Citation: *Canada Employment Insurance Commission v AL*, 2023 SST 1032

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître
Respondent:	A. L.
Representative:	Philip Cornish

Decision under appeal:	General Division decision dated December 14, 2022 (GE-22-1889)

Tribunal members:	Pierre Lafontaine Janet Lew Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	May 23, 2023
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	August 1, 2023
File number:	AD-23-13

Decision

[1] The appeal is allowed. The General Division made an error of law by misinterpreting the meaning of misconduct as it is used in the *Employment Insurance Act* (EI Act). We are giving the decision that the General Division should have given and disqualifying the Claimant from receiving Employment Insurance (EI) benefits.

Overview

[2] The Claimant, A. L., was employed as a patient registration clerk for X, a network of hospitals in Eastern Ontario.

[3] On October 29, 2021, X placed the Claimant on unpaid leave after she refused to confirm that she had been vaccinated against COVID-19.[1] The Canada Employment Insurance Commission (Commission) refused to pay the Claimant EI benefits because it determined that not complying with her employer's vaccination policy amounted to misconduct.

[4] The Claimant appealed the Commission's refusal to the Social Security Tribunal. After holding an in-person hearing, the Tribunal's General Division allowed the appeal. It found that the Claimant had not committed misconduct. It found that the Claimant did not breach an express or implied duty arising out of her employment contract. It found that the Claimant's collective agreement gave her the right to refuse vaccination. It found that the Claimant's constitutional rights had been violated.

[5] The Commission disagreed with the General Division's decision. It asked the Appeal Division for permission to appeal. It said that the General Division made the following errors:

- It interpreted misconduct in a way that was inconsistent with the EI Act and associated case law.

[1] The Claimant was let go from her job on November 13, 2021.

- It found that the employer's vaccination policy was not an express or implied duty resulting from the Claimant's employment contract.
- It exceeded its powers by determining that X's vaccination policy breached the terms of the Claimant's collective agreement.

[6] The Appeal Division granted the Commission permission to appeal. It saw an arguable case that, among other things, the General Division had exceeded its powers by finding that the policy breached the terms of the collective agreement. Earlier this year, a three-member panel of the Appeal Division held a full hearing on the issues.

[7] Now that we have considered arguments from both parties, we have concluded that the General Division's decision cannot stand.

Issue

[8] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division did one of the following:[2]

- proceeded in a way that was unfair
- exceeded its powers or refused to use them
- interpreted the law incorrectly
- based its decision on an important error of fact

[9] In this appeal, we had to decide whether any of the Commission's allegations fell under one or more of the above grounds of appeal and, if so, whether they had merit.

Analysis

[10] The General Division found that the Claimant's refusal to get vaccinated did not amount to misconduct under the EI Act. It based its decision on the following findings:

- There was nothing in either federal or provincial law that required anyone to be vaccinated against COVID-19.

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

- The Claimant's collective agreement and employment contract did not contain an express or implied duty to be vaccinated against COVID-19.
- The Claimant was under no obligation to comply with every one of her employer's policies—not even a vaccine mandate.
- The Claimant had a right under common law and her collective agreement to refuse any recommended or required vaccination.
- The Claimant's employer unilaterally opened her collective agreement and imposed a new essential condition of employment without her consent or the consent of her union.
- The Commission failed to meet the burden of proving that, by choosing not to be vaccinated, the Claimant breached an express or implied duty to her employer.

[11] The Appeal Division has reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. We have concluded that the General Division made two related errors. First, it misinterpreted the meaning of misconduct under the EI Act. Then, it went beyond its powers by deciding the merits of a grievance between an employer and an employee.

The General Division misinterpreted the meaning of misconduct

[12] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that does not necessarily correspond to its everyday usage. An employee may be disqualified from receiving EI benefits because of misconduct, but that does not necessarily mean that they have done something "wrong" or "bad."[3]

[13] According to the law, misconduct boils down to two elements: (1) an employee deliberately violated their employer's policy; and (2) the employee knew that the violation could result in suspension or dismissal. The General Division made an error in

[3] In *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140, the Federal Court of Appeal said that it was beside the point whether the root cause of an employee's dismissal was "blameless." According to the Court, "relevant conduct is conduct related to one's employment."

finding that, even if those two elements were proven, an employee might still not be guilty of misconduct if the employer's policy was illegal or inconsistent with the terms of employment contract.

– Misconduct is any action that is intentional and likely to result in the loss of employment

[14] The purpose of the EI Act is to protect workers who lose their job involuntarily, not those who lose their job by their own fault. The EI Act says that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct …."[4] Misconduct is not defined by the EI Act, but the term has been interpreted by the courts.[5]

[15] The Federal Court of Appeal has held that, to be misconduct, an employee's conduct must be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.

[16] There is misconduct 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 because of that.

[17] There must be a causal link between the claimant's alleged misconduct and their job. The misconduct must therefore constitute a breach of an express or implied duty resulting from the employment contract.[7]

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[4] See section 30 of the *Employment Insurance Act* (EI Act).
[5] In written submissions, the Claimant argued that, since misconduct is not defined by the EI Act, it should be given a "fair, large and liberal construction" in accordance with the Supreme Court of Canada's instruction in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27. We agree that, as remedial legislation, the EI Act must be interpreted generously where possible, but it is important to remember that *Rizzo* is predominantly a case about the principles of **statutory** interpretation. Although the EI Act itself is silent about what misconduct means, the Courts have filled the void by setting out a detailed, multipronged test for the concept. As members of an administrative tribunal, we are obliged to apply that test.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *Canada (Attorney General) v Secours*, [1995] FCJ No 210.
[7] See *Canada (Attorney General) v Lemire*, 2010 FCA 314. See also *Canada (Attorney General) v Brissette (C.A.)*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684: "[A] condition may be express or implied and may relate to a concrete or more abstract requirement."

– Misconduct is not about what an employer does or does not do

[18] The General Division said that having to get vaccinated against COVID-19 fell short of an implied duty. This was because the Claimant's employer did not take the time to negotiate an addendum (addition) to the collective agreement that explicitly mandated the shot.[8] We detect a touch of circular reasoning here—the General Division seems to be suggesting that an implied duty cannot exist unless the parties show an intention to make it explicit.

[19] But the bigger problem with the General Division's analysis is that it questions the way the employer implemented its COVID-19 vaccination policy in the first place:

> In this case, the Employer unilaterally opened the Claimant's CA and imposed a new essential condition of employment without her consent nor the consent of the Bargaining Agent. It did this by instituting a policy without any consultation or regard to the employment contract, which it had previously signed. The change established a new essential requirement (vaccination or valid exemption) because failing to meet the vaccination requirement, or provide authorized exemption, would result in dismissal. There were no other options for the Claimant to maintain her employment other than meet the condition.[9]

[20] This suggests that the General Division confused distinct legal concepts. It is one thing to ask whether an express or implied duty exists. It is another to ask whether the duty was validly imposed. The second question falls outside of EI law.

[21] Misconduct occurs when an employee intentionally breaches an express or implied duty and is let go because of that. In determining that the Claimant's employer had unilaterally imposed a "new essential condition of employment," the General Division shifted the focus from the employee's actions to the employer's. This was an error of law.

[22] The General Division's role is not to rule on whether the employer's policy is fair or legal. Its role is to determine whether the employee's actions met the essential criteria

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[8] See the General Division decision at para 47.
[9] See the General Division decision at para 52.

for misconduct under the EI Act.[10] This Tribunal is not the place to decide whether the employer wrongfully let the Claimant go or violated her human rights. Those are questions for other forums.

– An employer's policy does not have to be rooted in law

[23] As noted, the General Division found that X's vaccination policy was not an implied duty resulting from the Claimant's employment contract. It based this finding on the fact that nothing in either provincial or federal law required anyone to get vaccinated against COVID-19.

[24] In particular, the General Division referred to Ontario's Directive 6, which required the province's health care institutions to establish, implement, and enforce a COVID-19 vaccination policy. The General Division noted that, although Directive 6 forced health care institutions to develop a policy, it did not absolutely require their employees to get vaccinated. It so happens that the Claimant's employer mandated vaccination, but it did not have to.

[25] The General Division concluded that, since vaccination was "voluntary," the Claimant had not breached an express or implied duty to her employer.[11] However, the Claimant's right to refuse the COVID-19 vaccine was irrelevant to a misconduct analysis. The government did not require the Claimant to get vaccinated. Her employer did. The General Division proceeded to ask how far her employer could go in enforcing its vaccination policy. However, that was the wrong question.

[26] Employers are responsible for managing the day-to-day operations of the workplace. They do not have to justify every policy designed for that purpose with specific legislation.[12] By linking misconduct to the underlying legality of X's vaccination policy, the General Division again ignored established case law saying that an employer's conduct is not at issue.

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[10] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[11] See the General Division decision at paras 62 to 63.
[12] See *Dubeau v Canada (Attorney General)*, 2019 FC 725.

– Misconduct can include legal activities

[27] The General Division suggested that the Claimant's right to refuse vaccination as a citizen meant that she also had the right to refuse vaccination as an employee without facing consequences. From this, the General Division concluded that exercising a legal right could not be deemed misconduct: "Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful."[13]

[28] However, the law is not as clear-cut as the General Division believes. There are many cases where EI claimants were found guilty of misconduct even though they were doing no more than engaging in a legal activity or exercising a legal right. Here are a few examples:

- An employee of a Métis settlement was found to have committed misconduct after expressing disagreement with council salaries on social media and posting a bylaw amendment online (information that was already public).[14]
- A kitchen cabinetry finisher was found to have committed misconduct after taking her phone into a washroom, in violation of a policy explicitly prohibiting such behaviour.[15]
- A machine operator was found to have committed misconduct after disobeying an order from his boss to stop wearing a face mask emblazoned with a confederate flag (he argued that it was a symbol of pride not hate).[16]

[29] In each of these cases, the employee was disqualified from receiving EI benefits even though, in the course of breaking a rule or policy, they were otherwise exercising a legal right.

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[13] See the General Division decision at para 79.
[14] See *TT v Canada Employment Insurance Commission*, 2023 SST 81.
[15] See *CS v Canada Employment Insurance Commission*, 2017 SSTADEI 406.
[16] See *MT v Canada Employment Insurance Commission*, 2021 SST 506.

– EI is not meant to right workplace wrongs

[30] Employees often voluntarily give up certain rights when they take a job. For example, an employee might agree to submit to regular drug testing. Or an employee might knowingly give up an aspect of their right to free speech, for instance, their right to publicly criticize their employer.

[31] During the term of employment, the employer may try to impose policies that encroach on their employees' rights, but employees are free to quit their jobs if they want to fully exercise those rights. If they believe that a new policy violates their employment contract or collective agreement, they can sue their employer for wrongful dismissal or file a grievance. If they believe that a new policy violates their bodily integrity or freedom of speech, they can take their employer to court or to a human rights tribunal. However, the EI claims process is not the way to litigate such disputes.[17]

[32] The Federal Court has held that, even if an employee has a legitimate complaint against their employer, "it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits."[18]

– The General Division's decision departs from established principles of case law

[33] The General Division had to assess the Claimant's actions to determine the following:

- whether she was aware of her employer's policy
- whether she wilfully ignored her employer's policy
- whether she knew or should have known the consequences of ignoring her employer's policy

[34] However, as we have seen, the General Division did not assess the Claimant's actions. Instead, it chose to focus on whether the employer's actions were proper. This

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[17] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[18] See *Dubeau v Canada (Attorney General)*, 2019 FC 725.

analysis deviated from binding case law, as well as the Tribunal's established jurisprudence on misconduct.

[35] Again and again, these cases return to the same principles:

- Misconduct occurs when an employee violates a rule or policy established by their employer.
- The test for misconduct focuses on the actions of the employee, not the employer.[19]
- The rule or policy may be express or implied.[20]
- The violation of the rule or policy must be intentional, or so reckless that it is almost intentional.[21]
- The employee must be aware that violating the rule or policy could interfere with their duties and lead to their suspension or dismissal.[22]

[36] Because the law reduces any misconduct assessment to a few narrow questions, the General Division had no authority to decide whether the employer's vaccination policy was reasonable or fair. Nor could it decide whether the policy contradicted the Claimant's employment contract or violated her constitutional or human rights.

[37] The General Division also had no authority to determine whether the employer should have offered the Claimant a medical or religious exemption or otherwise accommodated her reluctance to be vaccinated.[23]

[38] What's more, the General Division failed to explain why it was not following existing case law. According to the Supreme Court of Canada, a reasonable decision is one that is: (a) based on an internally coherent and rational chain of analysis; and

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[19] See *Canada (Attorney General) v Bedell*, (FCA), [1984] FCJ No 515.
[20] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[21] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *McKay-Eden v Her Majesty the Queen*, A-402-96.
[22] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *Nelson v Canada (Attorney General)*, 2019 FCA 22.
[23] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

(b) justified in relation to the facts and law that constrain the decision-maker.[24] Here, the General Division disregarded some of the legal constraints that are part of any EI misconduct analysis.

– A recent case raises doubts about the General Division's approach to misconduct

[39] A recent Federal Court decision has reaffirmed the traditionally strict definition of misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved an EI claimant's refusal to follow his employer's unilaterally imposed COVID-19 vaccination policy.[25]

[40] The Federal Court confirmed that this Tribunal is not permitted to address the underlying fairness or legitimacy of an employer's vaccination policy:

> Despite the Applicant'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-General Division.[26]

[41] The Court agreed that, by making a deliberate choice not to follow the vaccination policy, Mr. Cecchetto breached a duty to his employer and lost his job because of misconduct under the EI Act.[27] The Court said that there were other ways under the legal system Mr. Cecchetto could have advanced his wrongful dismissal or human rights claims.

[42] Mr. Cecchetto happened to be aware of the Claimant's case and the General Division decision that is the subject of this appeal. At the Federal Court, he used it to argue that he too was entitled to EI benefits even though he had refused to comply with his employer's vaccination policy.

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[24] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85.
[25] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[26] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 48, citing *Canada (Attorney General) v Caul*, 2006 FCA 251; and *Canada (Attorney General) v Lee*, 2007 FCA 406.
[27] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 30, citing *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

[43] In its reasons, the Court acknowledged the General Division's decision but found it less than persuasive because (a) it was not binding; and (b) it involved what the Court described as "significantly different facts" than those involving Mr. Cecchetto.[28] To name one significant difference, the Court said that the employer's policy in this case allowed no exemptions or alternatives to vaccination. In contrast, Mr. Cecchetto lost his job because he had failed to comply with the requirement to submit to weekly antigen tests and give his employer the negative results.

[44] The Federal Court's remarks were made in passing, but we accept its finding that the Claimant's case rests on a "fundamentally different factual foundation" than Mr. Cecchetto's. However, that does not make *Cecchetto* irrelevant to this case. Although *Cecchetto* has its own facts, it still upholds the principle that the General Division's role is not to judge an employer's conduct when it attempts to establish and enforce its internal policies. It also confirms that the General Division has no authority to assess whether an employer's policy is fair or legal.[29]

– It was not enough for the General Division to cite the correct law

[45] It is worth observing that, despite its flaws, the General Division's decision contains numerous statements of the law that are, on the face of it, correct. In more than one section, the General Division accurately summarized and cited a key legal principle, only to ignore or distort it in the analysis that followed.

[46] At one point, the General Division wrote that it could only consider the behaviour of the employee.[30] But it then spent much of its written reasons describing how, in its view, the Claimant's employer wrongfully and unilaterally imposed a new condition of employment.

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[28] The Federal Court referred to the decision that is the subject of this appeal using its neutral citation: *AL v Canada Employment Insurance Commission*, 2022 SST 1428.
[29] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 32.
[30] See the General Division decision at para 18, citing *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[47] At another point, the General Division wrote the following:

> It is not the actions of the Employer that are in question. **Whether the Employer's policy is legal, violates the Charter of Rights and Freedoms (the Charter), or is unreasonable, is for the Claimant to argue in another venue of competent jurisdiction.** My jurisdiction is limited to examining the Claimant's actions and whether they can be characterized as misconduct under the Act [emphasis added].[31]

[48] This is correct, as far as it goes. But a few lines later, the General Division wrote the following:

> Again, it is not the Employer's actions that are in question. But **the Claimant raises a valid point concerning her right to bodily integrity**.
>
> […]
>
> It is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies. The individual has the final say in whether they accept any medical treatment.
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> The common law confirms that the Claimant has a legal basis or "right" to not accept any medical treatment, which includes vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it [emphasis added].[32]

[49] The General Division found that the Claimant had a right to choose whether to accept medical treatment. It concluded that her refusal to get vaccinated could not be considered a wrongful act that would disqualify her from receiving EI benefits.

[50] It is not enough for decision-makers to correctly state the law; they must also correctly apply it. Here, the General Division rightly said that it could not decide whether the employer's policy violated the Claimant's rights under the *Canadian Charter of Rights and Freedoms*, but it then turned around and did precisely that.

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[31] See the General Division decision at para 70.
[32] See the General Division decision at paras 73 and 75 to 76.

– The General Division made an error of law, not mixed fact and law

[51] It is well established that the Appeal Division cannot consider questions of mixed fact and law.[33] The Claimant says that the General Division made an error of mixed fact and law, not just an error of law, as the Commission alleges.

[52] According to the Claimant, the General Division's main conclusion was that the Commission failed to meet the burden of proving that she had committed misconduct. She maintains that, since this conclusion was based on both findings of fact and interpretations of law, it was therefore beyond the Appeal Division's scope.

[53] We do not find this argument persuasive. Every case that comes before the General Division requires it to analyze the existing law and assess the available evidence. When the General Division arrives at a particular interpretation of the law, it must then apply it to the facts established by the evidence.

[54] That is what happened in this case, although it appears that none of the key facts were in dispute. The parties agree on two things. First, that the Claimant was aware of her employer's vaccination policy. And second, that she intentionally disobeyed it knowing that consequences would follow. What the parties disagree about are entirely matters of law, in particular the correct meaning of misconduct and whether an implied duty has to be an essential condition of employment.

[55] According to the Claimant's flawed interpretation of the grounds of appeal, most of the matters that come to the Appeal Division would be off limits because they raise questions of mixed fact and law. Taken to its logical conclusion, the Claimant's position would effectively bar the Appeal Division from intervening except where natural justice is at issue. This would be an absurd result, one that we doubt Parliament intended.

The General Division exceeded its powers

[56] When it comes to assessing misconduct, this Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act

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[33] See *Garvey v Attorney General of Canada*, 2018 FCA 118; *Cameron v Canada (Attorney General)*, 2018 FCA 100; and *Quadir v Attorney General of Canada*, 2018 FCA 21.

may seem unfair to the Claimant, but it is one that the courts have repeatedly adopted and that the General Division was bound to follow.

[57] The test for misconduct looks to whether a claimant knew or should have known that their conduct would lead to dismissal. A decision-maker should not consider the employer's conduct or the legal principles that operate outside of the EI context, such as labour or human rights law.[34]

[58] In that light, the General Division exceeded its jurisdiction in the following ways:

- It decided that X unilaterally imposed its vaccination policy contrary to the collective agreement.[35] The General Division found that the employer had unilaterally reopened the Claimant's employment agreement and imposed a new essential condition of employment without her consent.

- It decided that X's vaccination policy violated the Claimant's bodily integrity.[36] The General Division found that the Claimant had the right to refuse medical treatment without jeopardizing her entitlement to EI benefits.[37]

- It decided that X's policy went beyond normal health and safety protocols.[38] The General Division found that requiring vaccination was not the same as expecting an employee to wear a safety vest or wash their hands before handling food.

[59] It was not up to the General Division to decide any of these questions. Its findings went beyond the scope of the misconduct analysis set out in the case law. By venturing into the realms of labour, constitutional, and public health law, the General Division exceeded its jurisdiction.[39] As the Federal Court held in *Cecchetto*, it is an error

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[34] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[35] See the General Division decision at para 52.
[36] See the General Division decision at para 75.
[37] See the General Division decision at para 80.
[38] See the General Division decision at para 49.
[39] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

for the General Division to answer questions that it is not, by law, permitted to address.[40]

Remedy

There are two ways to fix the General Division's errors

[60] When the General Division makes an error, the Appeal Division can fix it in one of two ways: (1) It can send the matter back to the General Division for a new hearing; or (2) it can give the decision that the General Division should have given.[41]

[61] The Tribunal is required to conduct proceedings as quickly as circumstances and considerations of fairness and natural justice allow. The Federal Court of Appeal has also said that decision-makers should consider delays in bringing claims for benefits to conclusion. It is now approaching two years since the Claimant applied for EI benefits. If this matter goes back to the General Division, it will needlessly delay a final resolution.

The record is complete enough to decide this case on its merits

[62] The facts of this case are not in dispute, and the remaining issues are entirely about matters of law and jurisdiction. The parties had ample opportunity to make written and oral arguments about the merits of this case, and those arguments were available to the Appeal Division.

[63] As a result, we are in a position to assess the evidence that was available to the General Division and give the decision that it should have given had it not made an error. In our view, if the General Division had properly understood the law around misconduct, it would have come to a different conclusion. Our own assessment of the record satisfies us that the Claimant's refusal to comply with her employer's vaccination policy amounted to misconduct and disqualified her from receiving EI benefits as a result.

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[40] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 32.
[41] See section 59(1) of the DESDA.

The Commission needed to prove just four things

[64] The law says that you cannot get EI benefits if you lose your job because of misconduct. The EI Act does not say what misconduct means. But, as we have seen, the courts have established the following four-part test for misconduct:

- An employer must have a policy.
- An employee must know about the policy.
- The employee must deliberately refuse to comply with the policy.
- The employee must be able to foresee that refusing to comply with the policy would lead to the loss of employment.

The Claimant's refusal to follow her employer's vaccination policy was misconduct

[65] The evidence in this case established the following facts:

- On September 7, 2021, the Claimant's employer issued a policy requiring all its employees to show proof that they had received a first dose of the COVID-19 vaccination by October 28, 2021, or face a two-week suspension.[42]
- The policy required all employees to show proof that they had been fully vaccinated by November 12, 2021, or face dismissal.[43]
- The employer sent several emails to the Claimant reminding her that failure to comply with the policy by the specified deadlines would cause her to lose her job.[44]
- The Claimant herself acknowledged the policy in correspondence to her employer.[45]

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[42] See X COVID-19 Immunization Policy issued September 7, 2021, at GD3-29.
[43] See X COVID-19 Immunization Policy issued September 7, 2021, at GD3-29.
[44] See various emails and notices from X managers dated August 11, 2021 (GD3-39), September 7, 2021 (GD3-37), and September 9, 2021 (GD3-35).
[45] See Claimant's Notice of Liability to A. W., CEO of X, dated October 7, 2021, GD3-119.

- The Claimant did not ask for a medical exemption, as permitted by the policy.[46]
- On October 28, 2021, the Claimant was placed on unpaid leave after failing to confirm that she had received a first dose. On November 13, 2021, she was let go after she continued to refuse to disclose her vaccination status.

[66] Given these facts, we are satisfied that the Claimant lost her job because of misconduct. She was aware of her employer's policy. She intentionally breached the policy by refusing to say whether she had been vaccinated within her employer's timelines. She knew or should have known that refusing to get vaccinated within the specified timelines could lead to suspension and dismissal.

[67] These outcomes were foreseeable for two reasons. First, the Claimant was explicitly told that she would be suspended and/or let go if she did not comply with the policy. And second, her employer made it clear that failing to get vaccinated would get in the way of carrying out her work duties.

[68] X's policy says the following in its preamble:

> Hospitals have a duty of care to protect workers under the *Occupational Health and Safety Act*, and to protect patients, and ensure service continuity under the Public Hospitals Act. Health court organizations are required to remain vigilant and respond to quickly changing circumstances, considering all relevant information at a particular time.
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> Unvaccinated, healthcare, workers in higher risk settings, such as hospitals, post risks to patients, other healthcare, workers, and themselves, and to the capacity of the healthcare system due to potential (re)introduction of COVID-19 into the setting.[47]

[69] The circumstances described above established a causal link, as required by *Lemire*, between the Claimant's alleged misconduct and her loss of employment.[48] The

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[46] See Service Canada's Supplementary Record of Claim, dated February 24, 2022, at GD3-27. The policy appears to have included a provision for medical exemption—see section headed "Phase 3 details for employees, volunteers and students" at GD3-31.
[47] See X COVID-19 Immunization Policy issued September 7, 2021, at GD3-29.
[48] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

Claimant may have believed that refusing to follow her employer's policy would not harm her employer but, from an EI standpoint, that was not her call to make.

The employer's conduct is irrelevant

[70] The Claimant argues that X acted unfairly by making her choose between her job and what she saw as her right to refuse medical treatment. She argues the following:

- There was nothing in federal and provincial law that required her to get vaccinated.
- Directive 6 only required Ontario's healthcare institutions to develop a vaccine policy. It did not require those institutions to impose vaccine mandates on all employees.
- Her collective agreement specifically gave X employees the right to refuse any vaccination.
- She offered to work from home or submit to regular testing, but X refused to consider any of her suggested accommodations.

[71] Unfortunately for the Claimant, none of these factors are relevant for the purpose of determining whether she was guilty of misconduct for EI purposes. As we have seen, the law has evolved to exclude any consideration of an employer's conduct in establishing, implementing, and enforcing workplace policies. Whatever X did or did not do, the fact remains that it had a policy and that the Claimant deliberately refused to follow it, knowing that consequences would follow. That is all that matters.

[72] Whether X unreasonably refused to accommodate the Claimant is beyond this Tribunal's jurisdiction. The law may not have required all healthcare workers to be vaccinated, but once X issued its strict policy, the Claimant was required to follow it or risk losing her job for misconduct.

[73] Nor are we empowered to interpret the Claimant's collective agreement.[49] It is not obvious that this agreement does in fact bar X from mandating any and all vaccines (a case can be made that it refers only to the flu vaccine). But, even if it does, it has no bearing on whether the Claimant's refusal to get vaccinated amounted to misconduct. That is because disputes between employee and employer, like other topics discussed in this section, are the domain of labour and employment law.

[74] In a post-hearing argument, the Claimant's legal representative raised a Federal Court case called *Astolfi*, which he says cautions against narrowly applying the legal test for misconduct.[50] He argues that decision-makers must consider an employer's conduct when deciding whether an EI claimant wilfully broke workplace rules.

[75] We considered *Astolfi* but concluded that it had limited applicability to the Claimant's case.

[76] The claimant in *Astolfi* felt that the president and CEO of his company had harassed him during a meeting. After the meeting, Mr. Astolfi told his employer that he would work from home until the situation had been investigated and resolved. The employer ordered him to physically show up at the office or face disciplinary measures. When he continued to work from home, the employer deemed his absence "misconduct" and let him go.

[77] The Federal Court held that the General Division should have considered the employer's actions before the dismissal to assess whether Mr. Astolfi's conduct was intentional. The Federal Court concluded that his allegations of harassment needed to be considered in their full context.

[78] However, the facts of this case are different. Here, X implemented a policy that applied to all its employees. There is no suggestion, as in *Astolfi*, that the employer actively targeted its employee.

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[49] See article 19 of the collective agreement between X and CUPE Local 4727 at GD7-234.
[50] See the Respondent's supplementary submission dated July 7, 2023 (AD27), citing *Astolfi v Canada* 2020 FC 30.

Conclusion

[79] We are unanimously allowing this appeal.

[80] The General Division made errors of law and jurisdiction when it assessed the legality and legitimacy of X's mandatory vaccination policy.

[81] Having conducted our own review of the record, we are satisfied that the Claimant's refusal to comply with the policy amounted to misconduct under the EI Act.

Pierre Lafontaine
Janet Lew
Neil Nawaz
Members, Appeal Division