Citation: *FS v Canada Employment Insurance Commission*, 2023 SST 1198

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | F. S. |
| **Co-Representative:** | R. N. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Melanie Allen |

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| **Decision under appeal:** | General Division decision dated December 2, 2022 (GE-22-2602) |

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| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | In person |
| **Hearing date:** | April 18, 2023 |
| **Hearing participants:** | Appellant<br>Appellant's co-representative<br>Respondent's representative (in writing only) |
| **Decision date:** | August 30, 2023 |
| **File number:** | AD-23-5 |

## Decision

[1] The appeal is dismissed.

## Overview

[2] The Appellant, F. S. (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 had been suspended and then lost her job as a correctional officer 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] As the General Division found that there was misconduct, it determined that the Claimant was disentitled from receiving Employment Insurance benefits from January 3, 2022 to March 14, 2022 when she was suspended from work and from March 13, 2022 onwards, was disqualified from receiving benefits.

[4] The Claimant argues that the General Division made legal errors. She argues that the General Division did not consider the legality of her employer's vaccination policy. She says that her employer did not have any legal authority to impose its policy because it violated her rights to bodily integrity and autonomy, and because it violated the Nuremburg Code.

[5] The Claimant also argues that the General Division failed to consider one of her arguments, namely, that her collective agreement did not require vaccination. She says that because her employer introduced a new policy that was not part of her employment contract, she did not have to comply. 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.

[6] The Claimant explained that there was a legitimate basis for her to question the vaccine mandates. She says that the evidence was becoming clear: the vaccines were not truly vaccines, and besides, they were unsafe, ineffective, and experimental.

[7] The Claimant also argues that misconduct is reserved for only certain behaviour or conduct. She says that past cases of misconduct did not involve making choices that impacted bodily integrity, whereas her employer's vaccination policy impacted her bodily integrity and autonomy and deprived her of any choice. She says that refusing to comply with her employer's vaccination policy fell far short of the type of behaviour that could be labelled as misconduct.

[8] The Claimant asks the Appeal Division to find that she had not engaged in any misconduct and to find that she is entitled to received Employment Insurance benefits.

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

## Issues

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

a) Did the General Division fail to consider the legality of the employer's vaccination policy?

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

c) Did the General Division misinterpret what misconduct means?

## Analysis

[11] 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 fail to consider the legality of the employer's vaccination policy?

[12] The Claimant argues that the General Division failed to consider the legality of her employer's vaccination policy. She says that her employer did not have any legal

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

authority to impose its vaccination policy on her because it violated her rights to bodily integrity and autonomy, and because it violated the Nuremburg Code.

[13] The Federal Court has addressed this issue. In a case called *Cecchetto v Canada (Attorney General)*,[2] 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.

[14] Mr. Cecchetto argued that because the efficacy and safety of these procedures were unproven, he should not have to get vaccinated. He said there were legitimate reasons to refuse vaccination. And, for that reason, he said misconduct should not have arisen if he chose not to get vaccinated.

[15] 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.
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> [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." …
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> [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]
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> (My emphasis)

[16] The Appeal Division did not make any findings in the *Cecchetto* case about the legality of the vaccination policy. The Court said it was simply beyond the Appeal Division's scope. The Court determined that the Appeal Division has a very limited role

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

in what it can do. It is restricted to determining why a claimant is dismissed from their employment and whether that reason constitutes misconduct.

[17] I understand that Mr. Cecchetto is pursuing an appeal of 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*.

[18] Given the Court's decision in *Cecchetto*, it is clear that the Claimant's arguments about the legality of her employer's vaccination policy are irrelevant to the misconduct question. 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*.

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

[19] 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.

[20] The Claimant did not file a copy of her collective agreement with the General Division. It did not form part of the evidence. But she testified that her collective agreement did not include any provisions requiring vaccination.

[21] The Claimant acknowledges that her employer introduced a vaccination policy. But she says that her employer did not consult nor seek her consent to the policy. Therefore, she claims that the policy did not form part of her collective agreement. She also claims that vaccination was not part of any of the obligations she owed to her employer.

[22] So, the Claimant argues that there cannot have been any misconduct on her part if she did not get vaccinated.

## – The General Division decision

[23] The General Division defined misconduct as follows:

> [15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to be doing something wrong) for her behaviour to be misconduct under the law. [Citation omitted]
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> [16] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that. [Citation omitted]

[24] The General Division restated the definition of misconduct from the case law. In essence, it found that misconduct under the *Employment Insurance Act* 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, and they are aware of the consequences that could result, that will be sufficient to be labelled as misconduct under the *Employment Insurance Act*.

[25] The General Division acknowledged the Claimant's arguments that her employer changed her employment contract without her permission. However, the General Division recognized that it fell outside its jurisdiction to address this issue.

## – The Claimant relies on *A.L. v Canada Employment Insurance Commission*

[26] The Claimant relies on a case called *A.L. v Canada Employment Insurance Commission*.[3] *A.L.* is a decision of the General Division. The General Division decided that it has the authority to consider an employee's employment contract.

[27] In *A.L.*, the General Division found that there was no misconduct because the employer had unilaterally imposed new conditions of employment when it introduced its vaccination policy. The Claimant says that her case is similar to *A.L.*, so argues that the outcome should be the same in her case.

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[3] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

[28] In *A.L.*, the General Division wrote:

> [31] An employment contract is just that, a contract. It is an agreement between parties that details the obligations both parties owe each other. Neither can unilaterally impose new conditions to the collective agreement without consultation and acceptance of the other. The only exception to this is where legislation demands a specific action by an employer and compliance by an employee.
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> . . .
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> [41] While these statements from the Commission are true, the Commission fails to recognize that in its determination of misconduct it proclaimed that the Claimant breached a duty arising out of her employment agreement and so it must prove that such a breach occurred.

[29] 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 when it declared that an employer could not impose new conditions to the collective agreement and that there was no misconduct if there was no breach of the employment contract.[4]

**– Court cases on misconduct**

[30] There has been a string of cases at the Federal Court and Federal Court of Appeal that have addressed whether misconduct can arise if there is a new policy or if a policy sits outside an employment contract.

[31] Recently, the Federal Court issued a decision about whether misconduct can arise in factual circumstances similar to those of the Claimant. The Federal Court issued *Kuk v Canada (Attorney General)*[5] after the hearing in this matter.

[32] Mr. Kuk chose not to comply with his employer's vaccination policy. His employer brought in a new policy that was not part of his employment agreement.

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[4] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[5] *Kuk v Canada (Attorney General)*, 2023 FC 1134.

[33] Mr. Kuk argued that the Appeal Division made an error in finding that he breached his contractual obligations by not getting vaccinated. He argued that he did not breach his obligations or duties because the vaccination policy did not form part of his employment contract.

[34] 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)

[35] The Federal Court found that, for misconduct to arise, it was unnecessary that there was a breach 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.

[36] The Federal Court determined 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.

[37] In another case, called *Nelson v Canada (Attorney General)*,[6] 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.

[38] 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.

[39] The 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 …"[7]

[40] In a case called *Canada (Attorney General) v Nguyen*,[8] 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. The policy did not form part of Mr. Nguyen's employment agreement either. Even so, the Court of Appeal found that Mr. Nguyen had engaged in misconduct.

[41] In another case, called *Karelia v Canada (Attorney General)*,[9] 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.

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[6] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[7] *Nelson*, at para 25.
[8] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.
[9] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.

[42] In *Cecchetto*, 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.

[43] 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.)

[44] 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.

### – Misconduct is not limited to what the employment agreement says

[45] 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 for determining whether misconduct rose.

[46] 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 arise under the *Employment Insurance Act*.

## Did the General Division misinterpret what misconduct means?

[47] The Claimant argues that the General Division misinterpreted what misconduct means. She argues that misconduct involves only certain behaviour or conduct that do not involve issues of bodily integrity, autonomy, and the right to make one's own medical choices. She says that refusing to comply with her employer's vaccination policy fell far short of the type of behaviour that could be labelled as misconduct.

[48] In *Kuk*, the applicant did not consent to his employer's vaccination policy. He stated that he had a legal right to exercise whether to be treated medically. He found it alarming that the policy went from voluntary to mandatory with no alternative and that the objective of the policy forced him to take medical treatment. Mr. Kuk argued that there was no misconduct under these circumstances.

[49] The Court found that this argument related to whether Mr. Kuk agreed with the policy and not whether he was entitled to Employment Insurance benefits.[10] In other words, the argument was irrelevant to the misconduct question.

[50] When assessing misconduct, the courts have not drawn any distinction between types of behaviour or conduct. As long as a claimant intentionally commits an act (or fails to commit an act) contrary to their employment obligations, and they are aware of the consequences that could result, that will constitute misconduct. The General Division applied this test. It did not misinterpret what misconduct means.

## Conclusion

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

Janet Lew
Member, Appeal Division

[10] *Kuk*, at para 39.