Citation: *RT v Canada Employment Insurance Commission*, 2023 SST 1203

# Social Security Tribunal of Canada
## Appeal Division

# Decision

| | |
|---|---|
| **Appellant:** | R. T. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Daniel McRoberts |

---

| | |
|---|---|
| **Decision under appeal:** | General Division decision dated February 3, 2023 (GE-22-3393) |

---

| | |
|---|---|
| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | July 11, 2023 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | September 1, 2023 |
| **File number:** | AD-23-219 |

## Decision

[1] The appeal is dismissed.

## Overview

[2] The Appellant, R. T. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had shown that the Claimant was suspended from his employment as an illustrator and designer because of misconduct.[1] In other words, he did something or failed to do something that caused him to lose his job. He had not complied with his employer's COVID-19 vaccination policy.

[3] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division misinterpreted what misconduct means. He says that for misconduct to arise, there has to be a breach of an express or implied duty arising out of his employment contract. In other words, he says that misconduct does not arise if it involves new terms and conditions of employment. He says that a claimant does not have to comply with new terms of employment that did not exist when they started working.

[5] The Claimant also argues that the General Division failed to consider the reasonableness of his employer's vaccination policy. He says it was unreasonable for the policy to have applied to him, given that he worked remotely from home and did not have any contact with anyone at work. He found the policy unjustified and unnecessary in his case, given his work circumstances.

---

[1] As noted in the Appeal Division decision of May 12, 2023, the General Division wrote that the Claimant lost his job. The General Division misstated the evidence. The Claimant was separated from his employment but that did not mean that he lost his employment. Although the General Division wrote that the Claimant lost his job, it is clear from paragraphs 29 and 30 of its decision that the General Division determined that, at most, the Claimant's employer suspended him. The Claimant has since returned to work.

[6] The Claimant asks the Appeal Division to accept that he did not engage in any misconduct and to find that he was not disentitled from receiving Employment Insurance benefits.

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

## Preliminary matters: New evidence

[8] The Claimant filed a copy of his employment agreement and his employer's vaccination policy.[2] These two documents represent "new evidence," as the General Division did not have copies of them.

[9] Generally, the Appeal Division does not accept new evidence.

[10] The Claimant asks me to accept the new evidence. He says that the evidence provides general background information and is not contentious. The documents support his evidence that vaccination was not required under his employment contract. He notes that he had offered to file these documents, but the General Division member "expressed no interest in [him] sending them."[3]

[11] The Commission agrees that, for the most part, the evidence is not contentious and that they verify that vaccination was not a condition of the Claimant's employer. However, the Commission says that the evidence goes beyond being mere background information as it would bolster the Claimant's evidence.

[12] I am not accepting the employment agreement. Had the Claimant wished to rely on this document, he should have filed it with the General Division. This evidence does not provide general background information, nor does it show any procedural defect. More importantly, as I will set out below, this evidence is not relevant to the misconduct issue.

---

[2] Employment contract and employer's vaccination policy, at AD4.

[3] See Claimant's submissions dated June 26, 2023, at AD 4-1, referring to approximately 15:40 of the audio of the General Division hearing.

[13] On the other hand, I will accept the employer's vaccination policy as the contents were referred to by the General Division, and as it serves as general background information.

## Issues

[14] The issues in this appeal relate to whether the General Division misinterpreted what misconduct means. Before misconduct can arise:

a) Does there have to be a breach of an express or implied duty that arises out of one's employment contract? Or, put another way, does misconduct arise if an employer unilaterally imposes new terms and conditions of employment?

b) Does an employer have to provide accommodation to an employee?

## Analysis

[15] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[4]

### Did the General Division misinterpret what misconduct means?

[16] The Claimant argues that the General Division misinterpreted what misconduct means. He argues that for misconduct to arise, the following must also exist:

- there has to be a breach of an express or implied duty that arises out of one's employment contract and
- there has to be a causal relationship between the misconduct and the employment.

[17] The Claimant also argues that an employer cannot unilaterally impose new terms and conditions of employment, without securing an employee's consent to any changes.

---

[4] Section 58(1) of the *Department of Employment and Social Development Act*.

### – The Claimant's arguments

[18] The Claimant argues that there was no misconduct in his case even if he did not get vaccinated as required by his employer's vaccination policy. He says misconduct did not arise because (1) there was no relationship between his employment and vaccination and (2) his employment agreement did not require vaccination. In other words, he says that his contract did not impose any duty or obligation on him to get vaccinated.

[19] The Claimant asserts that there was no relationship or connection between the vaccination policy and his employment as an illustrator and graphic designer. He says choosing to remain unvaccinated had no negative effect or impact on his work performance. He could have continued to fulfill his duties as an illustrator and graphic designer without vaccination.

[20] On top of that, the Claimant notes that he worked remotely from his home—over 3,000 km from his employer's headquarters---and did not have any contact with any work colleagues. So, he says vaccination was unnecessary in his particular case.

[21] The Claimant also states that he did not have any duty to get vaccinated. He testified that his employment contract (which he signed almost seven years ago) did not require vaccination.[5] And, when his employer introduced its vaccination policy, it did not consult him, let alone seek his consent.

[22] The Claimant also says that his employer's vaccination policy was unjustified. His employer is not in the health care industry. And he also says that the COVID-19 vaccines are ineffective at preventing infection and transmission.

[23] The Claimant says that his employer could have accommodated him and provided alternatives to vaccination. The Claimant is opposed to vaccination as he considers the vaccine an experimental synthetic with unknown long-term

[5] At approximately 7:41 of the audio recording of the General Division hearing.

consequences. He would have willingly undergone testing or worn a mask during Zoom meetings.

– **The Commission's arguments**

[24] The Commission agrees that the *Lemire* and *Brissette* line of authorities assist the Claimant, in that misconduct seems to arise only after there has been a breach of one's contractual obligations.

[25] The Commission also agrees that the General Division did not directly address the question about whether there had to be a breach of an express or implied duty under the employment agreement. But the Commission claims that the General Division assumed that there was an implied duty found in the employment contract. Or, if there was no implied duty, the Claimant nevertheless still had to comply with any rules or policies outside the employment contract.

– **Review of the Claimant's cases**

[26] The Claimant relies on the following passage from a case called *Canada (Attorney General) v Lemire*:[6]

> **[14]** 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: *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 F.C. 684 (C.A.), at para 14*; Canada (Attorney General) v Cartier*, 2001 FCA 274, 284 N.R. 172 at para 12; *Canada (Attorney General) v Nguyen*, 2001 FCA 348, 284 NR 260, at para 5.

and from *Canada (Attorney General) v Cartier:*[7]

> **[12]** It is settled law that there must be a causal relationship between the misconduct of which an employee is accused and his or her employment (*Canada (Attorney General) v Brissette* (CA*)*, 1993 CanLII 3020 (FCA), [1994] 1 C.F. 684 at p. 690*; Canada (Attorney General) v Nolet (*March 19, 1992), A-517-

[6] *Canada (Attorney General) v Lemire*, (2010) FCA 314 at para 14.
[7] *Canada (Attorney General) v Cartier*, 2001 FCA 274 at para 12.

> 91 (C.A.); *Smith v Canada (Attorney General) (CA)*, 1997 CanLII 5451 (FCA), [1998] 1 C.F. 529, at para 23).

[27] It was clear in the *Brissette* and *Cartier* cases that there was misconduct. The claimants in each of those cases were unable to fulfill essential conditions of employment. Their employment contracts required them to have valid driver's licences.

[28] In *Brissette*, the claimant was a truck driver. He lost his driver's licence for driving while impaired outside working hours. In *Cartier*, the claimant had an outstanding traffic ticket, so his driver's licence was suspended. In both cases, the Court of Appeal found that there was misconduct. There was a causal relationship between the misconduct and the employment. This was also the situation in the *Smith* case referred to in the *Cartier* case.

[29] In *Lemire*, the claimant in that case had been dismissed from his employment for having sold contraband cigarettes on his work premises outside of his work hours. Selling the cigarettes did not affect Mr. Lemire's job as a delivery person or harm the employer's business. He sold the cigarettes to his immediate supervisor. He did not face any criminal charges.

[30] In deciding whether the misconduct could lead to dismissal, the Court of Appeal found that there had to be a causal link between Mr. Lemire's conduct and his employment. Citing *Brissette*, *Cartier*, and *Nguyen*, the Court wrote that the "misconduct must therefore constitute a breach of an express or implied duty resulting from the contract." This passage suggested that the breach had to relate to the contract.

[31] The Court of Appeal went on to write:

> [15] 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: *Meunier v Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at para 2.

[32] Mr. Lemire's employer had a policy that prohibited the sale of contraband cigarettes on work premises. The Court did not say that the policy formed part of Mr. Lemire's employment contract.

[33] So, although the Court suggested that there had to be a breach of a duty resulting from the contract for misconduct to arise, it is clear from the facts of the *Lemire* case that there was misconduct because Mr. Lemire breached the employer's policy against selling contraband cigarettes on the work premises. In other words, the breach did not have to strictly flow from a breach of the employment contract. It was enough that there was a breach of a work policy. On top of that, there was a clear connection between Mr. Lemire's conduct and his employment.

[34] The Claimant also relies on *A.L. v Canada Employment Insurance* Commission.[8] A.L.'s employer had a mandatory vaccination policy. A.L. did not get vaccinated. Even so, the General Division found that there was no misconduct. The General Division found that the Commission had failed to prove that A.L. had a duty to either get vaccinated or provide an exemption.

[35] The General Division found that A.L. did not have a duty to get vaccinated because her employment contract did not require vaccination. The General Division also found that A.L.'s employer could not unilaterally impose a new condition to the collective agreement, absent any legislative demands, without consulting A.L. and obtaining her acceptance to the new condition.

[36] The Appeal Division has since overturned the General Division's decision in *A.L.* The Appeal Division found that the General Division overstepped its jurisdiction by examining A.L.'s employment contract. The Appeal Division also found that the General Division made legal errors, including declaring that an employer could not impose new conditions to the collective agreement, or that misconduct did not arise if there was no breach of a specific term within the employment contract.[9]

---

[8] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[9] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.

– **Review of other court cases**

[37] The courts have decided other cases involving an employer's policies that did not previously exist or did not form part of an employee's employment agreement.

[38] In *Nelson*, 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.

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

[40] 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 …" In other words, the employer's prohibition did not have to arise out of the employment contract.

[41] Similarly, in a case called *Nguyen*, 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.

[42] In another case, called *Karelia*, 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; otherwise, there was misconduct.

[43] Another case, called *Cecchetto*,[10] involved vaccination. Mr. Cecchetto had argued that it was not misconduct to refuse to abide by a vaccine policy that did not previously exist. His employer introduced the policy without his or his union's consent. He did not agree with the policy.

[44] The Federal Court was aware of the evidence and Mr. Cecchetto's argument. There was no dispute that the employer's vaccination policy had not formed part of Mr. Cecchetto's employment agreement. (In fact, the employer did not have its own vaccination policy but followed the rules set out by a provincial health directive.)

[45] The Federal Court found that Mr. Cecchetto's arguments did not give a basis to overturn the Appeal Division's decision in that case. In other words, the Court accepted that the employer could introduce a policy that required vaccination even if it did not form part of the original contract. It found that there was misconduct if employees knowingly failed to abide by that policy and were aware of the consequences that would result.

[46] More recently, the Federal Court issued a decision called *Kuk*.[11] The Court issued this decision after the hearing in this matter. This case also dealt with vaccination.

[47] Mr. Kuk chose not to comply with his employer's vaccination policy. Once the pandemic began, he worked full time at home. His employer's vaccination policy was not part of his employment contract. He argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated.

[48] 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.

[10] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[11] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

> 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.
>
> . . .
>
> [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**.
>
> (My emphasis)

[49] The Federal Court found that, for misconduct to arise, it was unnecessary that there was a breach of an express or implied duty arising out of the employment contract. Misconduct could arise even if there was a breach of a policy that did not form part of the original employment contract.

[50] The Federal Court found that it was reasonable for the Appeal Division to conclude that Mr. Kuk's arguments relating to his employment contract had no reasonable chance of success. The Federal Court dismissed Mr. Kuk's application for judicial review.

– **Misconduct can exist if there is a breach outside of the employment agreement**

[51] It is clear from these authorities that an employer's policy does not have to form part of the employment agreement for there to be misconduct. 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.

[52] The General Division did not commit a legal error when it focused on the Claimant's actions and whether he should have foreseen that they would likely result in suspension and dismissal, to determine whether there was misconduct.

[53] So, it did not matter then that the vaccination policy did not exist previously or that it did not form part of the Claimant's employment agreement for misconduct to have arisen under the *Employment Insurance Act*.

– **Accommodation is irrelevant to the misconduct question**

[54] The Claimant argues that misconduct does not arise if his employer failed to accommodate him. He says his employer should have offered options, such as testing or allowing him to work remotely. He worked from home and did not have any contact with his colleagues.

[55] As the Federal Court of Appeal stated in a case called *Mishibinijima*,[12] an employer's lack of accommodations is irrelevant to the misconduct question.

## Conclusion

[56] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal. The General Division properly determined that its focus was on whether the Claimant's action or inaction constituted misconduct under the *Employment Insurance Act*.

Janet Lew
Member, Appeal Division

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