Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1338

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. B.
Respondent:	Canada Employment Insurance Commission
Representative:	Ian McRobbie (counsel)

Decision under appeal:	General Division decision dated January 31, 2023 (GE-22-2272)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	August 4, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	October 5, 2023
File number:	AD-23-254

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, J. B. (Claimant), a nurse, is appealing the General Division decision.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant lost her employment because of misconduct. In other words, it found that she did something that led to her dismissal. She had not complied with her employer's COVID-19 vaccination requirements.[1] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors. She denies that she committed any misconduct. For one, she says that vaccination was not required under the terms and conditions of her collective agreement. Her union was opposed to the provincial health order that mandated vaccination for health care employees.

[5] The Claimant also says that the General Division overlooked the fact that her employer's vaccination requirements failed to provide adequate accommodations. She also says the General Division made factual errors, including that she had notice of her employment's vaccination requirements, and that her employer dismissed her from her job in December 2021. She says there is no evidence showing that she ever received notice of her employer's vaccination policy or could have known that she would be dismissed from her employment.

[1] The Claimant's employer adopted and enforced a Provincial Health Order. The employer later introduced its own vaccination policy.

[6] As the Claimant denies that there was any misconduct, she asks the Appeal Division to find that she was entitled to receive Employment Insurance benefits.

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

Preliminary matters

– The Claimant relies on new evidence

[8] The Claimant filed evidence with the Appeal Division. The General Division did not have this evidence. The Claimant says that this new evidence is relevant to her appeal. The evidence includes the following:

i. Nurses' union letter dated June 7, 2023 regarding industry-wide application dispute against the employers' association;[2]

ii. Nurses' union bulletins on health and safety regarding flu shot, vaccinate or mask policy (September 25, 2015 to December 23, 2020);[3]

iii. Letter of termination of employment, dated January 26, 2022;[4] and

iv. Claimant's letter dated December 18, 2021, to Provincial Health Officer.[5]

[9] Generally, no new evidence is accepted at the Appeal Division regarding Employment Insurance claims. New evidence may be accepted where it provides general background information or shows any procedural defects, but that is not the case here.

[10] I am not accepting the new evidence. It does not provide general background information or help to show any procedural defects. More importantly, this evidence is not relevant.

---

[2] Letter dated June 7, 2023, at AD 10-6.
[3] Nurses' union bulletins, at AD 11-416 to AD11-424.
[4] Letter of termination dated January 26, 2022, at AD 11-425.
[5] Claimant's letter dated December 18, 2021, to Provincial Health Officer, at AD 11-426 to 11-427.

[11] The Claimant could have filed a copy of the termination letter in her appeal at the General Division. Even so, the General Division determined that this evidence ultimately would have been irrelevant.

[12] The Claimant relies on the rest of this new evidence to show that her employer's vaccination policy was unreasonable. But, as I will set out below, the reasonableness of an employer's vaccination policy is beyond the General Division's authority to consider, so this new evidence would not have been relevant to the General Division's determination of whether misconduct arose.

– **The Claimant's request to keep her appeal in abeyance**

[13] The Claimant is asking to keep this appeal in abeyance while she awaits the outcome of a grievance against her employer. The grievance is part of an industry-wide application dispute. She is challenging her dismissal from her employment. She is seeking reinstatement and a make-whole order for lost wages, benefits, service, and seniority, in addition to special damages.[6]

[14] The outcome of the Claimant's grievance may have an impact on the outcome as to whether the Claimant was dismissed from her employment because of misconduct. If the Claimant is reinstated to her job as if she had never been dismissed due to misconduct, this could mean a disqualification is no longer appropriate. (Whether a disentitlement applies is another issue.)

[15] The Commission opposes the Claimant's request. The Commission acknowledges that the Claimant's appeal may become moot if the Claimant's grievance is successful. The Commission notes that, if the Claimant succeeds and gets retroactive wage loss payments, she would no longer be entitled to receive Employment Insurance benefits.

[16] Even if she does not get retroactive wage loss payments, the Claimant could file more information with the Commission. The Commission notes that if it receives more information, it will review that new evidence under section 111 of the *Employment*

[6] Letter dated June 7, 2023, at AD 10-6.

Insurance Act, and it will determine the appropriate response. So, this could mean that, if the employer reinstated the Claimant and treated her as if it had never dismissed her from her employment, the Commission would remove the disqualification.

[17] The Commission notes that, if the Claimant is unsuccessful with her grievance, she still has remedies available through this process (with an application for judicial review to the Federal Court of Appeal).[7]

[18] The Commission notes that it is entitled to getting a decision as quickly as possible unless there would be an adverse effect on the fairness of the process.[8]

[19] Irrespective of the outcome of the Claimant's grievance, any evidence or information from that process would be considered "new evidence." As I have noted above, the Appeal Division does not consider evidence of this nature. For this reason alone, I see no basis to justify placing this appeal in abeyance.

Issues

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

a) Did the General Division misinterpret what misconduct means?

b) Did the General Division make a perverse finding or overlook any of the evidence?

c) Did the General Division make a procedural error?

Analysis

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

---

[7] Commission's letter dated August 25, 2023, at AD 18-1.
[8] Commission's letter dated August 14, 2023, citing section 8 of the *Social Security Tribunal Rules of Procedure.*
[9] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[22] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[10]

– The Claimant says the General Division misinterpreted what misconduct means

[23] The Claimant argues that for misconduct to arise, there has to be a breach of the collective agreement or employment contract. In her case, she says that her collective agreement did not require vaccination. Therefore, she denies that she could have breached her collective agreement when she chose not to undergo vaccination.[11]

[24] The Claimant argues that the General Division should have reviewed her collective agreement. She says that the collective agreement was relevant to determining whether she breached any of her duties.

[25] The Claimant also says that her employer's vaccination had to be reasonable, and it had to provide accommodations, whether for religious, spiritual, or other reasons. She says that it was insufficient that any accommodations were subject to the approval of the Provincial Health Officer.

– The General Division's definition of misconduct

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

[27] The General Division found that the concept of misconduct for the purposes of Employment Insurance is different from the common, everyday use of that word. The General Division defined misconduct in the Employment Insurance context as an employee's violation of an employment rule. It does not require someone to be doing

---

[10] Paragraph 58(1)(c) of the DESD Act.

[11] The General Division did not have a copy of the employment contract, but I accept that it did not require vaccination.

something wrongful or harmful. As long as there is an intention action that results in a violation of an employer's rule or policy, and the employee is aware that their conduct will have consequences, there will be misconduct.

[28] The General Division found that it did not have any authority to interpret or apply the collective agreement. The General Division found that the Claimant had other avenues to pursue any remedies that she might have against her employer. It noted, for instance, that the Claimant could ask her union to file a grievance.

[29] The General Division concluded that its jurisdiction was limited in the Employment Insurance context to determining why the Claimant was dismissed from her employment, and whether that reason constituted misconduct.[12]

– **The Claimant says the General Division failed to follow case law**

[30] The Claimant argues that the General Division failed to follow established case law. She says that if the General Division had applied *Hopp v Lepp*[13] *and Simpson v Pranajen Group Ltd. o/a Nimigon Retirement Home*,[14] it would have concluded that the Claimant was entitled to be sufficiently informed before deciding whether to proceed with any medical procedures.

[31] The Supreme Court of Canada allowed the appeal of the defendant, Mr. Hopp, an orthopaedic surgeon. The issue before the Court was whether the patient had been sufficiently informed about a procedure to allow him to decide whether to proceed with it. The Court found that Mr. Hopp had met the duty of disclosure and that Mr. Lepp had been sufficiently informed to enable him to decide whether to proceed with surgery.

[32] In the *Simpson* case, the Human Rights Tribunal of Ontario considered whether the applicant's employer had failed to accommodate her special needs related to childcare. The arbitrator found that the employer discriminated against the applicant because it failed in its duty to accommodate the applicant's needs arising from her

---

[12] General Division decision, at para 46.
[13] *Hopp v Lepp*, [1980] 2 SCR 192.
[14] *Simpson v Pranajen Group Ltd. o/a Nimigon Retirement Home*, 2019 HRTO 10 (CanLII).

family status. The arbitrator ordered the employer to monetarily compensate the applicant for injury to dignity, feelings, and self-respect.

[33] The General Division mentioned neither *Hopp v Lepp* or *Simpson v Pranajen Group Ltd.* Even so, I find that it did not make a legal error by not applying either case. Neither decision addressed misconduct in the context of the *Employment Insurance Act*. The issues of informed consent and lack of accommodation are irrelevant to the misconduct question.[15] The General Division simply does not have any authority to address the issues of accommodation or consent to vaccination or medical testing.

– **The Claimant says the General Division failed to review her collective agreement**

[34] The Claimant denies that she committed any misconduct when she did not undergo vaccination. Her employer's vaccination requirements fell outside her collective agreement. So, she denies that she could have breached the collective agreement.

[35] The Claimant relies on *A.L. v Canada Employment Insurance Commission*,[16] a decision of the General Division. 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 General Division also found that A.L. had a right to refuse vaccination. So, if she had this right, the General Division questioned how that could be characterized as having done something "wrong" that it could support a finding of misconduct.

[36] The Appeal Division has since overturned the General Division's decision in *A.L.*[17] 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

---

[15] *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 39 (and at AD 18-16) and *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 32.
[16] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[17] *A.L. v Canada Employment Insurance Commission*, 2023 SST 1032 (and at AD 14-1 to 14-22).

impose new conditions to the collective agreement and that there was no misconduct if there is no breach of the employment contract.[18]

[37] It has now become well-established that an employer's policy does not have to form part of the employment agreement for there to be misconduct:

- The Federal Court decided *Kuk*[19] after the hearing in this matter. Mr. Kuk chose not to comply with his employer's vaccination policy. The policy did not form part of his employment contract. The Court found that the employer's vaccination requirements did not have to be part of Mr. Kuk's employment agreement. The Court found that there was misconduct because Mr. Kuk knowingly did not comply with his employer's vaccination policy and knew what the consequences would be if he did not comply.

- In *Nelson*,[20] the appellant lost her job because of misconduct. She was seen publicly intoxicated on the reserve where she worked. The employer regarded this as a violation of its alcohol prohibition. Ms. Nelson denied that her employer's alcohol prohibition was part of her job requirements under her written employment contract, or that her drinking even reflected on her job performance. The Federal Court of Appeal found there was misconduct. It was irrelevant that the employer's policy against consuming alcohol did not form part of Ms. Nelson's employment agreement.

- In *Nguyen*,[21] the Federal 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.

---

[18] A.L. is now appealing the Appeal Division's decision to the Federal Court of Appeal (file number A-217-23).
[19] *Kuk*.
[20] *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[21] *Canada (Attorney General) v Nguyen*, 2001 FCA 348 at para 5.

- In another case, called *Karelia*,[22] 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 Federal Court of Appeal determined that Mr. Karelia had to comply with them—even if they were new—otherwise there was misconduct.

[38] In addition to *Kuk*, the courts have issued two other decisions that address the misconduct issue in the context of vaccination policies. In *Cecchetto*[23] and in *Milovac*,[24] vaccination was not part of the party's collective agreement or contract of employment. The Federal Court found that, even so, there was misconduct.

[39] So, contrary to what the Claimant suggests, the duties that arose out of her employer's vaccination policy did not have to be part of her employment contract.

[40] As the courts have consistently stated, the test for misconduct is a very narrow and specific test. It involves assessing whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations.[25]

– The Claimant says there was no misconduct if her employer's vaccination policy was unreasonable

[41] The Claimant argues that the General Division should have considered whether her employer's vaccination was reasonable.

[42] The Claimant says vaccination policies and their implementation have little to do with health or safety. She says political considerations are behind vaccination policies. She says this is evidenced in part, by how disconnected, discriminatory, and inconsistent the Provincial Health Order is in achieving its stated purpose.

[43] The Claimant says that if the General Division had considered the reasonableness of the vaccination requirements, it would have decided that her

---

[22] *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[23] *Cecchetto*.
[24] *Milovac v Canada (Attorney General)*, 2023 FC 1120. The Federal Court also decided this case after the hearing in this matter.
[25] *Kuk* and also *Cecchetto*.

employer's vaccination policy and the Provincial Health Order were both unreasonable and that she did not have to comply with either.

[44] However, in both *Kuk* and in *Cecchetto*, the Federal Court said that it was beyond the jurisdiction of the General Division and the Appeal Division to assess an employer's policies. The Court said that their role is limited. The Court said that, when considering misconduct under the *Employment Insurance Act*, their role is to focus on whether a claimant intentionally committed an act (or failed to commit an act) contrary to their employment obligations.

[45] So, the General Division did not have any authority to consider the reasonableness of the employer's vaccination policy. It did not make a legal error when it did not decide this issue.

– **The Claimant says misconduct arises only if there is serious wrongdoing**

[46] The Claimant argues that misconduct arises only if there is serious wrongdoing. She relies on arguments made by a representative of the Justice Centre for Constitutional Freedoms.

[47] For misconduct, the Claimant says that an employee has to be "guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with [their] duties." The Claimant cites the dissenting opinion in the Ontario Court of Appeal decision in *R v Arthurs, Ex parte Port Arthur Shipbuilding Co*.[26]

[48] However, this decision does not deal with misconduct in the Employment Insurance setting. The decision deals with whether the employer had just cause to dismiss three employees. The decision is of no relevance to the issue of misconduct for the purposes of the *Employment Insurance Act*. So, the General Division did not make a legal error by not following *R v Arthurs* in deciding whether misconduct arose.

[26] *R v Arthurs, Ex parte Port Arthur Shipbuilding Co.*, [1967] 2 O.R. 49-73.

– The Claimant says there was no misconduct if her employer did not accommodate her

[49] The Claimant argues that misconduct does not arise if her employer failed to accommodate her. She says that she was entitled to an accommodation because of her beliefs.

[50] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,[27] an employer's lack of accommodations is not relevant to the misconduct issue.

[51] The General Division did not make a legal error when it determined that it could not consider whether the Claimant's employer should have made reasonable accommodations or arrangements for her.

[52] This is not to say that the Claimant is without any options to pursue her claims that her employer failed to adequately accommodate her. But her options lie outside the Social Security Tribunal (Tribunal).

Did the General Division make a perverse finding or overlook any of the evidence?

[53] The Claimant argues that the General Division made factual errors. She says that the General Division made a mistake about when her employer dismissed her and when she had been on a medical leave of absence.

[54] The Claimant also says that the General Division overlooked the fact that her employer's vaccination requirements failed to provide adequate accommodations. She also says the General Division misapprehended the evidence when it found she had notice of her employer's vaccination requirements.

---

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

– **The date of termination of the Claimant's employment**

[55] The Claimant argues that the General Division made a factual error by finding that her employer dismissed her from her job in December 2021. The Claimant says that her employer dismissed her on January 26, 2022.

[56] The General Division noted that the Claimant said in her Notice of Appeal that her employer terminated her on January 26, 2022.[28] The General Division noted that the Claimant's oral testimony was consistent, that her employer had dismissed her on January 26, 2022.[29]

[57] The General Division noted the Claimant's chronology. This included the Claimant's assertions that her employer terminated her on January 26, 2022, and gave her a termination letter on that date.[30] The General Division hearing file did not include a copy of the termination letter.[31]

[58] The General Division noted that the Commission had received conflicting information from the Claimant's employer. The employer had apparently advised the Commission that their records indicated that the Claimant had been dismissed effective December 5, 2021, for failing to comply with the provincial health order.[32] The General Division also noted that the record of employment listed December 5, 2021, as the Claimant's last day for which she was paid.[33]

[59] I note that the employer had initially issued a Record of Employment dated December 15, 2021, stating that it was issuing the Record because of illness or injury.[34] The employer later explained that it amended the Record because of the Claimant's

---

[28] General Division decision, at para 12.
[29] General Division decision, at para 13.
[30] General Division decision, at para 19.
[31] The Claimant filed a copy of the termination letter in her appeal to the Appeal Division, at AD 11-425.
[32] Supplementary Record of Claim dated March 31, 2022, at GD 3-18 and GD 3-19. The letter indicates that the Claimant was on an unpaid leave from December 22, 2021 to January 26, 2022. Her employed advised that her employment was terminated "effective immediately."
[33] Record of Employment dated February 25, 2022, at GD 3-15 (and GD 2-389).
[34] Record of Employment dated December 15, 2021, at GD 2-387.

vaccination status, and after it had paid all monies owed for vacation and banked overtime.[35]

[60] Ultimately, the General Division declined to decide whether the employer dismissed the Claimant effective December 5, 2021, or on January 26, 2022. The General Division decided that the issue was not relevant. The General Division determined that the issue it had to decide was whether the Claimant's conduct amounted to misconduct.[36]

[61] The General Division did not decide when the Claimant's employer effectively dismissed the Claimant from her employment. For that reason, I find that it could not have made a factual error on this point.

[62] If the disqualification date was contested, the General Division might have had to decide this issue. That way, the parties could know when the disqualification begins. But, as it is, the Commission refused benefits from February 27, 2022. So, it did not matter whether the dismissal took place in December 2021 or in January 2022. In other words, even if the General Division had decided this point and made an error, it would not have changed the outcome.

[63] As a footnote, I note that the General Division found that the Claimant "learned by no later than January 11, 2021, that she could be dismissed" for not complying with her employer's vaccination requirements.[37] Based on this finding alone, had the date of termination been relevant, I would have accepted the Claimant's evidence that her employer dismissed her on January 26, 2022.

[64] I find that the evidence, on the whole, supports the Claimant's assertions that, once her medical leave of absence ended, and after she declared she was able to return to work, that her employer suspended her for non-compliance with its vaccination requirements. And it was only well into January 2022 that her employer dismissed her.

---

[35] Supplementary Record of Employment dated March 31, 2022, at GD 3-19.
[36] General Division decision, at paras 21 and 22.
[37] General Division decision, at para 40.

[65] I would have rejected the record of employment as conclusive evidence of the date of termination. The record simply states that the last date for which the Claimant was paid was December 5, 2021. It does not state that she was dismissed on that date.

– The dates of the Claimant's medical leave of absence were not relevant to whether misconduct arose

[66] The Claimant argues that the General Division misstated the evidence about when she was on a medical leave of absence. The Claimant says the General Division found that she was on a medical from October 1, 2021, to December 5, 2021, and that she was dismissed following this leave.[38]

[67] The General Division noted the chronology that the Claimant shared. The General Division wrote that the Claimant reported that she began a medical leave of absence on September 28, 2021, that continued until December 22, 2021.[39]

[68] The General Division did not make any findings, one way or the other, about when the Claimant's medical leave began. Further, there is no indication that the General Division based its decision that the Claimant committed misconduct on any of the evidence relating to the Claimant's medical leave of absence. (The issue of her leave was relevant to whether the Claimant received notice of her employer's vaccination requirements, but I will address this below.)

[69] For these reasons, I am not satisfied that the General Division made a reviewable error that the General Division misstated when the Claimant was on a medical leave of absence.

– The Claimant says that her employer never notified her of its vaccination requirements

[70] The Claimant argues that the General Division made a perverse finding that she received notice of her employer's policy and its vaccination requirements. She denies that she ever received notice of her employer's policy or was aware of its vaccination

---

[38] Claimant's submissions in her letter dated June 26, 2023, at AD 11-3.
[39] The Claimant confirmed these dates in her letter of June 28, 2022, at GD 2-5 (and AD 11-10).

requirements, or that she had notice that there would be consequences for not complying. She says that there was no evidence to support the General Division's findings.

[71] The General Division noted the following evidence:

- The Claimant's chronology – on September 24, 2021, the employer circulated a memorandum to all staff announcing that it anticipated a province-wide Public Health Order would be issued that required all health care workers would need to be fully vaccinated as a condition of employment.[40]

- Between September 28, 2021 and December 22, 2021, the Claimant was on a medical leave of absence. During this timeframe, she did not review any communications from her employer.[41]

- On December 18, 2021, the Claimant sought an exemption from the Provincial Health Officer. She did not get an exemption.[42]

- The Claimant's evidence was that by December 23, 2021, at the latest, she was aware that she was not permitted to return to work unless she provided her employer with proof of vaccination.[43]

- The Claimant had contacted her manager about returning to work. Her manager advised her that under the Provincial Health Order, she was required to be vaccinated, otherwise would be placed on a leave of absence.[44] The Claimant says the manager did not make any reference to the employer's own policy.

[72] The General Division defined the issue it had to decide. It wrote, "I must only decide whether, in the above context, the [Claimant's] failure to comply with the

---

[40] General Division decision, at para 19, referring to Claimant's June 28, 2022 letter at GD 2-5.
[41] General Division decision, at para 19, referring to Claimant's June 28, 2022 letter at GD 2-5.
[42] Claimant's letter dated December 18, 2021, to Provincial Health Officer, at GD 2-385 to 386.
[43] General Division decision, at para 28, referring to Claimant's June 28, 2022 letter at GD 2-6. Also, at approximately 25:30 to 28:00 of the audio recording of the General Division hearing.
[44] General Division decision, at para 19.

vaccination requirements in the [Provincial Health] Order amounts to misconduct."[45] It is clear from this that the General Division focussed on the Claimant's compliance with the Provincial Health Order, rather than the employer's vaccination policy.

[73] The Provincial Health Order required all staff members to be vaccinated and to provide proof of vaccination to the employer or have an exemption. Otherwise, if they were not in compliance, they were not to work. The Provincial Health Order also required the employer not to permit a staff member who was not in compliance with these requirements to work.[46] The General Division accepted that both the employer and Claimant were bound by the Provincial Health Order.

[74] The General Division accepted that the Claimant was not expected to know about her employer's vaccination requirements during her medical leave of absence. But it found that the Claimant received notice and was aware of the requirements by December 23, 2021, at the latest, after speaking with her manager.[47]

[75] While the hearing file at the General Division does not include any written communications from the employer showing when it gave notice of the Provincial Health Order or of its own vaccination policy to the Claimant, the evidence shows that the Claimant was aware of her employer's vaccination requirements before December 23, 2021.

[76] The Claimant wrote to the Provincial Health Officer five days before then, on December 18, 2021.[48] In her letter, she referred to the Provincial Health Order and to the consequences that the employer's vaccination requirements (the Provincial Health Order) had on her, including job loss and restrictions on mobility. The Claimant's letter suggested that she had to have been aware of her employer's (and the province's) vaccination requirements of all health care employees.

---

[45] General Division decision, at para 22.
[46] Provincial Health Order, at GD 6-2 to 6-34 (and 11-428 to 11-455).
[47] At approximately 32:30 to 34:00 of the audio recording of the General Division hearing.
[48] Claimant's letter dated December 18, 2021, to Provincial Health Officer, at GD 2-385 to 386.

[77] The Claimant also says that she did not have notice of what the consequences would be if she did not comply with her employer's vaccination requirements. It is true, as the Claimant points out, that the Provincial Health Order says that the employer must not allow a non-vaccinated employee to work. The Order did not specify dismissal as a consequence of nom-compliance. So, for that reason, she claimed that she did not know or could have known that dismissal was a possibility.

[78] Despite this, the General Division found that the evidence showed that the Claimant was aware by no later than January 11, 2022, that dismissal was a possibility.[49] She confirmed that she was aware that dismissal could result if she did not comply.

[79] Given the evidence before it, the General Division could conclude that the Claimant had notice of and was aware of her employer's vaccination requirements and that there was a real possibility that she would face consequences, including dismissal, if she did not comply with those requirements.

– **The employer's vaccination policy did not provide adequate accommodations**

[80] The Claimant says that the General Division overlooked the fact that her employer's vaccination policy did not provide adequate accommodations. She says that the Provincial Health Officer only considered any requests for accommodation if an employee could show that they had experienced a severe reaction to a first dose. She says that there were no accommodations for religious or spiritual reasons.

[81] The Claimant also says the vaccination policy and Public Health Order contravened physicians' Hippocratic Oath and nurses' standard of care. She says vaccination policy and Public Health Order breached ethics and individuals' rights to making decisions based on informed consent, free of coercion.[50]

---

[49] General Division decision, at para 38. Also, at approximately 31::30 to 33:00 and 40:00 to 41:30 of the audio recording of the General Division hearing.
[50] Claimant's Application to the Appeal Division – Employment Insurance, at AD 1-3.

[82] But, as I have noted above, an employer's lack of or inadequate accommodations is not relevant to the misconduct issue.[51] Thus, the General Division did not make an error when it did not consider whether the employer's vaccination policy provided adequate accommodations.

Did the General Division make a procedural error?

[83] The Claimant argues that the General Division made a procedural error. She says that she asked for a copy of the transcript of the General Division hearing. She says that the Tribunal refused to provide a transcript. The Claimant says that this is a violation of her rights.

[84] The Claimant also says that she made an Access to Information and Privacy (ATIP) request. She wants "the complete and thorough details of events that have occurred pertaining to [Employment Insurance] and the employer."[52]

[85] The Tribunal does not have any transcripts of any hearings at either the General Division or the Appeal Division. The Tribunal produces audio recordings of the hearings, upon request. So, if one party requests a copy of the audio recording, the Tribunal will provide copies to all parties.

[86] As for the Claimant's ATIP request, this is outside the jurisdiction of the Tribunal. The Claimant's request is made directly to the Department of Employment of Social and Development.

[87] The General Division did not fail to provide the Claimant with copies of its file materials before the hearing. The Tribunal provides copies of claims-related materials to the parties. Obviously, it could not provide a copy of the audio recording until after the General Division hearing had ended, so there was no error by the General Division in failing to produce something that did not exist at the time.

---

[51] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[52] Claimant's Application to the Appeal Division – Employment Insurance, at AD 1-3.

Conclusion

[88] 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