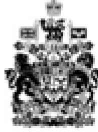

Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 1088

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated October 7, 2022 (GE-22-1954)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	April 25, 2023
Hearing participants:	Appellant Respondent's representative (in writing only)
Decision date:	August 14, 2023
File number:	AD-22-790

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, L. M. (Claimant), formerly a business analyst in the healthcare field, is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended and then lost her job because of misconduct. In other words, it found that she did something that caused her to be suspended and then dismissed. She had not complied with her employer's COVID-19 vaccination policy.

[3] The General Division found that there was misconduct. As a result, the Claimant was disentitled from receiving Employment Insurance benefits during her suspension, and then disqualified from receiving benefits after she was dismissed.

[4] The Claimant argues that the General Division made legal and factual errors. She denies that there was any misconduct because she did not intend any ill will or harm to her employer. She also claims that she fulfilled all of the duties required of her under the terms of her employment agreement.

[5] The Claimant notes that her collective agreement did not require vaccination. She argues that, because her employer introduced a new policy that was not part of her employment contract, she did not have to comply with the new policy. And, if she did not have to comply with the new policy, then she says that there was no misconduct if she did not comply with it.

[6] The Claimant also argues that misconduct does not arise if her employer failed to accommodate her. The Claimant also argues that her employer did not have any cause to dismiss her, so says that she is entitled to Employment Insurance benefits, in addition to severance for wrongful dismissal.

[7] The Commission argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the appeal.

Issues

[8] The issues in this appeal are as follows:

a) Did the General Division misinterpret what misconduct means?

b) Did the General Division fail to consider the Claimant's collective agreement?

c) Did the General Division fail to consider whether the Claimant's employer should have accommodated her?

Analysis

[9] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[1]

Did the General Division misinterpret what misconduct means?

[10] The Claimant argues that the General Division misinterpreted what misconduct means. She denies that there was any misconduct. She says that she was an outstanding employee who did not see any benefit from complying with her employer's vaccination policy. She says that her employer's vaccination policy had nothing to do with job performance.

[11] The Claimant argues that for misconduct to arise, the conduct has to be a "very marked departure from standards," involve a "high or serious degree of negligence manifested in behaviour substantially worse than that of an average reasonable man."[2] She denies that her conduct fell into either definition, so says that there was no misconduct.

[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] Claimant's (post-hearing) arguments, June 6, 2023, at AD 26-4.

[12] The Claimant states that her employer's vaccination policy is part of a world-wide agenda to inject poisonous chemicals in people, without care about the harm caused. She says it is widespread knowledge that the vaccines have killed or severely harmed people. She asked her employer for assurances that she would not be harmed but it would not accept any liability for any risks.

[13] The Claimant says that there should be limits on what employers can do or require of employees. She questions, for instance, whether it would be misconduct if an employee refused to comply with an employer's requirement to sever a finger. She says that if an employer is going to impose a policy on its employees, they should have to justify the policy and show that it relates to job performance.

[14] The Claimant argues that she had constitutional and other rights to refuse injections and any medical procedures. So, there should be no misconduct if she was simply exercising her rights.

[15] Essentially, the Claimant is arguing that her employer's vaccination policy was illegitimate as it did not relate to her employment. She says that there was no misconduct as one has a right to refuse either an illegitimate policy or an unwelcome medical procedure.

– **The *Cecchetto* case**

[16] The Federal Court has addressed some of the issues that the Claimant is raising. In a case called *Cecchetto v Canada (Attorney General)*,[3] Mr. Cecchetto argued that the Federal Court should overturn the decision of the Appeal Division in his case. He said the Appeal Division failed to deal with his questions about the legality of requiring employees to undergo medical procedures, including vaccination and testing.

[17] Mr. Cecchetto argued that because the efficacy and safety of these procedures were unproven, he should not have to get vaccinated. Much like the Claimant, he

[3] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

argued that there were legitimate reasons to refuse vaccination. And, for that reason, he claimed that misconduct should not have arisen if he chose not to get vaccinated.

[18] The Court wrote:

> [46] As noted earlier, it is likely that the Applicant [Cecchetto] will 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 simply 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.
>
> [47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, the role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct." …
>
> [48] Despite the Claimant'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 [the vaccination policy]. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD. [Citation omitted][4]

[19] The Court said it was beyond the Appeal Division's scope to deal with the merits, legitimacy, or legality of the vaccination policy in Mr. Cecchetto's case. The Court determined that the Appeal Division has a very limited role in what it can do. It is restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[20] I understand that Mr. Cecchetto is seeking to appeal his case. However, I am required to follow the law as it currently stands, and that includes applying the Federal Court's decision in *Cecchetto*.

[21] Given the Court's decision in *Cecchetto*, it is clear that the Claimant's arguments about the merits, legitimacy, legality of her employer's vaccination policy are irrelevant to the misconduct question. For that reason, the General Division did not make an error

[4] See *Cecchetto*, at paras 46 to 48.

when it decided that it had to focus on what the Claimant did or failed to do and whether that amounted to misconduct under the *Employment Insurance Act*.

– **The General Division's definition of misconduct**

[22] The *Employment Insurance Act* does not define what misconduct is. So, the General Division looked to various legal authorities, including the Federal Court of Appeal. The General Division cited the definition of misconduct that has emerged from the Court of Appeal.

[23] The General Division defined what misconduct means for the purposes of the *Employment Insurance Act* as follows:

> [19] There is misconduct under the law if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties to employer. And she knew or should have known that there was a real possibility she could be suspended or let go because of that. [Citation omitted]
>
> [20] There is misconduct where the Claimant's conduct is wilful. This means her conduct was conscious, deliberate, or intentional, or so reckless that it is almost wilful. [Citation omitted] She didn't have to have wrongful intent. In other words, she doesn't have to mean to be doing something wrong. [Citation omitted]
>
> [21] There must be a causal link between the Claimant's misconduct and her employment. In other words, the misconduct must constitute a breach of an express or implied duty resulting from her contract of employment, and she was suspended and lost her job because of misconduct, and not for another reason. [Citation omitted]

[24] Misconduct under the *Employment Insurance Act* is a lower standard than what one might typically consider in the employment context. Under the *Employment Insurance Act*, misconduct does not necessarily involve doing something criminal, unethical, or immoral. As long as an employee does or fails to do something that represents a breach of a duty owed to their employer, that will be sufficient to be labelled as misconduct under the *Employment Insurance Act.*

[25] The General Division simply restated the definition of misconduct from the case law. So, the General Division did not err in its definition.

– **The Claimant states that she fulfilled her duties**

[26] The Claimant challenges the General Division's application of the law to the facts. The Claimant accepts that there has to be a relationship between one's misconduct and their employment. But, in her case, she says that there was no connection between vaccination and her employment.

[27] The Claimant states that she worked from home, did not have any contact with other employees or patients, and never attended at the workplace. She argues that there were no safety concerns. And she was able to fulfill all of her duties without having to undergo vaccination.

[28] However, once the Claimant's employer introduced its vaccination policy, that became part of the Claimant's requirements of her employment—even if the Claimant disagreed with the policy and says that there was no connection to her employment. The employer required vaccination of its employees, so it became an essential condition of her employment. Hence, the Claimant was expected to comply with the employer's vaccination policy.

[29] The Claimant disputes that her employer could lawfully impose new terms to her employment without her consent. She says her employer could not change the conditions of her employment and, as such, she says she did not have to comply with any new conditions to which she did not consent. I will address this issue below.

Did the General Division fail to consider the Claimant's collective agreement?

[30] The Claimant argues that the General Division failed to consider the terms and conditions of her collective agreement. She argues that, if the General Division had considered her collective agreement, it would have determined that she did not have to undergo vaccination. The collective agreement did not say anything about having to get vaccinated.

[31] The Claimant made this same argument before the General Division. She denied that there was misconduct because vaccination was neither an express nor implied term

of her employment contract. The General Division found otherwise. The General Division found that the employer's vaccination policy made vaccination a term of her employment, so it became an implied term of her contract.

[32] Essentially, the Claimant is arguing that for misconduct to exist, there has to be a breach of a term or condition of the collective agreement. She relies on *A.L. v Canada Employment Insurance Commission*,[5] a decision by the General Division.

[33] However, *A.L.* has since been overturned on appeal to the Appeal Division.[6] The Appeal Division found that the General Division in *A.L.* had misinterpreted what misconduct means. The Appeal Division found that A.L.'s collective agreement was irrelevant to determining whether there was misconduct.

[34] The Appeal Division's decision in *A.L.* is consistent with the case law. The courts have said that there does not have to be a breach of a specific term of the collective agreement or contract of employment for misconduct to arise.

[35] In a case called *Nguyen*,[7] for instance, the Court of Appeal found that there was misconduct although the employer's harassment policy did not describe Mr. Nguyen's behaviour. Similarly, in another case, called *Karelia*,[8] the employer imposed new conditions on Mr. Karelia. He was always absent from work. The conditions did not form part of the original employment agreement, but the Court of Appeal determined that Mr. Karelia had to comply with them, otherwise there was misconduct.

[36] In the *Cecchetto*[9] case, the Federal Court found misconduct arose when Mr. Cecchetto did not comply with his employer's vaccination policy. Mr. Cecchetto did not comply with his employer's policy regarding vaccinations and testing. He argued that it was not misconduct to refuse to abide by a vaccine policy that did not previously exist, which his employer unilaterally imposed and with which he did not agree.

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[5] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428 and at AD 27-4 to AD27-20.
[6] The Appeal Division issued its decision on August 2, 2023.
[7] *Canada (Attorney General) v Nguyen,* 2001 FCA 348 at para 5.
[8] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[9] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[37] The Court was mindful of this issue. The vaccination policy had not formed part of Mr. Cecchetto's employment agreement. Indeed, his employer did not have its own policy, but followed the rules set out by a provincial health directive.

[38] But if found that none of Mr. Cecchetto's arguments provided a basis to overturn the Appeal Division's decision in that case. In other words, the Court accepted that Mr. Cecchetto's employer could introduce a policy that required vaccination even if it did not form part of the original contract, that employees would have to abide by that policy, and that failure to do so would result in misconduct.

[39] It is clear from these cases that for misconduct to arise, the breach or violation does not have to be a breach of the original employment agreement or collective bargaining agreement.

[40] Although it is not directly relevant to the misconduct issue, I note in passing that the Supreme Court of Canada has determined that employers may unilaterally impose a new rule or policy, even without the consent of the union or employees, provided that certain conditions are met.[10] So, it is not always the case that an employer must always obtain employees' consent before introducing any new policies.

Did the General Division fail to consider whether the Claimant's employer should have accommodated her?

[41] The Claimant argues that her employer should have accommodated her and provided her with an exemption to its vaccination policy. Apart from her personal position on the policy, the Claimant worked from home and did not have any interaction with her work colleagues or patients. She also did not go to the workplace.

[42] The General Division acknowledged the Claimant's arguments that her employer should have accommodated her. It did not directly address this issue, but it would not have made any difference to the outcome.

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[10] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458 at para 24.

[43] As the Federal Court of Appeal stated in a case called *Mishibinijima v Canada (Attorney General)*,[11] whether the Claimant's employer failed to accommodate the Claimant was not relevant to the misconduct issue.

Did the General Division fail to consider whether the employer wrongfully dismissed the Claimant from her employment?

[44] The Claimant suggests that the General Division should have considered whether her dismissal was wrongful. She says that if it had considered this issue, it would have accepted that she had been wrongfully dismissed and was entitled to receive Employment Insurance benefits, as well as severance.

[45] The courts have consistently said that, in the context of the Employment Insurance scheme, the issue of a wrongful dismissal is not relevant. The role of the General Division is narrow. The General Division should be focussed on whether the act or omission of an employee amounts to misconduct within the meaning of the *Employment Insurance Act*.[12]

[46] There are other avenues that employees can pursue for wrongful dismissal.

Conclusion

[47] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal.

Janet Lew
Member, Appeal Division

[11] *Mishibinijima v Canada (Attorney Genera)*, 2007 FCA 36.
[12] See, for instance, *Canada (Attorney General) v McNamara*, 2007 FCA 107 at para 22.