based on the definition for misconduct that the General Division set out, there was no misconduct in her case.

[50] However, it is clear that the Claimant's employer deemed vaccination to be an essential condition of her employment. Given the reasoning set out in *Cecchetto*, it is clear that the employer could introduce a new policy or practice with which employees were required to comply.

- **The Claimant says that there was no progressive discipline**

[51] The Claimant also argues that, had there been any misconduct, her employer would have taken progressive disciplinary steps against her, under the terms of the Agreement. The Agreement set out the disciplinary measures. These included verbal warnings, written warnings, and suspension, ranging from one to up to five days.

[52] As her employer did not discipline her by firstly issuing any warnings or suspending her for shorter periods, the Claimant says that this is proof that there was no misconduct. So, she says that if her employer did not adopt these measures, then clearly it did not consider her to have committed any misconduct.

[53] However, 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*.[13]

[54] 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.[14]

[55] The General Division was not allowed to rely on either the employer's or employee's determination as to whether misconduct occurred of the purposes of the

[13] See *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[14] See *Canada (Attorney General) v Jolin*, 2009 FCA 303.

Employment Insurance Act. Instead, the General Division was required to conduct its own objective analysis as to whether misconduct arose, which it did.

- **The Claimant says her employer's policy was ineffective, illegal, and unreasonable**

[56] The Claimant also argues that her employer's vaccination policy was ineffective, illegal, and unreasonable. She says that it violated the *Canada Labour Code* and *Occupational Health and Safety Act*. She says that, for these reasons, she did not have to comply with the policy, so there was no misconduct.

[57] The Federal Court addressed this issue in the *Cecchetto* case.[15] Mr. Cecchetto argued that the Federal Court should overturn the decision of the Appeal Division in his case. He said the Appeal Division had failed to deal with his questions about the legality of requiring employees to undergo medical procedures including vaccination and testing.

[58] Mr. Cecchetto argued that because the efficacy and safety of these procedures were unproven, he should not have to get vaccinated. He said there were legitimate reasons to refuse vaccination. And, for that reason, he says there was no misconduct if he chose not to get vaccinated.

[59] The Court wrote:

> [46] As noted earlier, it is likely that the Applicant [Cecchetto] will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.
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> [47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct." …

[15] See *Canada (Attorney General) v Cecchetto*, 2023 FC 102.

> [48] **Despite the Claimant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD**. [Citation omitted]
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> (My emphasis)

[60] The Appeal Division did not make any findings in the *Cecchetto* case about the merits, legitimacy, or legality of the vaccination policy. The Court said it was simply beyond the Appeal Division's scope. The Court determined that the Appeal Division has a limited role in what it can do. It is restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[61] It is clear from that case that Mr. Cecchetto's arguments about the legality of his employer's vaccination policy were irrelevant to the misconduct question.

[62] Similarly, I find that the General Division did not make any errors when it did not examine whether the Claimant's employer's policy was ineffective and unreasonable. Questions about the effectiveness and reasonableness of the policy were irrelevant to the misconduct issue. Given this, General Division did not make an error when it decided that it could focus only on what the Claimant did or failed to do and whether that amounted to misconduct under the *Employment Insurance Act*.

Did the General Division make any factual errors?

[63] The Claimant argues that the General Division made three primary factual errors, that: (1) she was subject to a mandatory vaccination practice, (2) she knew that her employer would place her on a leave of absence, and (3) she did not have a religious exemption from having to comply with her employer's vaccination practice.

– Whether the evidence showed that the Claimant was subject to her employer's mandatory vaccination practice

[64] The Claimant argues that the General Division made a factual error when it determined that she was subject to her employer's mandatory vaccination practice.

[65] The Claimant is employed by Canada Post Corporation, a federal Crown corporation. In fall 2021, the Government of Canada introduced a new policy that required vaccination of federal public servants in the Core Public Administration. The Core Public Administration is made up of departments and organizations named in Schedules I and IV of the *Financial Administration Act*.

[66] The Claimant denies that she was subject to the Core Public Administration vaccination policy. She says that it did not apply to her because she is not a federal employee or public servant. She points to section 3 and Schedules I and IV of the *Financial Administration Act*. The Claimant's employer is listed under Schedule III (Section 3), Part I. She says her employer falls outside the Core Public Administration.

[67] The Claimant's employer is not considered part of the Core Public Administration. So, the Core Public Administration vaccination policy did not apply to the Claimant.

[68] However, the Claimant's employer brought in its own vaccination policy, which it described as being "in line"[16] with the federal government's Core Public Administration vaccination policy.

[69] The Claimant was not subject to the Core Public Administration vaccination policy, but she remained subject to her employer's own vaccination policy.

– **Whether the Claimant had been unable to foresee that her employer would place her on a leave of absence**

[70] The Claimant argues that the General Division made a factual error when it determined that she should have known that her employer would place her on a leave of absence.

[71] The Claimant denies that she was aware that her employer would place her on a leave of absence. She explains that her employer had granted her leaves in the past (for unrelated reasons), and her employer's vaccination practice kept changing, leaving

[16] See "Canada Post's new mandatory vaccination practice," at GD 3-48 (and also at GD 3-64).

her insufficient time to get vaccinated. She also says that her employer did not allay her privacy concerns, so she did not expect that she would have to comply with its vaccination practice.

- **The Claimant believed that she could go on an extended paid elderly care leave as an alternative instead of complying with her employer's policy**

[72] The Claimant argues that the General Division made a factual error about leave options that her employer offered to her. She says that if the General Division had not made this error, it would have accepted that there was no misconduct.

[73] The Claimant states that, when the pandemic began, her employer placed her on an extended paid elderly care leave. She says that she reasonably believed that her employer would offer this paid leave to her again as an alternative to vaccination. If this alternative was available, then the Claimant may not have been aware that she could be placed on a leave of absence if she did not comply with her employer's vaccination policy.

[74] The Claimant points to her employer's emails. An email dated March 23, 2020, states, "There may be other paid options currently available for elder care leave related to these unusual circumstances. I'm checking, I'll let you know."[17] And an email dated April 9, 2020, states, "FYI, elder care has been extended, no end date is given."[18]

[75] It is unclear from the evidence when the Claimant's elderly care leave ended, but there is no indication that the Claimant remained on elder care leave when her employer placed her on leave. Indeed, emails with her employer indicate that she was no longer on elder care leave and that she was working. For instance, in one email, she stated that she was seeking accommodation, so she could continue to work.[19] This showed she was working at the time, rather than on an extended leave for elder care.

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[17] See Claimant's email dated May 18, 2022, at GD 6-2, referring to the employer's email of March 23, 2020, at GD 6-30.
[18] See Claimant's email dated May 18, 2022, at GD 6-2, referring to the employer's email of April 9, 2020, at GD 6-25.
[19] See Claimant's email dated November 15, 2021, to her employer, at GD 3-47.

[76] The evidence also suggests that the Claimant's employer provided what could be described as an "FAQ" (frequently asked questions) page or fact sheet. One of the questions asked, "If I have not complied with the Vaccination Practice as of November 26, can I access other leaves rather than being placed on LWOP (leave without pay)?"[20] The response read, "No. You will be placed on LWOP and will be unable to access alternatives paid or unpaid leaves."[21]

[77] The fact sheet is undated. But it refers to the employer's vaccination practice. So, presumably the employer provided the fact sheet sometime around the time that it announced its vaccination practice. In other words, the fact sheet was likely produced sometime in mid-to late 2021, well after the employer's emails of March 23, 2020, and April 9, 2020.

[78] None of this later evidence shows that either the Claimant or the employer contemplated she would continue to seek or be able to access elder care leave in 2021. I am not satisfied that the General Division made an error about the Claimant's belief that elder care leave remained available to her as an alternative to vaccination.

- **The Claimant claims her employer's vaccination policy kept changing**

[79] The Claimant argues that her employer's vaccination policy kept changing, which left her insufficient time to get vaccinated on time before the employer's deadline.

[80] There is insufficient evidence to show that the Claimant's employer's vaccination policy kept changing. The evidence includes the employer's announcement of its new vaccination practice. The announcement is dated October 28, 2021, and states that the employer required full compliance after November 26, 2021.[22]

[81] The Claimant argues that she did not have sufficient time to get vaccinated before the deadline of November 26, 2021. But there is no evidence to support this claim. If anything, the evidence shows that the Claimant did not intend to comply with

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[20] Employer fact sheet, at GD 6-13.
[21] Employer fact sheet, at GD 6-13.
[22] Employer's new mandatory vaccination practice, dated October 28, 2021, at GD 3-48 to 49 (and GD 3-64 to 67)

the employer's policy. So, it would not have mattered how much or how little time employees had to get vaccinated.

- **The Claimant had privacy concerns**

[82] The Claimant had privacy concerns over the vaccination policy. She says that there had been past privacy breaches. So, she denies that misconduct arose when she was merely trying to protect her privacy.

[83] The General Division acknowledged the Claimant's arguments over her privacy rights. At paragraphs 1 and 29, the General Division noted that the Claimant's main concern was that she did not want to attest to her vaccination status over an automated telephone line. The General Division determined that it did not have the authority to decide whether the Claimant's employer breached her rights.

[84] The General Division correctly identified the scope of its authority. As I noted above, the General Division was limited to determining whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*. So, while the Claimant was trying to protect her privacy rights, at the same time, her employer continued to require compliance with its vaccination policy.

[85] The General Division had to focus on:

- what was required of the Claimant by her employer's vaccination policy,
- whether the Claimant met her employer's requirements under that policy, and
- whether the Claimant's behaviour amounted to misconduct.

The Claimant's privacy concerns were irrelevant to the misconduct question.

[86] This is not to say that the Claimant is without her remedies where her privacy is concerned. The Claimant may well have remedies available to her against her employer for any breaches of her privacy rights or for not taking appropriate steps to safeguard her privacy. But that is a matter for another forum.

– The Claimant sought a religious exemption

[87] The Claimant argues that the General Division overlooked the fact that she had received or was entitled to receive a religious exemption from her employer's vaccination practice. So, she argues that, if she had or was entitled to a religious exemption, then she was compliant with the employer's vaccination practice and there would have been no misconduct.

[88] There is an exchange of email dated January 19, 2022. The Manager for Health & Safety Projects raised questions about the Claimant's request for an accommodation. The Manager queried how the Claimant was on a leave without pay since November 26, 2021, if she had attested to requesting an accommodation.[23]

[89] The Manager wrote that if the Claimant had made an attestation, she would be shown as compliant with the policy. The Manager determined that further investigation was required.[24]

[90] The General Division did not refer to this evidence. Even so, it was mindful of the Claimant's arguments that her employer had failed to accommodate her. So, the General Division did not overlook the fact that the Claimant sought an accommodation. The General Division simply determined that it did not have the authority to decide whether the Claimant's employer failed to accommodate her.

[91] The General Division's ruling in this regard is consistent with the legal authorities. In a case called *Mishibinijima*,[25] the Federal Court of Appeal held that the issue of whether an employee should have received an accommodation is an irrelevant consideration when it comes to the question of misconduct.

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[23] Employer's email of January 19, 2022, at GD 3-97.
[24] The Claimant states that she did not have to make an attestation in this case because she had received accommodations in the past.
[25] *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 at para 17.

[92] So, the General Division correctly determined that it did not have the authority to decide whether the Claimant should have received an exemption from the employer's vaccination policy, for the purposes of deciding whether there was any misconduct.

[93] To be clear, I am not making any ruling, one way or the other, about the Claimant's entitlement to a religious exemption. But the Claimant's recourse against her employer for any failure to appropriately accommodate her lies elsewhere.

Conclusion

[94] The General Division did not misinterpret what misconduct means. It followed established law in interpreting what misconduct means.

[95] The Claimant's Agreement did not require vaccination. Even so, her employer made the requirements under its vaccination practice an essential condition of the Claimant's employment. So, the Claimant had to comply with the employer's new practice. It was irrelevant whether the vaccination practice was ineffective, illegal, or unreasonable, for the purposes of assessing whether misconduct arose. The General Division simply did not have the authority to address these considerations.

[96] The General Division also did not make the factual errors that the Claimant says that it made. Either the evidence did not support the Claimant's allegations, or the facts (that the Claimant says the General Division overlooked) were not relevant to the misconduct question.

[97] The appeal is dismissed.

Janet Lew
Member, Appeal Division