Citation: *AG v Canada Employment Insurance Commission*, 2023 SST 1063

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. G.
Representative:	Philip Cornish
Respondent:	Canada Employment Insurance Commission
Representative:	Angèle Fricker

Decision under appeal:	General Division decision dated February 2, 2023 (GE-22-3134)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	July 18, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	August 10, 2023
File number:	AD-23-228

Decision

[1] The appeal is dismissed. The General Division made an error of law in coming its decision. My own review of the evidence convinces me that the Claimant is not entitled to Employment Insurance (EI) benefits.

Overview

[2] The Claimant, A. G., is an early childhood consultant who worked for X. On November 12, 2021, X placed the Claimant on an involuntary leave of absence after she refused to get vaccinated for COVID-19.[1] The Canada Employment Insurance Commission (Commission) decided that it didn't have to pay the Claimant EI benefits because her failure to comply with her employer's vaccination policy amounted to misconduct.

[3] This Tribunal's General Division dismissed the Claimant's appeal. It found that the Claimant had deliberately broken her employer's vaccination policy. It found that the Claimant knew or should have known that disregarding the policy would likely result in loss of employment.

[4] The Claimant asked the Appeal Division for permission to appeal the General Division's decision. She maintained that she was not guilty of misconduct and argued that the General Division made the following errors:

- It denied that it had any authority to determine whether X's mandatory vaccination policy was fair or reasonable, when the real issue was whether it was contrary to the terms of her employment;
- It failed to consider whether the vaccination policy was an implied or express term of employment, as required by a Federal Court of Appeal case called *Lemire*;[2]

[1] The Claimant was later dismissed altogether.
[2] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

- It failed to consider whether a new policy established by an employer outside of the terms of a collective agreement needed to be assessed according to the KVP test;[3] and
- It disregarded a General Division case called *A.L.*, even though it involved a factual situation much like her own.[4]

[5] In May, I granted the Claimant permission to appeal because I saw an arguable case on at least one issue. Last month, I held a hearing to discuss her allegations in full.

Issue

[6] 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.[5]

[7] My job is to determine whether any of the Claimant's allegations fall into the permitted grounds of appeal and, if so, whether they have any merit.

Analysis

[8] I am satisfied that the General Division erred in law by failing to consider a key aspect of the test for misconduct. Because the General Division's decision falls for this reason alone, I see no need to address the Claimant's remaining allegations.

---

[3] The Claimant is referring to case called *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.*, 1965 CanLII 1009 (ON LA).
[4] See *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[5] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

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

[9] 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. An employee may be disqualified from receiving EI because of misconduct, but it doesn't necessarily mean that they have done something "wrong" or "bad." The EI Act says that a claimant "is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct…"[6] Misconduct is not defined by the EI Act, but the term has been interpreted by the courts.

[10] 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.[7] Misconduct also includes conduct that is so reckless that it is almost wilful. There is misconduct if a claimant can reasonably foresee that their conduct will get in the way of carrying out their employment duties and that there is a real possibility of being let go because of it.

– Foreseeability implies a causal link between the claimant's alleged misconduct and their ability to carry out their employment duties

[11] The General Division found that the Claimant was guilty of misconduct because (i) she intentionally refused to get vaccinated and (ii) she knew or should have known that her refusal would lead to disciplinary measures.[8]

[12] However, the Claimant points to *Lemire*, which requires decision-makers to make sure that an employee's alleged misconduct actually impacts their job:

> 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

---

[6] See EI Act, section 30.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v Secours*, [1995] FCJ No 210.
[8] See General Division decision, paragraphs 14–15.

> constitute a breach of an express or implied duty resulting from the contract of employment [emphasis added].[9]

[13] This passage tells us that any alleged misconduct must be relevant to a claimant's ability to carry out their employment duties. In other words, an employee's "misconduct" can't be just whatever that the employer deems to be bad or unacceptable behaviour. I emphasize that *Lemire* requires the causal link to be between the employee's misconduct and their **employment**. It does **not** say that the causal link must be between the misconduct and the **dismissal**.

[14] If a claimant is expected to foresee that their conduct is likely to result in suspension or dismissal, then it should be possible for them, or any reasonable person, to understand why. To hold otherwise would be to subject employees to the mercy of employers who may be tempted to let employees go for capricious reasons that have nothing to do with the essential terms of their employment.

[15] In this case, the General Division found that the Claimant's conduct was intentional and that it would foreseeably result in suspension or dismissal. However, the General Division didn't explain why it believed there was a causal link between the Claimant's refusal to get vaccinated and her ability to perform her job: "I realize the Claimant argued that the employer's vaccination policy was vague. However, the employer's policy specifically states that failing to provide proof of vaccination would result in being subject to an unpaid leave of absence."[10]

[16] But it wasn't enough to find that the Claimant's mere failure to comply with the policy caused her dismissal. The General Division had to go further. It also had to satisfy itself that the Claimant's non-compliance would render her able to fulfill the terms of her employment.

[17] The General Division didn't address that question. It didn't ask how the Claimant's refusal to get vaccinated impaired her ability to perform her job. It failed to

---

[9] See *Lemire* at paragraph 14.
[10] See *Lemire* at paragraph 19.

establish a rational connection between her alleged misconduct and her employment. That was an error of law.

Remedy

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

[18] When the General Division makes an error, the Appeal Division can address it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.[11]

[19] As it conducts its proceedings, the Tribunal must balance simplicity, fairness, and quickness. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing applications for benefits to conclusion. It is now approaching two years since the Claimant submitted her EI application. If this matter goes back to the General Division, it will needlessly prolong a final resolution.

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

[20] I am satisfied that the record before me is complete. The Claimant filed a large volume of written evidence with the Tribunal, including her employer's vaccination policy and a letter that documents the circumstances that led to her dismissal. I also had access to the recording of the General Division hearing, in which the Claimant discussed what she knew about the policy and when she knew it. I doubt that the Claimant's evidence would be materially different if this matter were reheard.

[21] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, had it not erred. In my view, even if the General Division had properly followed the law, it would have come to the same result. My own review of the record satisfies me that the Claimant's refusal to get vaccinated amounted to misconduct.

---

[11] See DESDA, section 59(1).

The Claimant's refusal to get vaccinated was misconduct

[22] 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 may strike the Claimant as unfair, but it is one that the courts have repeatedly adopted and that I am bound to follow.

– Misconduct involves four essential elements

[23] The law says that you can't get EI benefits if you lose your job because of misconduct. As noted, the EI Act doesn't say what misconduct means, but the courts have established what is essentially a four-part test. For there to be misconduct:

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

[24] As we have seen, the element of foreseeability requires a causal link between the misconduct and the employment. An employee must be able to see how failing to comply with their employer's policy would interfere with their ability to do their job.

– The evidence shows that the Claimant committed misconduct

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

- On September 7, 2021, X issued a mandatory COVID-19 vaccination policy;[12]

[12] See X's COVID-19 Immunization Directive issued September 7, 2021, GD6-70. It appears that this Directive was updated several times (on September 21, 2021, February 15, 2022, and March 1, 2022) to, among other things, require booster shots and extend vaccination deadlines—see update of March 1, 2022, GD3-26.

- The policy required all employees to show proof that they had been fully vaccinated by October 1, 2021, or face suspension;[13]
- X said that it communicated the policy to all its employees by an organization-wide email, followed by memos outlining expectations and consequences, including loss of employment;[14]
- The Claimant never asked X for a medical or religious exemption under the policy;[15]
- On November 12, 2021, X placed the Claimant on unpaid leave after she failed to confirm that she had been fully vaccinated, as required by its client, the Y District School Board.[16]

[26] In her statements to the Commission and later the General Division, the Claimant insisted that, although she had heard "talk" about a vaccination policy, she had no idea that she could lose her job over it until the day she was suspended. She argued that, in any event, the policy was vague and did not clearly lay out what was expected of employees or what would happen if they did not get vaccinated.

[27] I don't find these arguments persuasive. The policy on file dated September 7, 2021 is directed to all employees of X. It is a lengthy and detailed document, but it does say that "failure to complete the Staff COVID-19 Vaccination Declaration Form" by October 1, 2021 "will result in staff to be considered 'unvaccinated' and subject to enhanced screening and additional precautionary measures including, but not limited to… prevented [sic] from working in a location that is experiencing an outbreak and/or placed on an unpaid leave…"[17]

[28] The Claimant said that she didn't see this document until after she was suspended, but I find it unlikely that X would have prepared a vaccination policy in

---

[13] See X Immunization Directive, GD6-72–73.
[14] See Service Canada Supplementary Record of Claim dated May 31, 2022 (GD3-17) documenting a telephone conversation with HM, X human resources officer.
[15] See Service Canada Supplementary Record of Claim dated August 22, 2022, GD3-24. Also refer to Claimant's testimony at 44:50 of the recording of the hearing before the General Division.
[16] See letter to the Claimant dated November 19, 2021 from EM, X Program Manager, GD6-2.
[17] See X Immunization Directive, GD6-72–73.

response to a pandemic and not taken steps to ensure that its essential terms were communicated to employees. I can see that the policy was revised several times, presumably in response to changing circumstances, but that does not change the fact that, at all times, it set out expectations, deadlines, and consequences.

[29] Given the above evidence, I am satisfied that the Claimant lost her job because of misconduct. She was aware of her employer's policy and of potential disciplinary measures if she did not follow it. She intentionally breached the policy by refusing to say whether she had been vaccinated within the timelines demanded by her employer. She knew or should have known that refusing to get vaccinated within those timelines could lead to suspension.

[30] This outcome was foreseeable because (i) the Claimant was explicitly told that she would be suspended if she didn't comply with the policy; and (ii) her employer made it clear that failing to get vaccinated would impair her ability to carry out her work duties. As X's policy stated in its preamble:

> The purpose of this Directive is to reduce the risk of exposure to and transmission of COVID-19 in the workplace by providing occupational protection to all staff and thereby preventing exposure to the people we support. Vaccination for COVID-19 is both safe and effective in preventing COVID-19.
>
> […]
>
> This Directive has been developed in consultation with [X's] Joint Health and Safety Committee as a reasonable and necessary measure to prevent, respond to, and alleviate the outbreak of COVID-19 and the associated risk to the people we support, many of whom are medically fragile and/or cannot comply with social distancing and infectious disease transmission prevention protocols.[18]

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

[18] See X Immunization Directive, GD6-70.

may have believed that her refusal to follow her employer's policy would not interfere with her job performance but, from an EI standpoint, that was not her call to make.

– The employer's conduct is irrelevant

[32] The Claimant has always insisted that she did nothing wrong by refusing to get vaccinated. She has accused X of attempting to impose a new condition of employment without her consent. She has argued that X acted unfairly by making her choose between her job and what she saw as her right to refuse medical treatment.

[33] Unfortunately for the Claimant, none of these arguments can succeed. As we have seen, the law has evolved to exclude any consideration of an employer's conduct in establishing, implementing, and enforcing its workplace policies. In this case, X had a policy, and the Claimant deliberately refused to follow it, knowing that consequences would follow. That is all that matters.

[34] I have no authority to determine whether X's vaccination policy was reasonable or fair. Nor do I have any authority to decide whether policy violated the Claimant's employment contract or collective agreement. That's because disputes between employee and employer are ultimately the domain of labour and employment law.

[35] Employees often voluntarily subordinate their 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—such as their right to publicly criticize their employer. 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.

[36] If they believe that a new policy violates their collective agreement or their human rights, they can file a grievance or take their employer to court or some other tribunal. However, the EI claims process is not the appropriate place to litigate such disputes.

[37] 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."[19]

– Several precedents cited by the Claimant have little or no bearing on her case

[38] I will conclude by briefly commenting on some of the cases that the Claimant relied on to support her claim for benefits:

- The Claimant cited a case called *KVP*, which prevented an employer from unilaterally imposing any rule or policy unless it was reasonable, consistent with the collective agreement, and agreed to by the union.[20] Because this legal test was developed in the context of employment and labour law, I didn't find it helpful in interpreting the EI Act.

- The Claimant cited a case called *A.L.*, which allowed a claimant to collect EI benefits, even though she had been suspended for refusing the COVID-19 vaccine. Because this case was decided by the General Division, I didn't have to follow it. In any event, it was recently overturned by the Appeal Division.[21]

- The Claimant, who has apparently been rehired by X, cited a case called *Boulton*, which said that a settlement could rebut evidence of misconduct.[22] However, *Boulton* also says that such a settlement must contain a clear indication that the prior finding of misconduct was wrong. In any event, since the Claimant and X reached their settlement after the General Division hearing, it can't be included in the evidentiary record before me.

- The Claimant cited a case called *Astolfi*, which she argues allows decision-makers to consider an employer's conduct when deciding whether an EI

[19] See *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[20] See *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 1965 CanLII 1009 (ON LA).
[21] See *Canada Employment Insurance Commission v A.L.,* issued August 1, 2023 (unreported).
[22] See *Canada (Attorney General) v Boulton* (1996), 208 N.R. 63 (FCA).

claimant wilfully broke workplace rules.[23] However, that case involves a particular set of facts that limit its wide applicability: In *Astolfi*, the employer targeted a single employee; in the Claimant's case, X's vaccination policy applied to all its employees.

Conclusion

[39] I am dismissing this appeal. The General Division erred in law by failing to consider whether there was a causal link between the Claimant's alleged misconduct and her employment. However, I think the General Division would have come to the same decision even if it had not made that error. Having conducted my own review of the record, I have concluded that, for the purpose of determining EI entitlement, the Claimant's refusal to get vaccinated amounted to misconduct.

Neil Nawaz
Member, Appeal Division

[23] See citing *Astolfi v Canada* 2020 FC 30.