Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 885

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. C.
Representative:	J. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (471587) dated May 30, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	January 12, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	February 16, 2023
File number:	GE-22-2195

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.[1]

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.[2]

Overview

[3] The Claimant was employed by a federally regulated employer. The Claimant's employer put in a place a policy that required all employees to attest to their COVID-19 vaccination status. Employees who were not vaccinated by November 14, 2021 and who did not have an approved exemption to vaccination would be placed on an administrative leave without pay. The Claimant's employer placed her on administrative leave without pay effective November 15, 2021 because she did not comply with its policy.[3]

[4] The Commission looked at the reasons the Claimant was not working. It decided the Claimant was suspended from her job because of misconduct within the meaning of the EI Act.[4] Because of this, the Commission decided the Claimant is disentitled from receiving EI benefits.

[5] The Claimant does not agree with the Commission. She says the Commission has not met the elements required to prove misconduct. It has not proven there was a duty to follow the policy. She says any policy not in compliance with the common law right to bodily autonomy and informed consent would be illegal and as such there can

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[1] In this decision the Appellant is called the Claimant and the Respondent is called the Commission.
[2] Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[3] The Record of Employment shows the last day for which the Claimant was paid was November 12, 2021.
[4] See section 31 of the EI Act

be no duty to comply. The Claimant's Representative provided additional argument to support this position.

Matters I considered first

The hearing was held by videoconference

[6] The Claimant requested that her appeal be heard in person. For the reasons contained in an interlocutory decision I issued on December 1, 2022, the hearing was held by videoconference.

The Commission made decisions while the appeal was ongoing

[7] The Claimant notified the Tribunal on November 18, 2022 that on November 13, 2022 Service Canada[5] had sent her a notice of two decisions in her My Service Canada Account. The first was that regular EI benefits were not payable because she lost her employment due to misconduct. The second was that her claim had been re-evaluated and it no longer considered that she was suspended from her job due to misconduct.

[8] I asked the Commission to clarify these decisions.

[9] The Commission responded that it was an error made by an agent who reviewed the Record of Employment and rescinded the suspension but replaced it with a dismissal. It was this action that generated the conflicting messages.

[10] The Commission said it was not changing its position: the Claimant remained disentitled from receiving EI benefits because she was suspended due to her own misconduct.

[11] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal.[6] Because the Commission's error occurred after the Claimant sought reconsideration of the Commission's initial decision and had appealed the

[5] Service Canada delivers the Canada Employment Insurance Commission's programs
[6] *Desrosiers v. Canada (AG),* A-128-89. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

reconsideration decision, I find that the error does not cause the Claimant any prejudice or harm.

The employer is not an added party to the appeal

[12] Sometimes the Tribunal sends a claimant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[13] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a leave of absence

[14] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.[7]

[15] In the Claimant's case, her employer initiated the stoppage of her employment on November 15, 2021 when she was placed on unpaid leave.

[16] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of unpaid leave from her employment. She testified she was not asked if she wanted to go on leave, she was not given a choice to stay at work, and she left work when she was asked to leave.

[17] The section of the EI Act on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.[8]

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[7] See section 32 of the EI Act.
[8] See section 31 of the EI Act.

[18] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the vaccine policy that led to her not working from November 15, 2021. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances the period of unpaid leave from November 15, 2021 can be considered as a suspension.[9]

I am accepting documents sent in after the hearing

[19] At the hearing the Claimant's Representative made reference to the Collective Agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) that covers the Claimant's classification. The Claimant is a member of the PSAC.

[20] The Claimant had previously submitted *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, but the case was not complete.

[21] After the hearing, the Claimant submitted the Collective Agreement and a complete copy of *A.C. v Manitoba (Director of Child and Family Services).*

[22] I have decided to accept the documents into evidence as the information they contained was referenced in the hearing and is relevant to the issue of whether the Claimant was suspended from her employment due to her own misconduct.

[23] The Commission was sent a copy of the documents. As of date of writing this decision, it has not provided any submissions on these documents.

Issue

[24] Was the Claimant suspended from her job because of misconduct?

Analysis

[25] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has dismissed you or suspended you.[10]

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[9] A suspension under the EI Act does not necessarily mean a suspension from a disciplinary perspective.
[10] See sections 30 and 31 of the EI Act.

[26] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers the reason the Claimant was suspended from her job to be misconduct.

Why was the Claimant suspended from her job?

[27] I find the Claimant was suspended from her job because she did not comply with her employer's COVID-19 vaccination policy.

[28] The Claimant's employer adopted a COVID-19 vaccination policy. The policy required all employees to be fully vaccinated by November 15, 2021.

[29] The Claimant testified she told her employer she would not be getting vaccinated for COVID-19. She was not vaccinated by that deadline. The employer sent the Claimant a letter dated November 12, 2021 which said as she was not fully vaccinated, she was not compliant with the policy, and she was placed on administrative leave without pay.

[30] The evidence tells me the Claimant was suspended from her job because she failed to be fully vaccinated as required by the employer's policy.

Is the reason for the Claimant's dismissal misconduct under the law?

[31] Yes, the reason for the Claimant's dismissal is misconduct under the law and within the meaning of the EI Act.

– What the law says

[32] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. Case law sets out the legal test for misconduct - the questions and criteria I can consider when examining the issue of misconduct.

[33] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it is almost wilful.[12] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[13] Put another way, misconduct as the term is used in the context of the EI Act and EI Regulations does not require an employee act with malicious intent, as some might assume.

[34] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of her carrying out her duties toward her employer and that there was a real possibility of being suspended or let go because of that.[14]

[35] A deliberate violation of the employer's policy is considered to be misconduct.[15]

[36] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.[16]

– **What I can decide**

[37] I only have the power to decide questions under the EI Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant's Collective Agreement was violated or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[17] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

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[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[13] See *Attorney General of Canada v Secours*, A-352-94.
[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[38] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[18] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[39] In response to Mr. McNamara's arguments, the FCA stated that it has consistently said the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the EI Act." The Court went on to note that the focus when interpreting and applying the EI Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[40] A more recent decision is *Paradis v. Canada (Attorney General)*.[19] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued he was wrongfully dismissed, the test results showed he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the EI Act.[20]

[41] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[21] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the

[18] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[19] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[20] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[21] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

focus is on what the employee did or did not do, and the fact the employer did not accommodate its employee is not a relevant consideration.[22]

[42] These cases are not about COVID vaccination policies. But, the principles in these cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in placing the Claimant on an unpaid leave of absence (suspension), failed to accommodate her or violated the Claimant's Collective Bargaining Agreement. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the EI Act.

– **The Commission's submissions**

[43] The Commission says in this case the Claimant made a personal decision to not adhere to the employer's vaccination policy. It says because she made the choice to not get vaccinated, it can say that she initiated the separation from employment because she knew not following the policy would result her loss of employment. The Commission says if it looks at the reason for separation as a suspension it can also determine, because the Claimant's actions were wilful, reckless and deliberate, the reason she lost her employment meets the definition of misconduct as per the EI Act.

– **The Claimant's submissions**

[44] The Claimant's Representative argued the Commission has not proven the elements for misconduct. He said it has not proven there was a duty to follow the policy. He bases his argument on the law which provides for the right to bodily autonomy and informed consent.

[45] In support of this position the Claimant's Representative cited *Hopp v. Lepp*, [1980] 2 S.C.R. 192 where at p. 196 the Court said "the underlying principle is the right of a patient to decide what, if anything, should be done with his body: see *Parmley v. Parmley and Yule*, [1945] S.C.R. 635." He also quoted from *Parmley*, at p. 646 of that decision "The conclusion appears unavoidable that both of the parties hereto, particularly in the operating room, failed to recognize the right of a patient, when

[22] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

consulting a professional man in the practice of his profession, to have an examination, a diagnosis, advice and consultations, and that thereafter it is for the patient to determine what, if any, operation or treatment shall be proceeded with."

[46] The Claimant's Representative noted that these decisions addressed the medical profession. But, he said, the point is that a person has the right as to what happens to their body, what procedures they should go through. He quoted again for *Parmley*, at page 646, "It may be that in the operating room the parties hereto were of the opinion they were acting in the best interests of Mrs. Yule … but it does not justify their proceeding without her consent." The Claimant's Representative submitted that informed consent is the underlying argument for bodily autonomy and who can or cannot do something with someone's body.

[47] The Claimant's Representative referred to *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, paragraphs 101 and 102 which address the right to liberty and security of the person. He says the Claimant has the autonomy to decide yes or no. He has raised informed consent because the employer provided all the positives of the COVID-19 vaccine, but the documents did not highlight any possible side effects or any unknowns that could result from the vaccine. He said these were also not in the training video.[23]

[48] The Claimant's Representative submitted that the Claimant exercised her right to bodily autonomy. Based on that he says he and the Claimant do not think that the employer's policy has a force to create a duty for her employment.

[49] The Claimant's Representative submitted that bodily autonomy is protected under the *Canadian Bill of Rights*, (S.C. 1960, c. 44). He noted that under s. 1 (a) of the *Bill of Rights* states, in part, "the right of the individual to life, liberty, security of the person and enjoyment of property." He also quoted from the preamble at section 2 of the *Bill of Rights* and said that section applied to the Claimant's circumstances.

[23] The employer's policy required those who attested to not being vaccinated to attend an on-line training session on COVID-19 vaccination

[50] The Claimant's Representative said the employer's policy had to comply with the Bill of Rights. He noted the employer's policy was issued pursuant to sections 7 and 11.1 of the *Financial Administration Act,* (R.S.C., 1985, c. F-11) (FAA). He said as such the employer's policy was subject to the *Statutory Instruments Act,* (R.S.C., 1985, c. S-22) (SIA). He noted section 3(2)(c) of the SIA requires the Clerk of the Privy Council examine any proposed regulation to ensure it "does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*."

[51] The Claimant's Representative submitted even if the employer's policy does require vaccination it must provide an accommodation for security of the person, which includes informed consent. He said security of the person would be protected through informed consent.

[52] The Claimant's Representative argued that because the employer's policy springs from the FAA it had to be examined to make sure it did not violate the *Bill of Rights.* He believes the definition of a "statutory instrument" as defined by the SIA applies to the employer's policy because the policy was issued pursuant to section 11 of the FAA. As a result, he submits, the policy must be compliant with the *Bill of Rights*.

[53] Based on this, the Claimant's Representative said the Claimant would attest that the employer's policy itself is not a duty and it is not something that would affect her ability to do her job.

[54] The Claimant's Representative said there is no clause in the Collective Agreement that addresses vaccination. He said there have been no amendments to the Collective Agreement, and no Memorandum of Agreement or Letter of Understanding to address vaccination. The Claimant's Representative said by simply having a policy that has authority from the FAA, the policy must take into account the Claimant's ability to exercise her natural rights.

[55] The Claimant's Representative submitted jurisprudence says the Claimant has the ability to decide what medical procedures she would accept. He submits that it is redundant for her to have to request an accommodation that was already established in law.

[56] The Claimant's Representative submitted the Commission has not proven any duty based on the Claimant's exercise of her rights. He said simply saying a policy was enacted does not create a duty for the Claimant.

[57] The Claimant's Representative noted Article 17 – Discipline in the Claimant's Collective Agreement lays out how an employee is deemed to have done something wrongful. He said there are steps in the Collective Agreement that would apply if there was a wrongful act. The Claimant's Representative said these were never applied. There is a communication from the employer that Article 17 did noy apply, that it was an "administrative act." The Claimant's Representative went on to say the Collective Agreement has a Memorandum of Understanding at Appendix G that addresses stoppage of pay for an administrative suspension and outlines the steps of what would be done. He says this was ignored and the Commission did not address the Collective Agreement in any way.

[58] The Claimant's Representative argued that based on the employer not applying Article 17 - Discipline of the Collective Agreement or the Memorandum of Understanding on administrative suspensions, the employer has shown it did not think anything wrongful was done.

[59] The Claimant's Representative submitted the Collective Agreement is the sole source of the employment contract. He said there is no vaccine requirement in the Collective Agreement so there is no duty for the Claimant to follow.

[60] The Claimant's Representative noted that the employer has reached out the union to provide amendments. He says that is evidence indicating the employer has unilaterally decided this is a condition of employment regardless of the law. He says the two parties must agree to a new condition of employment.

[61] The Claimant's Representative submitted that for a duty to exist it must be expressed clearly that the duty is owed to the employer. He says the Collective Agreement has no express clause for vaccination. He says the implied duty is covered by the Claimant's ability to choose, which leads back to the Claimant's informed consent. The Claimant's Representative noted employees were expected to get vaccinated. This was not discussed when the Claimant started work. Until the policy was implemented there was never any discussion of vaccination and it was not required by the Collective Agreement.

[62] The Claimant's Representative submitted that *Canada (Attorney General) v. Lemire*, 2010 FCA 314 did not fit the Claimant's situation. He noted *Lemire* does put some weight on what the Collective Agreement says and what expectations can exist outside of a Collective Agreement. But in the Claimant's case the employer's policy is the first time a medical procedure is required. Alternatively, he suggests that in the Claimant's case the Collective Agreement should be given more weight.

[63] The Claimant's Representative noted there are no federal or provincial laws requiring or mandating the COVID-19 vaccine. Based on that he says vaccination is choice. He says vaccination cannot be mandated because of personal autonomy.

[64] The Claimant's Representative highlighted a statement made in the Claimant's request for reconsideration where she wrote, "Furthermore, the *Canadian National Report on Immunization 1996*, Section 1 states that "Unlike some countries, immunization is not mandatory in Canada; it cannot be made mandatory because of the Canadian Constitution ..." He said this goes back to the Claimant's ability to choose vaccination, the employer cannot have a duty that she must be vaccinated. The Claimant's Representative referenced section 1 of the Nuremberg Code, which speaks to "voluntary consent of the human subject" must be obtained.

[65] The Claimant's Representative referred to *Her Majesty the Queen (Appellant) v. Steve Brian Ewanchuk (Respondent) and the Attorney General of Canada, Women's Legal Education and Action Fund ("LEAF"), Disabled Women's Network Canada ("DAWN Canada") and Sexual Assault Center of Edmonton (Intervenors)*, [1999] 1 SCR

330.[24] He cited this decision for its analysis of consent and how consent must be given freely. He argues there can be no misconduct because the Claimant has the ability to consent or not consent.

[66] The Claimant said because her employer did not use the word "misconduct" she does not understand how the word misconduct can be used by the Commission. The Record of Employment says in the comments section "please treat as a code M" which is the code for dismissal or suspension. Yet, the Claimant says, the employer made it clear it was an administrative leave and there is no letter on her file.

[67] The Claimant's Representative noted the Commission's decision relies on misconduct and it says there is or was a duty the Claimant owed to the employer under the policy. However, he says the Claimant had a right to not follow the policy and as such there was no duty to be vaccinated.

– **The Claimant's testimony**

[68] The Claimant testified she read the employer's policy. She said there were rumours before it was released, and the policy was emailed out to employees in early October 2021. The Claimant completed an attestation form on October 12, 2021, using the employer's on-line reporting tool. In the attestation form she indicated that her COVID-19 vaccination status was "unvaccinated." [25]

[69] The Claimant also sent an email to the acting chief of operations on October 18, 2021. In the email she wrote "I am not planning on getting any COVID-19 vaccination any time soon. I don't like to cause trouble, but I also won't be coerced into a medical procedure I don't want."[26] The employer acknowledged her email and said it would get back to her.

[70] The Claimant testified that her thought was she did not have to consent. She said other employees did continue to work with an exemption. However, no options

[24] Indexed as *R. v. Ewanchuk*, [1999] 1 S.C.R. 330
[25] See page GD7-69 in the appeal file
[26] See page GD17-2 in the appeal file

were given to her to test for COVID-19 and they were already wearing masks. She said the only exemption allowed was on the human rights ground of religion and not conscience. The Claimant said she did not ask for an exemption to the policy. She said she did not have a medical reason for exemption. The Claimant said she was exercising her rights as protected in law.

[71] The Claimant said she did not file a grievance about being placed on an unpaid leave of absence. At the beginning her union expressed its frustration with the employer. She has filed a lawsuit against her employer. In December 2022 she was told by the union she could submit a grievance, but it would not be retroactive. A policy grievance was submitted by the union when the employer's policy was not reviewed after six months as required by the policy but the grievance was not on the content of the policy itself.

[72] She said that through the years there have been different viruses such as SARS and H1N1. Employees were encouraged to get vaccinated but were not expected to get vaccinated or asked for their vaccination status for any vaccine.

[73] The Claimant testified she did complete the on-line training session on COVID-19 vaccination. She said she did not get vaccinated.

[74] The Claimant testified the superintendent handed her a letter on November 12, 2022. The letter said, "as you are not fully vaccinated, you are not compliant with the Policy and will be placed on administrative leave without pay, effective November 15, 2021 until such time as you comply with the Policy or in the event the Policy is not longer applicable." The Claimant said this was the first piece of non-generalized communication she got from her employer.

– **My findings**

[75] I find the Commission has proven the Claimant was suspended from her job due to her own misconduct. My reasons for this finding follow.

[76] Before I explain my reasons, I will address the arguments and case law submitted by the Claimant's Representative in support of the Claimant's position.

[77] A very recent Federal Court decision addressed arguments from an applicant, Anthony Cecchetto, that decisions made by the Tribunal's General Division and Appeal Division did not deal with his fundamental questions about the legality of requiring employees to undergo medical procedures (i.e. vaccination and testing) where the efficacy and safety of such procedures have not been established.[27] He argued he was fired because of his personal medical choices, and the decision-makers in his case failed to address whether that was lawful.[28]

[78] At the Federal Court, Mr. Cecchetto argued that none of the previous decision-makers had addressed his two questions: (i) what was his misconduct? and (ii) how can a person be forced to take untested medication or testing because this violates everyone's fundamental bodily integrity and amounts to discrimination based on personal choices?[29]

[79] In dismissing Mr. Cecchetto's case, the Federal Court said:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen testing – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[30]

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[27] Initially Mr. Cecchetto's appeal was dismissed by the Tribunal's General Division (GD) which found he was suspended and later dismissed from his job because he did not comply with the employer's vaccination policy. See *AC v Canada Employment Insurance Commission*, 2022 SST 588. He appealed the GD's decision to the Tribunal's Appeal Division (AD). The AD refused leave to appeal, which meant the appeal would not proceed. The AD found the General Division had not made a reviewable error and the appeal had no reasonable chance of success. See *AC v Canada Employment Insurance Commission*, 2022 SST 587.
[28] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 2.
[29] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 27
[30] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.

[80] The Federal Court said:

> As noted earlier the Applicant will likely 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 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.[31]

[81] The Federal Court also said:

> The SST-GD, [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[32]

[82] The Court went on to say:

> 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-GD (*Canada (Attorney General) v Caul*, 2006 FCA 251 at para 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at para 5).[33]

[83] I have to follow the Federal Court's decisions. I would be making an error of law if I focused on the employer's conduct, which includes making determinations under other laws or a collective agreement whether the employer was correct or legal for the employer to create, implement and enforce a policy. I do not have the jurisdiction to do that. The Tribunal has expertise in the interpretation and the application of the EI Act and EI Regulations to a claimant's circumstances and the Commission's decision. The

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[31] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 46
[32] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.
[33] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 48

Federal Courts' decisions, including its most recent decision in *Cecchetto,* has said this is all the Tribunal should do.

[84] Fundamental legal, ethical, and factual questions about COVID vaccines and COVID mandates put in place by governments and employers are beyond the scope of appeals to the Tribunal.

[85] The Tribunal doesn't have the mandate or jurisdiction to assess or rule on the merits, legitimacy, or legality of government directives and employer's policies aimed at addressing the COVID pandemic. There are other ways a claimant can challenge these directives and policies.

[86] The Claimant bases her argument that there was no misconduct largely on the notions of informed consent and bodily autonomy. The cases submitted in support of her position deal with informed consent with respect to medical treatments and the obligation of medical professionals to ensure patients are provided with an opportunity to give informed consent.

[87] Whether or not the employer's policy should or should not have provided an opportunity for informed consent is not within my jurisdiction to decide. This is because to make that determination I would have to look at the actions of the employer by assessing the choices it made as to the requirements it chose to include in its policy and not look at the claimant's actions. *Cecchetto* and the other court decisions I have cited above tell me a decision based on the employer's actions is outside of my jurisdiction and if I were to make a decision based on an assessment of the employer's actions, I would be committing an error of law.

[88] The Claimant's Representative argued the employer's policy cannot have a force to create a duty for her employment because the Claimant has a right to bodily autonomy. The Court said in *Cecchetto* that in law, I am not permitted to address this argument.[34]

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[34] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.

[89] The Claimant's Representative argued the employer's policy has to comply with the *Canadian Bill of Rights* because it was issued under the FAA and as such was subject to the SIA.

[90] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The *Canadian Charter of Rights and Freedoms (*Charter*)* is just one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[91] These laws are enforced by different courts and tribunals and the Claimant may seek relief in those venues.

[92] The Tribunal is allowed to consider whether a provision of the EI Act or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter. But that is not what is being argued by the Claimant or the Claimant's Representative.

[93] The Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. The Claimant's argument fails to recognize the Government of Canada enacted its COVID-19 vaccination policy in its role as an employer and not in its role as a government.

[94] The Claimant's Representative argued the Collective Agreement does not require the Claimant be vaccinated and there has been no amendment to that effect. He says it is the sole source for the employment contract. He also argues the provisions in the agreement with respect to discipline were not followed when the employer placed the Claimant on an unpaid leave of absence. This argument requires that I consider and apply the terms and conditions of the Claimant's Collective Agreement when reaching my decision as to whether the Claimant was suspended within the meaning of the EI Act.

[95] The provisions of the Claimant's Collective Agreement are not relevant to the issue before me. This is because an allegation of a violation of a collective agreement

is made and decided using a process contained in the collective agreement (as agreed to by the parties to that collective agreement). The legal tests applied in arbitrations to decide disciplinary penalties is different from the legal test applied when deciding whether misconduct has occurred within the meaning of the EI Act.[35]

[96] I would note as well, while the Collective Agreement does contain terms and conditions of employment there are, in my opinion, other documents, such as job descriptions and policies, that can impose a duty on an employee. In addition, the Claimant's Collective Agreement contains a management responsibilities clause which says, "Except to the extent provided herein, this agreement in no way restricts the authority of those charged with managerial responsibilities in the public service." I am not relying on this term of the Collective Agreement in reaching my decision but am providing it here to illustrate the Collective Agreement recognizes there are managerial responsibilities that might not be addressed by the Collective Agreement.

[97] The Claimant's Representative argued that for a duty to be imposed on the Claimant it must be an express or implied duty. I think an employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the Claimant's employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[36]

[98] The Claimant's Representative's referred to *R v. Ewanchuk* for the Court's analysis of "implied consent." In *R v. Ewanchuk,* the trial judge acquitted him of sexual assault on the grounds the complainant implicitly consented to the sexual activity in question. It is in this context the Supreme Court analyzed "implied consent." Because

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[35] The legal test for misconduct within the meaning of the EI Act is stated above. It does not require a determination as to whether suspension and / or dismissal was imposed with just cause or was the appropriate penalty.

[36] See *Attorney General of Canada v. Secours*, A-352-94; *Canada (Attorney General) v Bellavance*, 2005 FCA 87, *Canada (Attorney General) v Gagnon*, 2002 FCA 460, and *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

those circumstances are so far removed from the Claimant's circumstances, I do not consider the Court's analysis to be relevant to the issue before me.

[99] The Claimant argued her employer did not use the word "misconduct" and made it clear that she was placed on an unpaid administrative leave. She does not see how the Commission can use the word "misconduct." The Federal Court of Appeal has considered this question and found that an employer's characterization of the grounds of an employee's suspension or dismissal is not determinative of whether the employee lost their job because of misconduct within the meaning of the EI Act.[37] As a result, the employer's characterization of the reason why the Claimant was not working is not determinative of the issue under appeal.

– **The Claimant was suspended due to her misconduct**

[100] The Claimant's employer introduced a policy on October 6, 2021 requiring all employees to attest to their COVID-19 vaccination status by the attestation deadline of October 29, 2021. Employees who disclosed their vaccination status as unvaccinated were required, within two weeks of the attestation deadline, to complete an online training session on COVID-19 vaccination. Two weeks after the attestation deadline, employees who were not vaccinated would be placed on administrative leave without pay.

[101] The Claimant attested on October 12, 2021 that she was unvaccinated. She e-mailed a supervisor on October 18, 2021 stating "I am not planning on getting any COVID-19 vaccination any time soon."

[102] The Claimant testified she read the employer's policy. The Claimant testified the policy said what would happen and what could possibly happen if she was not fully vaccinated. She read the policy when it was issued. The policy said a person who remained unvaccinated after the attestation deadline would be placed on an unpaid administrative leave of absence. She was aware her employer required her to be vaccinated and exemptions to the policy could be granted. She did not apply for an

[37] See *Canada (Attorney General) v Boulton*, 1996 FCA 1682

exemption. The evidence is clear the Claimant was aware that she would be suspended (placed on an unpaid administrative leave of absence) if she was not vaccinated within two weeks of the attestation deadline.

[103] The Claimant completed the attestation form stating she was not vaccinated, told her employer she would not be vaccinated and remained unvaccinated by the deadline. As a result, I find the Claimant made the conscious, deliberate and wilful choice to not comply with the employer's policy when she knew that by doing so there was a real possibility she could be suspended (placed on an unpaid leave of absence) and not be able to carry out the duties owed to her employer. Accordingly, I find that the Commission has proven the Claimant was suspended due to her own misconduct within the meaning of the EI Act and the case law described above.

So, was the Claimant suspended from her job because of misconduct?

[104] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

Conclusion

[105] The Commission has proven the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[106] This means that the appeal is dismissed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section