Citation: *CP v Canada Employment Insurance Commission*, 2023 SST 1049

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | C. P. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Daniel McRoberts |

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| **Decision under appeal:** | General Division decision dated January 23, 2023 (GE-22-3082) |

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| **Tribunal member:** | Neil Nawaz |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | June 19, 2023 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | August 7, 2023 |
| **File number:** | AD-23-193 |

## Decision

[1] The appeal is dismissed. The General Division's decision stands.

## Overview

[2] The Claimant, C. P., is appealing a General Division decision to deny him Employment Insurance (EI) benefits.

[3] On May 31, 2021, the Claimant started work as an accountant for a law firm. On October 27, 2021, the law firm dismissed him after he refused to get vaccinated for COVID-19. The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because his failure to comply with his employer's vaccination policy amounted to misconduct.

[4] This Tribunal's General Division agreed with the Commission. It found that the Claimant had deliberately broken his employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely lead to dismissal.

[5] The Claimant then asked for permission to appeal the General Division's decision. He argued that the General Division made the following errors:

- It ignored the fact that his refusal to get vaccinated did not breach any express or implied term of his employment contract;
- It failed to acknowledge that his employer substantially altered the terms of his employment contract; and
- It adopted a test for misconduct that is not supported by case law.

[6] I granted the Claimant permission to appeal because I thought he had at least an arguable case. In particular, I thought it was possible that that the General Division had disregarded a principle from a case called *Fakhari*.[1]

[7] I held a hearing to fully discuss the Claimant's concerns. Now that I have heard arguments from both parties, I have concluded that the General Division did not make any errors.

## Issue

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

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

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

## Analysis

[10] I have reviewed the General Division's decision, as well as the law and the evidence that it used to reach that decision. I am satisfied that the General Division did not make any errors.

### The General Division did not misinterpret the law

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

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[1] See *Fakhari v Canada (Attorney General)* (1996), 197 N.R. 300.
[2] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

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

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

[12] The Claimant argues that getting vaccinated was never a condition of his employment. He claims that, by forcing him to do so under threat of dismissal, his employer infringed his rights.

[13] I don't find these arguments persuasive.

[14] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't necessarily correspond to the word's everyday usage. The General Division defined misconduct as follows:

> Case law says that, to be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful.
>
> The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.
>
> There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[3]

[15] These paragraphs show that the General Division accurately summarized the law around misconduct. The General Division went on to correctly find that, when determining EI entitlement, it doesn't have the authority to decide whether an employer's policies are reasonable, justifiable, or even legal.

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[3] See General Division decision, paragraphs 17–19, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *McKay-Eden v Her Majesty the Queen*, A-402-96; and *Attorney General of Canada v Secours*, A-352-94.

### – Employment contracts don't have to explicitly define misconduct

[16] The Claimant argues that nothing in his employment contract and collective agreement required him to get the COVID-19 vaccination However, case law says that is not the issue. What matters is whether the employer has a policy and whether the employee deliberately disregarded it. In its decision, the General Division put it this way:

> I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[4]

[17] This passage echoes a case called *Lemire*, in which the Federal Court of Appeal had this to say:

> To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an **express or implied** duty resulting from the contract of employment.
>
> However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal [emphasis added].[5]

[18] The court in *Lemire* went on to find that it was misconduct for a food delivery employee to sell contraband cigarettes in his restaurant's parking lot outside of working hours. The court found that this was so even if his employer didn't have an explicit policy against such conduct.

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[4] See General Division decision, paragraph 20, citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[5] See *Canada (Attorney General) v Lemire*, 2010 FCA, paragraphs 14–15.

[19] In this case, the Claimant's employer did have an explicit policy, which it linked to a safe workplace and the eventual return of employees to the office.[6]

### – *Fakhari* has been overtaken by subsequent cases

[20] As noted, the General Division said that misconduct occurs whenever an employee deliberately breaks a work rule knowing that consequences are likely to follow. The General Division added: "The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act."[7]

[21] However, the Claimant has pointed to *Fakhari*, a Federal Court of Appeal case that seemingly permits decision-makers to examine an employer's behaviour when determining whether a claimant was appropriately dismissed for misconduct.

[22] *Fakhari* involved a coach who was hired by a community college to organize an evening volleyball league. In due course, the college discovered that the coach was leaving early to perform the duties of a sports instructor at a nearby recreational centre. When confronted, the coach denied, against all evidence, that he was under contract elsewhere. The college terminated his employment.

[23] The Commission denied the coach EI benefits after finding that he had lost his job because of his own misconduct. The matter came to Board of Referees (a now defunct body that was roughly analogous to today's General Division). It found that the coach had not committed misconduct, because he had never received a warning about his overlapping duties and his previous denial was not a lie but a "panic reaction."

[24] The Umpire (a position analogous to the Appeal Division) disagreed with the Board. He found that the coach had committed misconduct by violating the terms of his employment contract and then lying about it. He also found that it was "warped and "illogical" for the Board to explain away the coach's lie as a "panic reaction."

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[6] See Goodmans LLP Mandatory COVID-19 Vaccination Policy and Procedure dated September 20, 2021, GD3-38.
[7] See General Division decision, paragraph 19.

[25] On judicial review, the Federal Court of Appeal reversed the Umpire's decision. It found that, while the coach was "less than forthright with his employer," the Umpire was not entitled to substitute his appreciation of the coach's credibility for the Board's. It also found that the Board was right to take into account the "attendant circumstances" surrounding the coach's dismissal—including the college's conduct. The Federal Court of Appeal wrote:

> An employer's subjective appreciation of the type of misconduct which warrants dismissal for just cause cannot be deemed binding on a Board of Referees. It is not difficult to envisage cases where an employee's actions could be properly characterized as misconduct, **but the employer's decision to dismiss that employee will be rightly regarded as capricious, if not, unreasonable.** We do not believe that an employer's mere assurance that it believes the conduct in question is misconduct, and that it was the reason for termination of the employment, satisfies the onus of proof which rests on the Commission... [emphasis added][8]

[26] This passage implies that the employer's actions, as much as the employee's, are subject to scrutiny when assessing misconduct. For that reason, the Claimant argues that the General Division should have taken his employer's actions into account before finding him ineligible for EI.

[27] At the General Division, the Claimant noted that his employer hired him in late May 2021, only a few months before it introduced its mandatory vaccine policy. At that point, the pandemic had been raging for more than a year, but vaccines were becoming widely available across Canada. The Claimant testified that, if his employer had hinted during his job interview that getting vaccinated would soon be a condition of keeping his job, then he might have pursued opportunities elsewhere. Instead, he was hired only to be fired a few months later, even though he spent most of his time working from home and posed no threat to his co-workers.

[28] When I allowed permission to appeal, I wondered whether *Fakhari* in fact said what it seemed to be saying and, if so, whether it was still good law. I invited the parties

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[8] See *Fakhari v Canada (Attorney General)* (1996), 197 N.R. 300.

to explain how *Fakhari* could be reconciled with other cases that have adopted a more unforgiving approach to misconduct.

[29] Now, having heard from the parties, I have concluded that, in the more than two decades since it was issued, *Fakhari* has been superseded by new developments in the law. I base this conclusion on a series of cases since that firmly direct decision-makers to not consider an employer's actions when assessing misconduct:

- A case where an employee with 14 years of service was dismissed without prior warning for smoking a joint on the job, when there was evidence that other workers were given lighter punishments for similar behaviour, such as drinking on the job: "**The role of the Board of Referees was to determine not whether the severity of the penalty imposed by the employer was justified** or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act."[9]

- A case where an employee was dismissed for failing a drug test even though he had passed another one only seven days earlier and had been led to believe that at least 90 days had to elapse between tests: "In the interpretation and application of section 30 of the Act, **the focus is clearly not on the behaviour of the employer**, but rather on the behaviour of the employee… There are, available to an employee wrongfully dismissed, remedies to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits."[10]

- A case where an employee was dismissed for repeated absenteeism, even though there was evidence his employer knew that he was suffering from a disability, namely alcohol dependence: "Although the measures which an employer takes or could have taken with respect to an employee's alcohol

[9] See *Canada (Attorney General) v Marion*, 2002 FCA 185, paragraph 3.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, paragraph 23.

problem may be relevant to the determination of whether there is misconduct, **the fact that the employer failed in its duty to accommodate its employee pursuant to the provisions of the CHRA is not, in my view, a relevant consideration**."[11]

- A case where an employee was dismissed for failing a cannabis test even though he had a prescription for medical marijuana to treat ADHD: "Both the SST-AD and the SST-GD were correct in finding that **the conduct of the employer is not a relevant consideration under section 30 of the EIA**… While the applicant feels very strongly that he was unfairly treated by his employer, he could not point to a reviewable error...[12]

[Emphasis added in the above quotations.]

[30] These cases, which all suggest that an employer's conduct is irrelevant when assessing alleged employee misconduct, appear to stand at odds with *Fakhari*. I make this observation knowing that two of the cases listed above (*Marion* and *McNamara*) cited *Fakhari*. Still, I am satisfied that, whatever the Court's position in the mid-1990s, it has evolved since then to the stricter position that prevails today.

**– A recent case validates the General Division's interpretation of the law**

[31] Earlier this year, the Federal Court reaffirmed the General Division's approach to misconduct in the specific context of COVID-19 vaccination mandates. As in this case, *Cecchetto* involved a claimant's refusal to follow his employer's COVID-19 vaccination policy.[13] The Federal Court confirmed the Appeal Division's decision that this Tribunal is not permitted to address these questions by law:

> 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 [the Ontario government's COVID-19 vaccine policy]. That sort of

[11] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, paragraph 23.
[12] See *Paradis v Canada (Attorney General)*, 2016 FC 1282, paragraphs 31 and 33.
[13] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

> finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD.[14]

[32] The Federal Court agreed that, by making a deliberate choice not to follow the employer's vaccination policy, Mr. Cecchetto had lost his job because of misconduct under the EI Act. The Court said that there were other ways under the legal system in which the claimant could have advanced his wrongful dismissal or human rights claims.

[33] Here, as in *Cecchetto*, the only questions that matter are whether the Claimant breached his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in his suspension or dismissal. In this case, the General Division had good reason to answer "yes" to both questions.

## The General Division considered all relevant evidence

[34] At the General Division, the Claimant argued that he was not guilty of misconduct because his employment contract didn't require him to get vaccinated. He said that he had a family history of an autoimmune disease that causes clotting and was worried about the potential impact of the vaccine on his health. He noted that his employer said nothing about a potential vaccination policy when he was interviewed for the job. He insisted that, if he had known such a policy was coming only three months later, he would not have accepted his employer's job offer.

[35] From what I can see, the General Division didn't ignore these points. It simply didn't give them as much weight as the Claimant thought they were worth. Given the law governing misconduct, I don't see how the General Division erred in assessing the available evidence.

[36] When the General Division reviewed the available evidence, it came to the following findings:

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[14] See *Cecchetto*, note 5, at paragraph 48, which cites *Canada (Attorney General) v Caul*, 2006 FCA 251 and *Canada (Attorney General) v Lee*, 2007 FCA 406.

- In September 2021, the Claimant's employer adopted and communicated a clear policy requiring employees to get fully vaccinated by the end of the year;
- The employer was free to establish the policy, even if it did so only a few months after hiring the Claimant;
- The Claimant was aware that failure to comply with the policy by the specified timeline would cause loss of employment;
- The Claimant intentionally refused to confirm that he had been vaccinated within the timeline; and
- The Claimant failed to satisfy his employer that he fell under one of the exceptions permitted under the policy.

[37] These findings appear to accurately reflect the documents on file, as well as the Claimant's testimony. In its role as finder of fact, the General Division is entitled to some leeway in how it chooses to assess the evidence before it.[15] In this case, having reviewed the available documents and heard testimony, the General Division concluded that the Claimant knew about her employer's policy and understood that there was a good chance he'd be let go if he failed to comply with it by December 31, 2021. In the absence of a significant factual error, I see no reason to second-guess these findings.[16]

## Conclusion

[38] I am dismissing this appeal. The General Division did not make an error when found that the Claimant's refusal to disclose his vaccination status amounted to misconduct under the law. The Claimant is not entitled to EI benefits.

Neil Nawaz
Member, Appeal Division

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[15] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[16] Among the grounds of appeal for an EI decision is an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material." See section 58(1)(c) of DESDA.