Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 1268

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. J.
Respondent:	Canada Employment Insurance Commission
Representative:	Mélanie Allen

Decision under appeal:	General Division decision dated October 12, 2022 (GE-22-1761)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	March 29, 2023 and June 13, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	September 14, 2023
File number:	AD-22-744

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, M. J. (Claimant) is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost her employment because of misconduct. The Claimant had not complied with a Provincial Health Authority Order (PHO) that required employees in the public health sector to undergo vaccination. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made several jurisdictional, legal, and factual errors.

[4] The Claimant argues that the PHO and her employer's vaccination policy were unreasonable, unethical, unconstitutional, and inconsistent with the terms of her collective agreement. She argues that, for these reasons, her employer was not allowed to unilaterally impose the vaccination policies.

[5] The Claimant argues that, as long as she performed the duties required by her collective agreement, there was no misconduct. She notes that her collective agreement did not require vaccination.

[6] The Claimant also argues that the General Division overlooked important evidence and also failed to analyze the evidence in a meaningful way. For instance, she says that the General Division failed to recognize that she could not possibly have received adequate notice of the vaccination policy, whether it was her employer's vaccination policy or the PHO, as her employer suspended her on October 26, 2021 before it had even approved its own policy, or the PHO had even been drafted.[1]

[1] The General Division found the Claimant had been suspended on October 26, 2021, and then dismissed from her employment on December 9, 2021. The copy of the PHO in the hearing file (GD 3-66

[7] The Claimant also says the language of either vaccination policy was ambiguous, so she could not have known what the PHO or employer's policy was, what was required of her under the PHO or employer's policy, or what the potential consequences were if she did not comply with either.

[8] The Claimant says the PHO and policy failed to provide reasonable accommodations, including for those with natural immunity or immutable characteristics. She says the General Division overlooked these important considerations.

[9] The Claimant asks the Appeal Division to allow the appeal and to find that there was no misconduct.

[10] The Commission agrees that the General Division could have addressed the issue about whether misconduct arises when an employee does not comply with a policy that did not form part of the original employment contract.

[11] Even so, the Commission argues that the General Division did not make any errors. The Commission says that the evidence supports the General Division's findings that the Claimant was aware of the employer's vaccination policy or PHO, and that if she did not comply with the employer's policy or PHO, that she possibly faced dismissal. The Commission asks the Appeal Division to dismiss the appeal.

Issues

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

(a) Did the General Division misinterpret what misconduct means?

(b) Did the General Division overlook or misconstrue any of the evidence regarding notice of the employer's vaccination policy or of the PHO?

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to GD 3-90) is dated October 21, 2021. The employer's vaccination policy was approved on December 1, 2021 (GD3-60 to GD 3-65).

(c) Did the General Division overlook or misconstrue the evidence about whether the Claimant should have foreseen the consequences of her actions?

Analysis

[13] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[2]

[14] A factual error exists if the General Division 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.

Did the General Division misinterpret what misconduct means?

[15] The Claimant argues that the General Division misinterpreted what misconduct means.

[16] The Claimant says that misconduct does not arise if it involves having to comply with a policy that (a) is not part of the original employment contract or collective agreement, (b) is unreasonable, unethical, unconstitutional, or inconsistent with the terms of one's collective agreement, or (c) fails to provide any accommodations.

(a) The policy was not part of the claimant's employment contract

[17] The Claimant denies that she engaged in any misconduct. She says that she did not have to comply with the PHO or any vaccination policies because they fell outside the terms and conditions of her original collective agreement.

[18] And, the Claimant says her employer was not allowed to impose new conditions of employment without her consent, particularly if they were unreasonable, unethical, unconstitutional, and inconsistent with the terms of her collective agreement.

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[2] See section 58(1) of the *Department of Employment and Social Development Act*.

[19] The Claimant denies that she engaged in any misconduct when she did not get vaccinated. Otherwise, she says that she fulfilled the duties set out in her employment agreement.

– The Claimant relies on *AL v Canada Employment Insurance Commission*

[20] The Claimant relies on a decision issued by the General Division, a case called *A.L.*[3] The General Division found that there was no misconduct in that case because the employer had unilaterally introduced a vaccination policy without consulting employees and getting their consent.

[21] However, the Appeal Division has since overturned the General Division's *A.L.* decision.[4] The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract.

[22] The Appeal Division also found that the General Division made legal errors. The General Division made an error when it declared that an employer could not impose new conditions to the collective agreement. The Appeal Division found that the General Division also made an error when it found that there had to be a breach of the employment contract for misconduct to arise.[5]

– Review of court cases

[23] The Federal Court has since addressed the issue regarding a claimant's employment contract.

[24] In *Kuk*,[6] Mr. Kuk chose not to comply with his employer's vaccination policy.

[25] Mr. Kuk argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated. He denied any misconduct.

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[3] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[4] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[5] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).
[6] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[26] The Court wrote:

> [34] . . . **As the Federal Court of Appeal held in *Nelson*, an employer's written policy does not need to exist in the original employment contract to ground misconduct**: see paras 22-26. A written policy communicated to an employee can be in itself sufficient evidence of an employee's objective knowledge "that dismissal was a real possibility" of failing to abide by that policy. The Applicant's contract and offer letter do not comprise the complete terms, express or implied, of his employment… It is well accepted in labour law that employees have obligations to abide by the health and safety policies that are implemented by their employers over time.
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> . . .
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> [37] Further, unlike what the Applicant suggests**, the Tribunal is not obligated to focus on contractual language** or determine if the claimant was dismissed justifiably under labour law principles when it is considering misconduct under the [*Employment Insurance Act*]. Instead, as outlined above, **the misconduct test focuses on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations**.
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> (My emphasis)

[27] The Federal Court found that the vaccination requirements did not have to be part of the employment agreement. As long as Mr. Kuk knowingly did not comply with his employer's vaccination policy, and knew what the consequences would be, misconduct would arise.

[28] In the *Nelson*[7] case (referred to by the Court in *Kuk*) the applicant lost her employment because of misconduct under the *Employment Insurance Act*. The Federal Court of Appeal found that, contrary to the terms of her employment, Ms. Nelson was seen publicly intoxicated on the reserve.

[29] Ms. Nelson argued that the Appeal Division made a mistake in finding that her employer's alcohol prohibition was a condition of employment causally linked to her job.

[30] Ms. Nelson argued that there was no rational connection between her consumption of alcohol and her job performance, particularly as she had consumed

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[7] *Nelson v Canada (Attorney General)*, 2019 FCA 222.

alcohol off-duty and during her private time and there was nothing to suggest that she had arrived at work intoxicated or impaired. She denied that there was an express or implied term of her employment contract that prohibited alcohol on the reserve.

[31] The Federal Court of Appeal wrote, " …, in my view, it is irrelevant that the Employer's alcohol prohibition existed only as a term of employment under its policies, not in any written employment contract …"[8] In other words, the policy did not have to be in the employment agreement.

[32] Similarly, in a case called *Nguyen*,[9] the Court of Appeal found that there was misconduct. Mr. Nguyen harassed a work colleague at the casino where they worked. The employer had a harassment policy. However, the policy did not describe Mr. Nguyen's behaviour, and did not form part of the employment agreement.

[33] In another case, called *Karelia*,[10] the employer imposed new conditions on Mr. Karelia. He was always absent from work. These new conditions did not form part of the employment agreement. Even so, the Court of Appeal determined that Mr. Karelia had to comply with them—even if they were new—otherwise there was misconduct.

– **The General Division has a limited role in what it can examine**

[34] It is clear from these cases that an employer's policy or a provincial health order does not have to form part of the employment agreement for there to be misconduct.

[35] As the courts have consistently stated, the test for misconduct is whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations. It is a very narrow and specific test that does not involve examining employment agreements.

(b) The Claimant says the policy was unreasonable and illegal

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[8] *Nelson*, at para 25.
[9] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[10] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.

[36] The Claimant also argues that misconduct does not arise if it involves having to comply with a policy that is unreasonable unethical, unconstitutional, or inconsistent with her employment contract.

[37] In a case called *Cecchetto v Canada (Attorney General)*, Mr. Cecchetto argued that he should have been able to make a personal medical decision. He questioned the efficacy and safety of the COVID-19 vaccines. He questioned the legality of the vaccination policy that his employer adopted and said there were legitimate reasons why he refused vaccination. So, if he chose not to get vaccinated, he says that should not be seen as misconduct.

[38] The Federal Court said neither the General Division nor the Appeal Division have any authority to assess or rule on the merits, legitimacy, or legality of the vaccination policy.[11] The Court also determined that the Appeal Division has a 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.

[39] It is clear from *Cecchetto* that the Claimant's arguments about the legality and reasonableness of her employer's vaccination policy or the PHO are irrelevant to the misconduct question. They are beyond the scope of the General Division's authority to consider. For that reason, the General Division did not make an error when it decided that it could focus only on what the Claimant did or failed to do and whether that amounted to misconduct under the *Employment Insurance Act*.

[40] The Claimant's avenues to challenge the PHO or her employer's policy lie elsewhere.

[11] *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 48.

(c) The Claimant says the policy failed to provide any accommodations

[41] The Claimant says that misconduct does not arise if it involves having to comply with a policy that fails to provide reasonable accommodations, including for those with natural immunity or immutable characteristics.

[42] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,[12] an employer's lack of accommodations is not relevant to the misconduct issue. The General Division did not make a legal error when it determined that it could not consider whether the PHO or the employer's policy should have included reasonable accommodations.

Did the General Division overlook or misconstrue any of the evidence regarding notice of the employer's vaccination policy or of the PHO?

[43] The Claimant argues that the General Division made important factual errors. She argues that it overlooked or misconstrued some of the evidence regarding notice of her employer's vaccination policy or of the PHO. She denies that she received adequate notice of either policy.

[44] The Claimant provided a brief chronology:

- In August 2021, she saw a news article. The Prime Minister declared that the federal government would not mandate vaccinations. She found assurance from this as she believed this meant that she would not face mandatory workplace vaccination.

- In September 2021, the provincial health officer announced that vaccinations would become mandatory. The Claimant did not know what this would entail and whether it would affect her as a registered nurse in a public health setting.

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

- On September 24, 2021, the Claimant's employer circulated a memo.[13] The employer confirmed that the provincial health officer had announced that she would be issuing an order that would require health-care workers to get two doses of the COVID-19 vaccine by October 26, 2021.

  The employer wrote that it "anticipate[d] all health-care workers will need to be fully vaccinated as a condition of employment." It also wrote that "individuals will need to have received their first dose of vaccine by Monday, Sept 27, 2021 to allow for the required 28-day interval between the first and second dose." The employer also wrote that the PHO and details would be available in the coming days.

- The Claimant received her first dose of the vaccine around September 28, 2021. She states that she obtained it under duress.

- On October 15, 2021, the employer issued a second memo.[14] The memo referred to the PHO. The memo also provided a link to the PHO.

  The employer wrote that the PHO required all employees to have received at least one dose of vaccine before October 26, 2021, in order to continue working. For those who had one dose, they would be required to receive their second dose 28 to 35 days after receiving their first dose and to follow preventative measures until fully vaccinated.

  The memo also indicated that the only exceptions were for those who were seeking approval from the Public Health Officer for a medical deferral or exemption.

[45] The Claimant acknowledges that she received her employer's memos. But she says that she did not receive her employer's actual vaccination policy or the PHO requiring vaccination. She says that there is no way that she could have received her

[13] See employer's email memo of September 24, 2021, at GD 3-57.
[14] See employer's email memo of October 15, 2021, at GD 3-58 to 59.

employer's vaccination policy before her employer suspended her because it did not approve its vaccination policy until December 1, 2022.[15]

[46] Similarly, the Claimant argues that the PHO was not drafted in September 2021. She notes that the provincial health officer did not date and sign the Order until October 21, 2021. So, she says that if the Order did not exist until October 21, 2021, she could not possibly have known its requirements or consequences for non-compliance.

[47] The Claimant later discovered that, if she had not gotten a first dose by October 26, 2021, but received a first dose between October 26 and November 15, 2021, she would have been allowed to continue working after October 26, 2021. However, this would have required the following:

- A second dose 28 to 35 days after receiving the first dose,
- Following preventive measures (i.e., wearing a medical mask) until fully vaccinated, and
- Confirming her vaccine status and immunization plan with her manager.

[48] The Claimant states that she was distressed upon learning that she could have waited until November 15, 2021, before deciding whether to receive a first dose. If she had had this extra time, she says that she would have never taken the first dose.

– The General Division Decision

[49] The General Division found that the Claimant lost her job because she did not comply with the PHO to be fully vaccinated by November 15, 2021.[16] As she lost her job for reasons relating to the PHO, the issue about whether the Claimant had adequate notice of her employer's own vaccination policy was irrelevant for the General Division. Indeed, the General Division did not make any findings as to when the Claimant learned of or received a copy of her employer's vaccination policy.

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[15] See employer's AV3100 – COVID-19 Immunization Requirement Policy, at GD 3-60 to GD 3-65.
[16] General Division decision, at para 15.

[50] The General Division found that the Commission had proven that there was misconduct because it showed that the Claimant was aware of the PHO and the employer's memos.

[51] The General Division noted that the Claimant had indicated to the Commission that she was aware of the PHO but made the personal decision not to comply. The General Division pointed to phone log notes at page GD 3-53 of the hearing file.[17]

[52] The phone log notes read that, "The claimant was aware of the PHO, but made the personal decision not to comply with the mandatory policy." However, the phone log notes also read:

> The claimant received the communication from the employer on Sept. 24, 2021 and Oct. 15, 2021 providing updates on the COVID-19 vaccination requirements, but the claimant does not believe these communications represent a Policy and disputes she was dismissed for misconduct….

[53] The General Division should have addressed the part of the memo where the Claimant reportedly said that she did not believe her employer's communications represented the vaccination policy. It would not have changed the outcome, however.

[54] The Claimant says that the PHO was not dated until October 21, 2021, so she claims that she could not have known what was required.

[55] However, the Claimant confirms that she received her employer's memos, including the memo of October 15, 2021.[18] The memo provided a link to the PHO (though it is unclear whether the PHO in the hearing file is the same one for which the employer provided a link).

[56] Additionally, the memo summarized the vaccination requirements for all public health employees. The memo provided vaccination timelines and also set out the consequences in the event of non-compliance. The memo reads, in part, as follows:

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[17] Supplementary Record of Claim dated April 19, 2022, at GD 3-53.
[18] See employer's email memo of October 15, 2021, at GD 3-58 to 59.

> If you have **not received your first dose** of COVID-19 vaccine before Oct 26:
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> - You will not be permitted to work, on-site or remotely;
> - You will be placed on unpaid leave, and/or see a pause to your contract, education experience or on-site research activity;
> - You will not be able to use banked time or other forms of paid leave.
>
> If you receive your first dose **between Oct. 26 and Nov. 15,** you will be able to return to work after seven days, and you are required to:
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> - Receive your second dose 28 to 35 days after receiving the first dose;
> - Follow preventive measures (i.e. wearing a medical mask) until fully vaccinated;
> - Confirm your vaccine status and immunization plan with your manager.
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> Employees who have not received a first dose of COVID-19 vaccine by Nov. 15, should anticipate that their employment and/or other contractual arrangements with [the employer] may be terminated.

[57] The General Division may not have addressed the Claimant's statement that she did not believe her employer's communications represented the PHO or its own vaccination policy. Even so, the evidence clearly shows that the employer provided the Claimant with a copy of the PHO by email attachment on October 15, 2021.

[58] The Claimant denies that she received the PHO before October 21, 2021, but it is unlikely that the employer would have circulated a memo with a link to the PHO and been able to summarize the contents of the PHO if the PHO did not already exist.

[59] The General Division's findings that the Claimant had notice of the PHO was supported by the evidence before it.

Did the General Division overlook or misconstrue the evidence about whether the Claimant should have foreseen the consequences of her actions?

[60] The Claimant argues that the General Division overlooked the evidence about whether she should have foreseen the consequences of her actions. She says that the language of the PHO was ambiguous. So, she says that, even if she had adequate

notice, she could not have known what was required by the PHO, when she had to comply, or what the potential consequences were if she did not comply.

[61] This was somewhat like the argument that the applicant raised in a case called *Milovac*.[19] Mr. Milovac asserted that he did not foresee that his employment would be terminated. The Federal Court found that he was he was wilfully blind to the circumstances facing him.

[62] Section B., 2.(b) of the PHO set out the vaccination requirements and other preventive measures, and the deadlines by which employees hired before October 26, 2021 were required to comply.[20] The section reads:

> **B. STAFF MEMBERS HIRED BEFORE OCTOBER 26, 2021**
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> **1.** Subject to section 2 and 3, as of October 26, 2021, a staff member who was hired before October 26, 2021 must be vaccinated or have an exemption to work.
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> 2. Despite section 1, an unvaccinated staff member …
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> b. who received one dose of vaccine before October 12, 2021, but did not receive a second dose of vaccine before October 26, 2021, may continue to work after October 25, 2021, if the staff member receives a second dose of vaccine before November 15, 2021, and complies with the preventive measures in Part D, until 7 days have passed after receiving the second dose of vaccine …

[63] The PHO states that an employee in the Claimant's circumstances could have continued to work after October 25, 2021. if they received a second dose before November 15, 2021, and complied with preventive measures.

[64] The corollary to this was that if an employee did not get a second dose by November 15, 2021, they would not be able to continue to work. However, the PHO did not define what not being able to continue to work meant.

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[19] *Milovac v Canada (Attorney General)*, 2023 FC 1120.
[20] PHO, Section B, at GD 3-75.

[65] The employer's memo of October 15, 2021 indicated that employees who had not received a first dose by November 15, 2021 could face termination. The memo did not address the Claimant's situation, who already had a first does before October 26, 2021,

[66] If the Claimant had read the PHO, she would or should have understood that someone in her circumstances would not be able to continue to work if they did not get a second dose by November 15, 2021. She should have understood that, at the very least, she would not be allowed to work after November 15, 2021.

[67] Given the memo's reference to possible termination for those who were unvaccinated, the Claimant should have appreciated that termination was a possibility for someone who had received a first dose but not the second dose. After all, neither unvaccinated employees nor those who had received a single dose were able to continue to work.

[68] As the Federal Court of Appeal held in *Jolin*, the fact that the consequences were harsher than an employee might have expected does not mean that their actions did not amount to misconduct.[21]

[69] The General Division did not make a factual error about whether the Claimant should have foreseen the consequences of her action. The PHO made it clear that she would be unable to work if she did not arrange to get a second dose by November 15, 2021. The employer's memo reinforced this message.

Conclusion

[70] 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

[21] *Canada (Attorney General) v Jolin*, 2009 FCA 303, cited in *Nelson*, and in *Canada (Attorney General) v Lemire,* 2010 FCA 314.