Citation: *Canada Employment Insurance Commission v RB*, 2023 SST 1249

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve
Respondent:	R. B.
Representative:	L. M.

Decision under appeal:	General Division decision dated January 31, 2023 (GE-22-3167)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	June 13, 2023
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	September 12, 2023
File number:	AD-23-186

Decision

[1] The appeal is allowed. The Claimant lost her job because of misconduct.

Overview

[2] The Respondent (Claimant) lost her job. The employer said she lost her job because she did not comply with the employer's COVID-19 vaccination policy (Policy). The Claimant did not request an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[3] The Appellant (Commission) determined that the Claimant lost her job because of misconduct, so it was not able to pay her EI benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division concluded that the Commission did not prove that the Claimant lost her job because of misconduct. Therefore, the Claimant is not disqualified from receiving EI benefits.

[5] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division erred in law or based its decision on an erroneous finding of fact when it concluded that the Claimant did not lose her job because of misconduct under the *Employment Insurance Act* (EI Act).

[6] I must decide whether the General Division made an error of law, or based its decision on an erroneous finding of fact when it concluded that the Claimant did not lose her job because of misconduct.

[7] I am allowing the Commission's appeal.

Issue

[8] Did the General Division make an error of law or base its decision on an erroneous finding of fact when it concluded that the Claimant did not lose her job because of misconduct?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make an error of law or base its decision on an erroneous finding of fact when it concluded that the Claimant did not lose her job because of misconduct?

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

Position of the parties

[12] The Commission submits that the employer had a legal obligation to ensure the health and safety of the workplace and employees. Therefore, the employer had a legal basis for its Policy. It submits that failure to comply with a lawful directive is considered misconduct under the EI Act.

[13] The Commission submits that the reason why the employer did not accept to extend the deadline for compliance with the Policy was not relevant to whether the Claimant's conduct amounted to misconduct as per the EI Act.

[14] The Commission submits that the General Division made an error in law because the Claimant made a personal and deliberate choice not to follow the employer's Policy. This is considered misconduct under the EI Act.

[15] The Claimant submits that she was dismissed from her position because she refused the vaccines available at the time of the Policy. However, she was willing to take the Novavax vaccine that was not yet approved. As the Claimant was permitted to work from home, she was not endangering herself or any of her work colleagues. She did nothing wrong. There was no misconduct. The Claimant submits that the employer's Policy allowed for discretion in enforcement which the employer failed to use in her case.

[16] The Claimant submits that the employer reached out to her in the fall of 2022 and requested she return to her previous position on a contractual basis, even though the Policy is still in place and the Claimant has still not been vaccinated for COVID-19. The employer has twice extended her contract and is now in deliberations to hire her back as a full-time employee even though the Policy is still in place and the Claimant is not vaccinated.

[17] The Claimant submits that the employer is now using its discretion and questions why the employer did not use it at the time of termination.

The General Division decision

[18] On January 31, 2023, the General Division allowed the Claimant's appeal finding that the Commission had not proven that there was misconduct.

[19] The General Division found that the employer was inflexible about enforcing the strict terms of the Policy and failed to use any discretion provided for in the Policy. It found that the Claimant was willing to take the Novavax vaccine when available in six to eight weeks. She wanted to comply with the Policy but could not meet the deadline. The General Division found that it could not conclude that the Commission had proven that the Claimant wilfully breached the Policy and a duty owed to the employer. It allowed the Claimant's appeal.

The General Division exceeded its jurisdiction and departed from established principles of case law

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

[21] The General Division had to decide whether the Claimant was dismissed because of misconduct.

[22] 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 under the EI Act, but that does not necessarily mean that they have done something "wrong" or "bad."[3]

[23] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature

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[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."

that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[24] Therefore, 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

[25] 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.[4]
- The rule or policy may be express or implied.[5]
- The violation of the rule or policy must be intentional, or so reckless that it is almost intentional.[6]
- The employee must be aware that violating the rule or policy could interfere with their duties and lead to their suspension or dismissal.[7]

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

[26] The General Division found that the evidence showed that the Claimant was aware of the Policy and that she had clearly decided not to take the mRNA vaccines. It found that the Claimant was in breach of the Policy. The General Division found that she was aware from December that dismissal was a possibility.

[27] However, the General Division chose to focus on whether the employer's actions were proper. This analysis deviated from binding case law, as well as the Tribunal's established jurisprudence on misconduct.

[28] The big problem with the General Division's analysis is that it questions the way the employer **applied** its COVID-19 vaccination Policy:

> "Par [33] …The employer had the discretion under the Policy to take steps other than dismissal, or to grant an extension of time for the Claimant to receive the Novavax vaccine. It refused. That showed the employer putting the set deadline of the Policy, which it had the discretion to modify, ahead of retaining a valued and valuable employee. That refusal was inconsistent with having approved the Claimant for a work-from-home arrangement starting January 17, 2022. The refusal was also inconsistent with its reason for the termination: the very significant health concerns being a material breach of the Policy. Working from home did not present a significant health concern. The Claimant getting the Novavax vaccine when available would eliminate the health concern. It was these actions of the employer that resulted in the alleged misconduct."

[29] 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.

[30] Because the law reduces any misconduct assessment to a few narrow questions, the General Division had no authority to decide questions about the fairness or reasonableness of the employer's Policy that applied to workers working from home. Nor did it have authority to decide that the employer should have accommodated the Claimant by allowing her an extension of time to receive the Novavax vaccine.[8]

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

[31] Furthermore, the General Division's role was not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[32] 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 (b) justified in relation to the facts and law that constrain the decision-maker.[9] Here, the General Division disregarded some of the legal constraints that are part of any EI misconduct analysis.

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

[34] 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.[10]

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

- It decided that the employer did not use its discretion properly when it refused to extend the Policy deadline so that the Claimant could receive the Novavax vaccine.
- It decided that because the Claimant worked from home, the employer went beyond what was necessary to address its health concerns.
- It decided that the employer did not properly use its discretion when it decided to dismiss the Claimant.

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[9] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85.
[10] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[36] It was not up to the General Division to decide any of these questions. Its findings went beyond the scope of the EI misconduct analysis set out in the case law. By venturing into the realms of labour and public health law, the General Division exceeded its jurisdiction and erred in law.[11]

[37] Furthermore, the fact that the employer implemented a health and safety policy during the pandemic with which the Claimant clearly disagreed with from its implementation does not constitute behavior that would justify the General Division's application of *Astolfi*. Here, the employer followed the Alberta's Chief Medical Officer of Health recommendations to implement its Policy that applied to all its employees. The employees could refuse to follow the employer's Policy. There is no suggestion, as in *Astolfi*, that the employer actively targeted the Claimant.[12]

[38] For these reasons, the General Division exceeded its jurisdiction and erred in law in its interpretation of misconduct.

[39] I am therefore justified to intervene.

Remedy

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

[40] 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.[13]

The record is complete and I can decide this case on its merits

[41] The facts of this case are not really 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 before the General and Appeal Division.

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[11] See *Canada (Attorney General) v Lemire*, 2010 FCA 314.
[12] See *Astolfi v Canada (Atorney General),* 2020 FC 30.
[13] See section 59(1) of the *Department of Employment and Social Development Act*.

[42] As a result, I can 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.

[43] In my view, if the General Division had properly applied the law around misconduct, it would have come to a different conclusion. My own assessment of the record satisfies me 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.

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

[44] I must decide the issue of misconduct solely within the parameters set out by the Federal Courts, which have defined misconduct under the EI Act.[14]

[45] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[46] My role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[47] Based on the evidence, the Claimant was aware of the Policy, and she had clearly decided not to take the mRNA vaccines. She did not request an exemption. The Claimant refused intentionally; this refusal was wilful. This was the direct cause of her dismissal.

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[14] *Paradis v Canada (Attorney General)*; 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; CUB 73739A, CUB 58491; CUB 49373.

[48] The Claimant knew or ought to have known that her refusal to comply with the Policy could lead to her dismissal. The Claimant stated that she tried everything to stay employed without having to meet the requirement of taking the then available vaccines but that her employer was strictly applying the Policy.[15]

[49] The preponderant evidence supports a conclusion that the Claimant's behavior constituted misconduct.

[50] A deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.[16] It is also considered misconduct within the meaning of the EI Act not to observe a policy duly approved by a government or an industry.[17]

[51] It is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace. In the present case, the employer followed the Alberta's Chief Medical Officer of Health recommendations to implement its Policy to protect the health of all employees during the pandemic.[18] The Policy was in effect when the Claimant was dismissed.

[52] The question of whether the employer should have accommodated her, or whether the employer violated her employment contract, or whether the employer's Policy violated her human and constitutional rights, is a matter for another forum. This Tribunal is not the appropriate forum through which the Claimant can obtain the remedy that she is seeking.[19]

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[15] See GD3-12.

[16] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[17] CUB 71744, CUB 74884.

[18] See GD3-33: The employer followed the recommendations provided by the *Occupational Health and Safety Act* and Alberta's Chief Medical Officer of Health.

[19] In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

[53] 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."[20]

[54] The Claimant relies heavily on a General Division decision, *AL*.[21] However, said decision was overturned by a panel of three members of the Appeal Division.[22] The Appeal Division found that the General Division had misinterpreted the meaning of misconduct under the EI Act and that it went beyond its powers by deciding the merits of a dispute between an employer and an employee.

[55] Furthermore, the Federal Court has since then rendered a decision in *Cecchetto* regarding misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.[23] The teachings of the Federal Court in that case go well beyond the interpretation given by the Claimant.

[56] The claimant *Cecchetto* submitted that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct. He put forward that it was not proven that the vaccine was safe and efficient. The claimant felt discriminated against because of his personal medical choice. The claimant submitted that he has the right to control his own bodily integrity and that his rights were violated under Canadian and international law.

[57] The Federal Court confirmed the Appeal Division's decision that by making a personal and deliberate choice not to follow the employer's vaccination Policy, the claimant had breached his duties and had lost his job because of misconduct under the EI Act.[24] The Court again stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

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[20] *Dubeau v Canada (Attorney General)*, 2019 FC 725.
[21] *AL v Canada Employment Insurance Commission*, 2022 SST 1428. The Claimant presented other cases from the General Division, but the facts are different, and the Tribunal is bound by the Federal Court decisions and not General Division decisions.
[22] *Canada Employment Insurance Commission v AL*, 2023 SST 1032.
[23] *Cecchetto v Canada (Attorney general)*, 2023 FC 102.
[24] The Court refers to *Bellavance,* see note 16.

[58] The *Cecchetto* case has since then been followed by two other Federal Court decisions regarding vaccine cases, *Milovac* and *Kuk*.[25] These decisions all say that it is not for this Tribunal to assess or rule on the merits, legitimacy, or legality of the employer's vaccination Policy.

[59] The Federal Court found it reasonable for this Tribunal to conclude that the claimants had lost their employment because of their misconduct because they were aware of their employer's vaccination policies and the consequences that would result from refusing to comply.

[60] In the *Mishibinijima* case, the Federal Court of Appeal said that the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[61] As stated previously, the General Division's role is not to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that her dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.

[62] The preponderant evidence before the General Division shows that the Claimant, **made a personal and deliberate choice** not to follow the employer's Policy in response to the exceptional circumstances created by the pandemic and this resulted in her being dismissed from work.

[63] I am fully aware that the Claimant may seek relief before another forum if a violation is established. This does not change the fact that under the EI Act, the Commission has proven on a balance of probabilities that the Claimant was dismissed because of misconduct.

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[25] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[64] The Claimant submitted that the employer called her back to work unvaccinated. This fact does not change the nature of the misconduct, which initially led to the Claimant's dismissal.[26]

Conclusion

[65] The appeal is allowed. The Claimant lost her job because of misconduct.

Pierre Lafontaine
Member, Appeal Division

[26] See GD3-38: The release between the employer and the Claimant is without any admissions of liability. See *Canada (Attorney General) v Boulton*, 1996 FCA 1682; *Canada (Attorney General) v Morrow*, 1999 FCA 193.