



Citation: *CD v Canada Employment Insurance Commission*, 2023 SST 2117

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

## Decision

**Appellant:** C. D.  
**Representatives:** Denis Poudrier and Jesse Fafard Théorêt  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (477172) dated January 5, 2023 (issued by Service Canada)

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**Tribunal member:** Normand Morin  
**Type of hearing:** Videoconference  
**Hearing date:** June 13, 2023  
**Hearing participants:** Appellant  
Appellant's representatives  
**Decision date:** September 14, 2023  
**File number:** GE-23-179

## Decision

[1] The appeal is allowed. I find that the Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant was suspended from her job because of her misconduct.<sup>1</sup> This means that the disentitlement from regular benefits, imposed on the Appellant from November 29, 2021, to December 24, 2021, isn't justified.<sup>2</sup>

## Overview

[2] Since October 1990, the Appellant has worked as a [translation] "postmaster's assistant" for X (X or employer). On November 26, 2021, she stopped working because of a leave of absence.<sup>3</sup> The employer explained that it suspended the Appellant without pay from November 27, 2021, to December 26, 2021, because she failed to comply with the COVID-19 vaccination policy.<sup>4</sup> She returned to work on December 29, 2021.

[3] On December 10, 2021, she filed an initial claim for Employment Insurance benefits (regular benefits).<sup>5</sup> A benefit period was established effective November 21, 2021.<sup>6</sup>

[4] On March 29, 2022, the Commission informed her that it could not pay her Employment Insurance benefits from November 29, 2021, to December 24, 2021, as she was suspended from her job on November 26, 2021, because of her misconduct.<sup>7</sup>

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<sup>1</sup> See sections 29 and 31 of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 31 of the Act.

<sup>3</sup> See GD3-17 and GD3-18.

<sup>4</sup> Coronavirus 2019.

<sup>5</sup> See GD3-3 to GD3-16.

<sup>6</sup> See GD3-1 and GD4-1.

<sup>7</sup> In its arguments, the Commission says that the notice of decision that was sent to the Appellant on March 29, 2022, contains a clerical error. It says that according to the document, the Appellant is disentitled from receiving benefits from November 22, 2021, to December 24, 2021, but it should be from November 29, 2021, to December 24, 2021, that she is disentitled—GD3-27 and GD4-2.

[5] On January 5, 2023, after a request for reconsideration, the Commission informed her that it was maintaining the March 29, 2022, decision in her case, saying that she had been suspended because of her misconduct.<sup>8</sup>

[6] The Appellant submits that she was not suspended because of her misconduct. She argues that she had valid reasons for not complying with the employer's vaccination practice. She explains that because of her medical condition, related to a rheumatoid arthritis diagnosis, she refused the COVID-19 vaccine, as she was afraid that getting it would aggravate her medical condition. She also says that she had religious reasons to refuse vaccination. She says that the employer didn't offer alternatives or accommodations (for example, to work different hours), considering that she didn't want to get the vaccine or because she had fears about it. She also says that the employer's vaccination policy amounted to a unilateral change in her work conditions. And she says that applying the practice was unreasonable in her workplace context. She says that there was no misconduct in her employment record. She submits that the reference to misconduct in her file isn't from the employer, but rather from the Commission. On January 13, 2023, she appealed the Commission's reconsideration decision before the Social Security Tribunal of Canada (Tribunal).

## Issues

[7] I have to decide whether the Commission has proven that the Appellant was suspended from her job because of her misconduct.<sup>9</sup> To decide this, I have to answer the following questions:

- Why was the Appellant suspended from her job?
- Is the reason for the Appellant's suspension misconduct under the Act?

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<sup>8</sup> See GD2-9 and GD3-35.

<sup>9</sup> See sections 29 and 31 of the Act.

## Analysis

[8] The Act provides that a claimant cannot receive Employment Insurance benefits if they lose their job because of their misconduct. This applies if their employer has dismissed or suspended them.<sup>10</sup>

[9] The Act doesn't define the term "misconduct." Decisions by the Federal Court of Appeal (Court) describe the characteristics of misconduct.

[10] In one of its decisions, the Court said that to be misconduct, "the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."<sup>11</sup>

[11] To be misconduct under the Act, the conduct has to be wilful. In other words, it has to be conscious, deliberate, or intentional.<sup>12</sup> Misconduct also includes conduct that is so reckless as to "approach wilfulness," meaning that it is almost wilful.<sup>13</sup> For their behaviour to be misconduct under the Act, the claimant doesn't have to have wrongful intent; in other words, they don't have to mean to be doing something wrong.<sup>14</sup>

[12] There is misconduct if the claimant knew or should have known that their conduct could get in the way of fulfilling their obligations toward their employer and that there was a real possibility of being let go as a result.<sup>15</sup>

[13] To determine whether the misconduct could result in dismissal, there has to be a link between the claimant's alleged misconduct and the loss of their job. So, the misconduct has to be a breach of an express or implied duty resulting from the employment contract.<sup>16</sup>

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<sup>10</sup> See sections 30 and 31 of the Act.

<sup>11</sup> The Court established this principle in *Tucker*, A-381-85.

<sup>12</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>13</sup> The Court established this principle in *McKay-Eden*, A-402-96.

<sup>14</sup> The Court established this principle in *Secours*, A-352-94.

<sup>15</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>16</sup> The Court established this principle in *Lemire*, 2010 FCA 314.

[14] The Commission has to prove, on a balance of probabilities, that the Appellant lost her job because of her misconduct.<sup>17</sup> This means it has to show that it is more likely than not that the Appellant lost her job because of her misconduct.<sup>18</sup>

### **Question 1: Why was the Appellant suspended from her job?**

[15] The employer explained that the Appellant was suspended without pay from November 27, 2021, to December 26, 2021, because she failed to comply with its vaccination policy. It says that she went back to work on December 29, 2021.<sup>19</sup>

[16] The evidence on file indicates that the employer adopted a COVID-19 vaccination practice with the following provisions:

- a) X's mandatory vaccination practice comes into effect October 29, 2021.
- b) It requires that all employees be fully vaccinated.
- c) It applies to all active employees, regardless of where they work.
- d) Employees must provide an attestation of their vaccination status before November 12, 2021, according to their situation: 1. Fully vaccinated; 2. Partially vaccinated and intending to be fully; 3. Can't be fully vaccinated for medical or religious reasons, or on prohibited grounds of discrimination; (Accommodations may be made for certain conditions.) 4. Refuse to be fully vaccinated or refuse to disclose vaccination status, and no accommodation can be made.
- e) Employees refusing to be fully vaccination or to provide the attestation of their vaccination status will be placed on leave without pay after November 26, 2021.<sup>20</sup>

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<sup>17</sup> The Court established or reiterated this principle in the following decisions: *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

<sup>18</sup> The Court established this principle in *Bartone*, A-369-88.

<sup>19</sup> See GD3-25 and GD3-26.

<sup>20</sup> See document, [translation] "X – *Canada Post* – Mandatory vaccination practice – Approval date: October 22, 2021"—GD3-19 to GD3-23.

[17] The Record of Employment that the employer issued on December 14, 2021, indicates that the Appellant stopped working on November 26, 2021, because of a leave of absence.<sup>21</sup> In Block 18 (Comments), the following comment was made: [translation] “Non-compliance with vaccination practice.”<sup>22</sup>

[18] The Appellant admits that she was placed on leave without pay from November 27, 2021, to December 26, 2021, because she failed to comply with the employer’s mandatory vaccination practice.

[19] She says that she was informed of this practice and that she would be placed on leave without pay after November 26, 2021, if she didn’t comply.

[20] She submits that she had valid reasons for not complying. Those reasons were related to her medical condition and religious beliefs. She also says that the application of the employer’s vaccination practice brought a unilateral change to her work conditions and that it wasn’t reasonable in her workplace context. She says that the employer didn’t offer alternatives or accommodations before putting her on unpaid leave.<sup>23</sup>

[21] The Appellant’s representatives recognize that the Appellant was put on administrative leave because she failed to comply with her employer’s mandatory vaccination practice. They also say that in the context of a global pandemic, the employer has the right to establish a mandatory vaccination practice.<sup>24</sup>

[22] The Commission explains that the Appellant was put on leave without pay because she failed to comply with her employer’s mandatory vaccination practice.<sup>25</sup>

[23] According to the Commission, although [translation] “at the time,” the employer used the term “leave,” the Commission considered the interruption a suspension under

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<sup>21</sup> See GD3-17 and GD3-18.

<sup>22</sup> See GD3-17.

<sup>23</sup> See GD3-31 and GD3-32.

<sup>24</sup> See GD6-3.

<sup>25</sup> See GD4-4.

the Act<sup>26</sup> because it was the employer that initiated the Appellant's separation after she failed to comply with its mandatory vaccination policy or practice.<sup>27</sup>

[24] The Commission submits that the Appellant's separation is not a leave of absence within the meaning of the Act<sup>28</sup> because she did not voluntarily take leave.<sup>29</sup> It submits that she wanted to continue working, but the employer suspended her because she refused to comply with its vaccination policy or practice.<sup>30</sup>

[25] The Commission argues that there is a cause-and-effect relationship between the Appellant's non-compliance with the vaccination practice and her suspension.<sup>31</sup>

[26] I find that the Appellant was put on leave without pay or suspended from her job because she didn't comply with the employer's mandatory vaccination practice.

[27] In this specific case, the employer refers to the period in which the Appellant wasn't able to work, after failing to comply with the mandatory vaccination practice, as both leave without pay<sup>32</sup> and suspension.<sup>33</sup> The Appellant and her representatives call it administrative leave without pay, and the Commission calls it a suspension.

[28] Since the Commission's decision is about a suspension, I will consider the period in which the Appellant wasn't able to work, after failing to comply with the employer's mandatory vaccination practice, as a suspension.

[29] Now, I have to decide whether the act attributed to the Appellant is misconduct within the meaning of the Act.

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<sup>26</sup> See section 31 of the Act.

<sup>27</sup> See GD4-4.

<sup>28</sup> See section 32 of the Act.

<sup>29</sup> See GD4-4.

<sup>30</sup> See GD4-4.

<sup>31</sup> See GD4-5.

<sup>32</sup> See the document, [translation] "X – *Canada Post* – Mandatory vaccination practice – Approval date: October 22, 2021"—GD3-19 to GD3-23.

<sup>33</sup> See GD3-26.

## **Question 2: Is the reason for the Appellant's suspension misconduct under the Act?**

[30] I find that the Appellant didn't act wilfully in a manner that would cause her to be suspended from her job. The Commission hasn't proven that what she did is misconduct under the Act.

[31] I find the Appellant's testimony credible and place the most weight on it. She didn't contradict herself. She showed that the reasons related to her medical condition and religious beliefs were what led her not to comply with the employer's mandatory vaccination practice, and it wasn't a wilful or deliberate act. She also showed how implementing the practice unilaterally changed the terms of her employment contract. And she showed that in the context of her workplace, alternatives or accommodations could have allowed her to continue working without having to comply with the employer's vaccination practice.

[32] The Appellant's testimony and statements indicate the following:

- a) She was informed of the employer's COVID-19 vaccination policy. After the policy took effect in October 2021, the employer gave employees about a month to be fully vaccinated.<sup>34</sup> The policy ended in July 2022.
- b) The Appellant submitted that she could not get the COVID-19 vaccine. She has had rheumatoid arthritis for several years, and has been followed by a rheumatologist since 2011. She explained that it's a degenerative illness affecting her nervous system. It causes her a lot of pain. She said that she had to wear hand supports to do her job. After trying several medications, her specialist prescribed one that offered relief and slowed down the illness's progression. She said she was afraid that the COVID-19 vaccine would throw her system off balance, causing her condition to flare up and progress more quickly. This would

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<sup>34</sup> See GD3-19 to GD3-23.

mean that she would have to stop working. She was very afraid of becoming disabled if she got the vaccine.<sup>35</sup>

- c) In August 2021, she tried, without success, to meet with her rheumatologist to discuss her fears about the COVID-19 vaccine and get information about it. Her rheumatologist's secretary told her that the clinic's rheumatologists didn't talk about vaccination with patients. She told her that vaccination wasn't mandatory and that if she needed information, she had to contact "Info COVID."
- d) In November 2021, she tried again to contact her rheumatologist for information, given her fears (for example, to find out what was in the vaccine and its side effects) and that her job was in jeopardy because she refused to get the vaccine. She wanted him to reassure her. Again, her efforts were unsuccessful. A nurse told her that none of the clinic's doctors would give a medical exemption for that vaccine. Again, she was referred to "Info COVID."<sup>36</sup>
- e) She had a lot of questions about the vaccine, as she was already taking medication to keep her immune system in check. Since she wasn't able to get all the information she wanted, she refused to get the vaccine.<sup>37</sup>
- f) On May 26, 2022, she was able to get an appointment with her rheumatologist. However, he didn't give her a medical note exempting her from getting the vaccine. He explained that that type of exemption was given only in specific cases. For example, when a person previously had a [translation] "serious reaction" to a vaccine.<sup>38</sup>
- g) She explained that she also refused to get the COVID-19 vaccine for religious reasons. She said that she is Christian. She feels that it is important to respect and care for her body. She has a soul and a conscience inside. Her body is like

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<sup>35</sup> See GD3-31 and GD3-32.

<sup>36</sup> See GD3-31 and GD3-32.

<sup>37</sup> See GD3-31 and GD3-32.

<sup>38</sup> See GD3-31 and GD3-32.

her vehicle. It allows her to get around and enjoy life's pleasures. Since she couldn't get answers to all her questions about the COVID-19 vaccine, she couldn't bring herself to have a substance injected into her body without knowing what it was, out of respect for her body, her soul, and her conscience. So there was no question of her getting vaccinated. It was unacceptable, unthinkable.<sup>39</sup>

- h) The employer didn't offer alternatives or accommodations to individuals who refused to be vaccinated or who had fears about the vaccine (for example, to work in a different location or different hours, or to test regularly).
- i) The Appellant explained that she worked in a small post office in a community of about 2,800 people. She worked with two coworkers, including a mail carrier delivering the mail to rural routes who she saw about two hours a day, in the morning. When the measures were in effect, she wore a mask, as did her coworkers, and abided by social distancing and hand hygiene measures. There was a "plexiglass" panel between her and customers. There were no COVID-19 outbreaks at the post office she worked at.
- j) She explained that in the circumstances, she could have worked without having any contact with customers (for example, in the [translation] "backroom," or different hours). However, she was not offered any alternative. The only alternative she was given was [translation] "the door."
- k) The union that represents her provided no instruction to employees to comply with the employer's vaccination policy. It waited for employees to ask about it. She informed the union several times that she was against the employer's vaccination policy or practice. She hoped that her union would be able to show that there were alternatives to vaccination. It did not. She took steps to have a grievance filed in her case, but nothing came of it.<sup>40</sup>

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<sup>39</sup> See GD3-31 and GD3-32.

<sup>40</sup> See GD3-31 and GD3-32.

- l) When the Commission informed her that she wasn't entitled to receive benefits because she had been suspended for misconduct, she didn't understand why it mentioned misconduct. She submitted that she had no record of misconduct at work. She also submitted that it wasn't her employer, but rather the Commission, that mentioned misconduct and decided that her refusal to be vaccinated was misconduct.
- m) She went back to work on December 29, 2021, after being suspended from November 27, 2021, to December 26, 2021. After she went back, she requested an exemption for a religious reason or under the *Canadian Charter of Rights and Freedoms*. Although she wasn't vaccinated, she was approved to return to work as long as she tested for COVID-19 twice a week, while waiting to receive a [translation] "kit"<sup>41</sup> to further explain her request for a religious exemption.<sup>42</sup>
- n) She worked that way for six weeks. Her request to be exempted or accommodated was denied.<sup>43</sup>
- o) On February 6, 2022, she stopped working for medical reasons.<sup>44</sup>
- p) In November 2022, she went back to work on a gradual return, until February 2023. She then returned to work full-time and performed her job as before.

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<sup>41</sup> See the letter to the Appellant dated January 19, 2022, with the subject, [translation] "Request for religious accommodation," and the document, [translation] "questionnaire on religious accommodation and attestation," completed by the Appellant, dated January 26, 2022—GD6-6 to GD6-8.

<sup>42</sup> See GD3-24, and GD6-6 to GD6-8.

<sup>43</sup> See the Appellant's letter dated January 26, 2022, as well as the employer's letter to the Appellant dated February 18, 2022, in response to her request, indicating that she has a sincerely held religious belief that stops her from being fully vaccinated, but that her request for accommodation is denied—GD6-9 to GD6-12. See also GD3-24, GD3-31, GD3-32, and GD6-6 to GD6-8.

<sup>44</sup> See GD3-24, GD3-31, and GD3-32.

[33] The representatives argued that the Appellant's conduct shouldn't be considered misconduct for the following reasons:

- a) The *Canadian Charter of Rights and Freedoms* wasn't invoked in this case. However, the Appellant's right to integrity, namely, her right to choose what she does to her body, was at issue because of the employer's mandatory vaccination practice.<sup>45</sup>
- b) The Commission referred to one of the criteria that make a behaviour misconduct, citing a Court decision stating that "the misconduct must [...] constitute a breach of an express or implied duty resulting from the contract of employment,"<sup>46</sup> but failed to explain how it applied to the Appellant's case.
- c) The express or implied duties resulting from the employment contract were very well laid out in a decision by the Tribunal's General Division (General Division).<sup>47</sup>
- d) In the Appellant's case, when she was hired, neither her employment contract nor her collective agreement contained an express or implied duty to be vaccinated.<sup>48</sup>
- e) The Tribunal's role isn't to assess whether or not the Appellant's suspension was fair. However, the employer can't unilaterally change a term of the Appellant's employment contract, which is where the Commission made an error in analyzing the situation. Since vaccination can't legally be part of an employment contract unless the employee or their bargaining agent has agreed to it, which is not the case here, the Appellant, through her conduct, didn't breach any express or implied duty resulting from her employment contract.<sup>49</sup>

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<sup>45</sup> See GD6-4.

<sup>46</sup> See the Court's decision in *Lemire*, 2010 FCA 314—GD4-8.

<sup>47</sup> See the General Division's decision in *AL v Canada Employment Insurance Commission*, 2022 SST 1428, GE-22-1889, January 16, 2023, at paras 37, 46, and 49—GD6-3, GD6-4, and GD6-26 to GD6-44.

<sup>48</sup> See GD6-5.

<sup>49</sup> See GD6-4.

- f) This means that the criterion for determining whether a behaviour is misconduct if a person fails to fulfill an express or implied duty resulting from their employment contract doesn't apply to the Appellant's case.<sup>50</sup>
- g) The employer's vaccination practice represents a major change in the Appellant's work conditions, as no other term of her contract undermines her right to integrity. Unilaterally adding a new work condition that may result in suspension, administrative leave, or dismissal is necessarily a major change in the Appellant's conditions of employment.<sup>51</sup>
- h) The union representing the Appellant never agreed to the employer's vaccination practice. The employer unilaterally opened the collective agreement and imposed a new essential condition of employment without the consent of the Appellant or the bargaining agent.<sup>52</sup>
- i) The union suggested that the employer introduce alternatives that would allow non-vaccinated individuals to keep their job. The employer denied the request.
- j) The union filed a general grievance on behalf of all employees. That grievance had no resolution. Employees asked to file [translation] "personal grievances" of their own.
- k) The Commission said the Appellant didn't give details or explanations about her religious reasons for refusing to be vaccinated.<sup>53</sup> But it didn't ask her for the documents she gave to the employer to explain her religious reasons. Nor did it ask the employer for the reasons that she gave.
- l) The Commission believed that the Appellant's refusal to be vaccinated was misconduct within the meaning of the Act, while the employer viewed the situation as an administrative leave of absence or administrative suspension,

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<sup>50</sup> See GD6-4.

<sup>51</sup> See GD6-4.

<sup>52</sup> See GD6-5.

<sup>53</sup> See GD4-5.

giving her time to comply with the policy, rather than misconduct. There was no mention of misconduct or suspension in the employer's documents. In its assessment of misconduct, the Commission was much harsher than the employer. It referred to a breach of trust that resulted in suspension,<sup>54</sup> but there was no indication that trust was broken between the employer and Appellant. The employer never said there was a breach of trust with employees who weren't vaccinated. The Commission found that there was a breach of trust resulting in misconduct, but that was never the case.

- m) In its submissions, the Commission said that [translation] "[i]t appears that her [the Appellant's] behaviour is incompatible with the purposes of the employment contract and undermines the trust relationship."<sup>55</sup> The term [translation] "appears" means that there's something that shows this, that there's evidence. But the evidence contains no evidence supporting that there was a breach of trust between the employer and the Appellant.
- n) The Appellant had no disciplinary notes in her record in 31 years of service.
- o) The Commission submitted that for there to be misconduct, the policy's application to employees must be reasonable in the workplace context.<sup>56</sup> This requirement is also stated in an internal departmental directive guiding public servants in interpreting misconduct in vaccination cases.<sup>57</sup>
- p) The Commission didn't examine whether the application of the policy (mandatory vaccination practice) was reasonable in the workplace context. It has an obligation to evaluate this practice, as the departmental directive indicates.<sup>58</sup>

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<sup>54</sup> See GD4-6.

<sup>55</sup> See GD4-6.

<sup>56</sup> See GD4-5.

<sup>57</sup> See document, "EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)"—GD6-13 to GD6-25. See also GD6-4.

<sup>58</sup> See document, "EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)"—GD6-13 to GD6-25.

- q) The Commission made an error of law by failing to examine this question. It had a responsibility to do so. It appeared to find that the vaccination practice was always reasonable, regardless of the workplace context. It didn't explain why it decided not to consider the facts about the workplace context.<sup>59</sup>
- r) The analysis of relevant elements of misconduct was not carried out because the Commission's necessary discretion to conduct such an analysis was curtailed by internal memos or directives. This analysis was hijacked by political will, leaving no wiggle room.<sup>60</sup>
- s) The Appellant was able to work for six weeks (from December 29, 2021, to February 5, 2022), while her exemption request was being analyzed, without jeopardizing her coworkers' health. She complied with the public health measures in place (for example, social distancing, mask wearing) during that time. The tasks that she was assigned could be carried out in her workplace (small post office), minimizing contact with others. The Commission should have considered the workplace context in its analysis, but it didn't.<sup>61</sup>
- t) Analyzing the workplace context should also include whether there was a risk of spreading COVID-19. In the Appellant's case, the pandemic had been going on for 18 months, there had been no vaccine, and public health measures had been in place and followed by employees. The Appellant agreed with the measures. She was also prepared to test for COVID-19 after the employer's vaccination practice took effect, and change her work hours. In the circumstances, the practice's application wasn't reasonable.

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<sup>59</sup> See GD2-5, GD6-4, GD6-5, and GD6-13 to GD6-25.

<sup>60</sup> See GD2-5.

<sup>61</sup> See GD6-5.

- u) Decisions by the Tribunal affecting employees of X indicate that the workplace context must be considered, but don't analyze it.<sup>62</sup>
- v) The Tribunal also has an obligation to carry out this analysis because the Commission asked officials to apply a specific directive in this respect when assessing cases of misconduct related to vaccination.<sup>63</sup>
- w) Although the Commission said that the Appellant [translation] "considers the employer's practice reasonable in her workplace context,"<sup>64</sup> she never said that. She said that the practice was unreasonable.<sup>65</sup>
- x) The Commission called the employer's vaccination practice [translation] "reasonable" when it said the Appellant "failed to comply with a reasonable duty toward her employer and made no mention of exceptional circumstances or contraindications to explain her refusal."<sup>66</sup> Then, the Commission put the burden on the Appellant to show that this practice wasn't reasonable, saying, [translation] "[i]f the person claims that the order or directive is unreasonable, the claimant has to justify their conduct or show that the requirement wasn't reasonable. [...] the Claimant [Appellant] didn't show that the employer's requirement was unreasonable in the circumstances."<sup>67</sup>
- y) The Appellant is not an irrational person or someone who believes in [translation] "conspiracy theories." She simply hadn't received clear and complete information beforehand that applied to her situation, so that she could give her informed consent before agreeing to be vaccinated. She didn't get answers to her questions. For her, it was harsh and unsettling.

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<sup>62</sup> See the decisions by the Tribunal's General Division in the following: *LG v Canada Employment Insurance Commission*, GE-22-3538, March 21, 2023; and *GL v Canada Employment Insurance Commission*, GE-22-2580, March 21, 2023—GD6-45 to GD6-70.

<sup>63</sup> See document, "EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)"—GD6-13 to GD6-25.

<sup>64</sup> See GD2-5 and GD4-6.

<sup>65</sup> See GD2-5.

<sup>66</sup> See GD4-6.

<sup>67</sup> See GD4-6.

z) Usually, with the Commission and Tribunal, cases are assessed or analyzed on a case-by-case basis. However, in vaccination situations, the cases seem to be [translation] “always lost from the outset.” The Tribunal has to issue a decision that applies to the Appellant’s case. It’s a matter of procedural fairness.

[34] In this case and based on the evidence presented, I find that the circumstances surrounding the Appellant’s suspension from her job don’t show that she wilfully or deliberately made that choice.

[35] I find that the Appellant has shown that her suspension wasn’t the result of a wilful or deliberate act for the following reasons: medical reasons, religious beliefs, unilateral change in the terms of her employment contract, workplace context showing that she could have benefited from alternatives or accommodation without having to comply with the employer’s mandatory vaccination practice.

#### Medical reasons

[36] I find that considering her medical condition related to rheumatoid arthritis, the Appellant could legitimately fear for her health if she were to be vaccinated against COVID-19.

[37] Having to agree to medical treatment to continue to be employed, as in the case of the employer’s mandatory vaccination practice, goes beyond simply having to abide by health and safety protocols in a workplace. The practice differed entirely from the measures put in place during the COVID-19 pandemic, such as mask wearing, hand hygiene, and social distancing.

[38] Without presuming the validity of her medical concerns if she were to get the COVID-19 vaccine, the Appellant could reasonably believe that getting this vaccine could be damaging to her health.

[39] I am of the view that in the circumstances, the Appellant’s refusal to be vaccinated wasn’t an act so careless or negligent that it could be considered

misconduct.<sup>68</sup> Rather, her decision reflected a legitimate fear of putting her health at risk if she were vaccinated. She was concerned about the consequences that her refusal to be vaccinated could have on her job.

[40] I note that before the Appellant was suspended, she tried without success to contact her rheumatologist for answers to her questions about the COVID-19 vaccine and for reassurance. It wasn't until May 2022, several months after her suspension and after she went back to work, that she was able to speak with him.

[41] I also note that the Appellant abided by the public health measures in effect at the employer to try to mitigate the spread of COVID-19, other than those provided for specifically in the vaccination practice (for example, mask wearing, hand hygiene, and social distancing).

#### Religious reasons

[42] I also find that the religious reasons the Appellant gave for refusing the COVID-19 vaccine support that it was not a deliberate act on her part.

[43] I understand from her explanations on this point that because of her religion, as a Christian she feels it is essential to respect her body's integrity and decide what she wants to do to it, according to her soul and conscience. In a letter to the employer dated January 26, 2022, to request accommodations related to the vaccination practice in effect at the time, the Appellant further explained how her refusal to get the COVID-19 vaccine was motivated by her religious beliefs.<sup>69</sup>

[44] The Commission submits that the Appellant gave a religious reason, but didn't explain how vaccination was incompatible with her religious beliefs.<sup>70</sup>

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<sup>68</sup> The Court established or reiterated this principle in the following decisions: *Tucker*, A-381-85; and *McKay-Eden*, A-402-96.

<sup>69</sup> See GD6-9 and GD6-10.

<sup>70</sup> See GD3-31 and GD4-5.

[45] The Commission hasn't shown that it asked the Appellant about the religious reasons for refusing to get the vaccine.

[46] I find that there is also no indication that the Commission took into account the Appellant's written request to the employer, dated January 26, 2022, to explain how her religious beliefs stopped her from being vaccinated.<sup>71</sup>

[47] The evidence from the employer doesn't show why it refused the Appellant's request for religious accommodation.

[48] I am of the view that in the circumstances, although the employer didn't accept the Appellant's religious reasons to provide accommodation, and although it found that she was still not complying with the provisions set out in the vaccination practice, it doesn't mean that she acted deliberately, resulting in her being put on unpaid leave.

[49] The fact that she asked for an exemption after her suspension changes nothing with respect to the reasons she gave for not complying with the employer's vaccination practice.

[50] I also note that she said she didn't invoke the *Canadian Charter of Rights and Freedoms* in her case. In the circumstances, I find that she doesn't have to argue before another authority (for example, the Human Rights Tribunal) that the employer's mandatory vaccination practice could compromise her physical integrity. Above all, her appeal seeks to show that she wasn't suspended because of her misconduct.

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<sup>71</sup> See GD6-9 and GD6-10.

Unilateral change in the terms of the Appellant's employment contract

[51] I find that the Appellant's failure to comply with the employer's mandatory vaccination practice is also a labour relations matter, not a wilful or deliberate act on her part.

[52] I find that her testimony shows how the practice's implementation unilaterally changed the terms of her employment contract.

[53] During the COVID-19 pandemic, the employer had a right to adopt a mandatory vaccination policy or practice to stop or reduce the spread of COVID-19.

[54] However, I find that the evidence gathered from the employer doesn't show that the Appellant was suspended from her job because of her misconduct, for not complying with that practice.

[55] I find that although the Appellant knew that she could be risking her job if she didn't comply within the time given, it doesn't mean that she breached an express or implied duty resulting from her employment contract.

[56] In my opinion, concluding misconduct on the sole basis that a person knew or should have known that they could be suspended or lose their job because of a new policy established by their employer, whatever that may be, after they were hired, would be rash and would not take into account all the characteristics of misconduct.

[57] I note that misconduct is not defined in the Act. For this reason, it is important to examine all the characteristics of this concept, to which the Court has referred in many decisions.

[58] The Court has, among other things, determined that to conclude misconduct, it is necessary to evaluate the characteristic associated with the term, namely, to determine

whether there was a breach of an express or implied duty resulting from the employment contract.<sup>72</sup>

[59] In the circumstances, I find that the analysis of this characteristic refers to the provisions of the employment contract established between an employee and their employer, and may also require examining the employer's actions. This means that its conduct must be examined in this respect, in addition to the claimant's. To ignore this aspect would be an incomplete analysis of a case of misconduct.

[60] The Federal Court also teaches us that analyzing a case of misconduct by focusing on the conduct of the claimant, and not the employer, is problematic for a number of reasons.<sup>73</sup> The Federal Court decided that evaluating a case of misconduct that way is a narrow application of the legal test for misconduct.<sup>74</sup>

[61] Although the decision refers to a case of misconduct relating to harassment affecting one individual, not to a policy applicable to a group of employees (for example, employer's vaccination practice), the Federal Court does not draw such a distinction in making its conclusion.<sup>75</sup>

[62] In my opinion, that decision supports the idea that the employer's conduct, in addition to the claimant's, has to be examined in evaluating a case of misconduct.<sup>76</sup>

[63] I also believe that to evaluate, among other things, whether there was a breach of an express or implied duty resulting from an employment contract, it may be necessary or justified to examine the employer's conduct.

[64] This doesn't mean interfering in an employer-employee or employer-union dispute, or even in the field of labour law.

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<sup>72</sup> The Court established this principle in *Lemire*, 2010 FCA 314.

<sup>73</sup> See the Federal Court decision in *Astolfi*, 2020 FC 30 at para 31.

<sup>74</sup> See the Federal Court decision in *Astolfi*, 2020 FC 30 at para 31.

<sup>75</sup> See the Federal Court decision in *Astolfi*, 2020 FC 30.

<sup>76</sup> See the Federal Court decision in *Astolfi*, 2020 FC 30.

[65] I am also of the view that to show that a claimant wasn't suspended or dismissed because of their misconduct, the claimant may argue that their employer didn't respect their employment contract, without having to engage in legal recourse other than that undertaken before the Tribunal.

[66] This means that I don't accept the Commission's argument that it doesn't have to prove that an employer's policies are reasonable or fair, or that the employer's conduct is relevant, according to the case law of the Federal Courts and the Tribunal's decisions.<sup>77</sup>

[67] I find that by implementing a mandatory vaccination practice, the employer unilaterally changed an essential or fundamental term of the Appellant's employment contract. That change was brought without the Appellant's consent, and without the consent of the union representing her.

[68] That change established a new requirement or essential condition in the Appellant's job, namely, to comply with the employer's mandatory vaccination practice or to provide an exemption based on specific criteria (for example, medical or religious exemption), otherwise she would be placed on unpaid leave.

[69] Generally, the terms of a person's employment are established by a contract when their job begins. Before setting up an employment contract, if a person can't meet the term, they aren't hired. When such a term has to be set later on, the employment contract is open for negotiation between the parties involved.

[70] In my view, although the Appellant failed to comply with the employer's mandatory vaccination practice, she didn't breach an express or implied fundamental duty resulting from her employment contract.<sup>78</sup>

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<sup>77</sup> See GD4-6.

<sup>78</sup> See the Court's decision in *Lemire*, 2010 FCA 314.

[71] I find that the Commission hasn't shown that there is an express or implied duty resulting from the Appellant's employment contract or collective agreement that would require her to be vaccinated against COVID-19.

[72] I don't accept the Commission's argument that by refusing to comply with the mandatory vaccination practice, the Appellant breached her obligation toward the employer.<sup>79</sup>

[73] There's no indication that when the Appellant was hired or during her employment, she, or the union that represents her, accepted an employment contract providing an express or implied requirement to be vaccinated against specific illnesses or conditions.

[74] I also don't accept the Commission's argument that the Appellant's behaviour was incompatible with the terms of her employment contract and undermined the relationship of trust.<sup>80</sup>

[75] In my view, the Commission didn't present evidence to show how the Appellant breached her employment contract.

[76] To support its argument that the Appellant was suspended because of her misconduct, the Commission relied on a Court decision that referred to a claimant's breach of an express or implicit duty resulting from his employment contract that led to his dismissal.<sup>81</sup>

[77] However, I am of the view that the circumstances described in that decision differ from those in the Appellant's case.<sup>82</sup> In that decision, the Court refers to the provisions of the claimant's collective agreement to find that he lost his job because of his misconduct.<sup>83</sup> The Commission hasn't shown that in the Appellant's case.

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<sup>79</sup> See GD4-8

<sup>80</sup> See GD4-6.

<sup>81</sup> See the Court's decision in *Lemire*, 2010 FCA 314. See also GD4-6.

<sup>82</sup> See the Court's decision in *Lemire*, 2010 FCA 314.

<sup>83</sup> See the Court's decision in *Lemire*, 2010 FCA 314.

[78] The Commission also hasn't shown how the Appellant may have breached the [translation] "relationship of trust" with her employer. There is no indication in the evidence from the employer that the relationship of trust between it and the Appellant may have been compromised by the fact that she didn't comply with its mandatory vaccination practice.

[79] The Appellant's testimony, which wasn't contradicted, also indicates that she went back to work. According to the terms of her suspension from November 27, 2021, to December 26, 2021, she was able to do so, even if she didn't comply with the employer's vaccination practice. This suggests that the relationship of trust between the employer and Appellant wasn't undermined.

[80] In one of its decisions, the General Division decided that the Commission hadn't proven that a claimant had lost their employment for misconduct because she had decided not to get the COVID-19 vaccine, as the employer's vaccination policy required.<sup>84</sup>

[81] Although I am not bound by the General Division's decisions, I find that that decision has similarities to the Appellant's case, namely, with respect to unilateral changes in the terms of an employee's employment contract.<sup>85</sup> That decision also has similarities to the Appellant's case in terms of what the Commission has to show to find misconduct and that failing that, such a finding can't be made.<sup>86</sup> For this reason, I have adopted the same approach in evaluating the Appellant's case.

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<sup>84</sup> See the General Division's decision in *AL v Canada Employment Insurance Commission*, 2022 SST 1428, GE-22-1889, January 16, 2023.

<sup>85</sup> See the General Division's decision in *AL v Canada Employment Insurance Commission*, 2022 SST 1428, GE-22-1889, January 16, 2023.

<sup>86</sup> See the General Division's decision in *AL v Canada Employment Insurance Commission*, 2022 SST 1428, GE-22-1889, January 16, 2023.

[82] Although that decision was appealed, and the Tribunal's Appeal Division (Appeal Division) allowed the Commission's appeal in a decision dated August 1, 2023, I am no more bound by the findings of that decision.<sup>87</sup>

[83] Furthermore, I note that the Appeal Division's decision<sup>88</sup> is pending judicial review before the Court.

#### Workplace context

[84] I am of the view that the Appellant has also shown that given her workplace context, she could have benefited from alternatives or accommodations without having to comply with all the measures set out in the employer's vaccination practice. She has shown that the practice's application wasn't reasonable in her case.

[85] The Commission argues that if an employee wilfully refuses to comply with the employer's vaccination requirement or policy and there's a clear causal link between the refusal to be vaccinated and the dismissal or suspension, misconduct can be established, if: 1) the employer has adopted and communicated a clear mandatory vaccination policy to all affected employees; 2) the employees are aware that failure to comply with the policy could cause a loss of employment; and 3) the application of the policy to the employees is reasonable within the workplace context.<sup>89</sup>

[86] The evidence on file also shows that a memo was issued to Commission representatives to guide them in analyzing cases of misconduct related to employers' application of a mandatory vaccination practice.<sup>90</sup> That memo specifically refers to the

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<sup>87</sup> See the Appeal Division's decision in *Canada Employment Insurance Commission v AL*, AD-23-13, August 1, 2023.

<sup>88</sup> See the Appeal Division's decision in *Canada Employment Insurance Commission v AL*, AD-23-13, August 1, 2023.

<sup>89</sup> See GD4-4 and GD4-5.

<sup>90</sup> See document, "EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)"—GD6-13 to GD6-25.

condition that such practice or policy must be “reasonable within the workplace context.”<sup>91</sup>

[87] However, I find that in analyzing the Appellant’s case, the Commission failed to consider that factor. This means that it didn’t fully analyze the Appellant’s case, to find that she was suspended because of her misconduct.

[88] For this reason, I find unconvincing the Commission’s assertion that the Appellant [translation] “breached a reasonable requirement of her employer”<sup>92</sup> because she didn’t comply with the vaccination practice, without making any arguments as to the workplace context.

[89] In my view, the analysis of that factor is part of examining the employer’s conduct as required to evaluate a case of misconduct, given that the employer is responsible for day-to-day management of operations in the workplace.

[90] Furthermore, analyzing the workplace context is an integral part of the Commission’s policy to determine whether a claimant has lost their employment or been suspended because of misconduct for not complying with their employer’s mandatory vaccination practice.<sup>93</sup>

[91] I find contradictory the Commission’s argument that it [translation] “doesn’t have to prove that an employer’s policies are reasonable or fair,”<sup>94</sup> given that it gave itself a directive to do so in a case of misconduct related to employers’ application of a mandatory vaccination policy.<sup>95</sup>

[92] I accept the Appellant’s arguments that in the context of her workplace, she was able to complete her tasks without needing to be vaccinated and without being at risk of

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<sup>91</sup> See document, “EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)”—GD6-13 to GD6-25.

<sup>92</sup> See GD4-6.

<sup>93</sup> See document, “EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)”—GD6-13 to GD6-25.

<sup>94</sup> See GD4-6.

<sup>95</sup> See document, “EI Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)”—GD6-13 to GD6-25.

spreading COVID-19 among her coworkers. She explained that she worked in a small post office with two coworkers and that she could have continued in her job by working different hours or having no contact with customers. She submitted that she was already complying with the measures in place to mitigate the spread of COVID-19 (for example, mask wearing, hand hygiene, and social distancing).

[93] The Appellant also testified that the employer didn't offer her alternatives or accommodations in place of vaccination to allow her to continue to work.

[94] She testified that when she went back to work after her suspension from November 27, 2021, to December 26, 2021, she was able to work for six weeks, from December 29, 2021, to February 5, 2022, inclusive, without complying with the employer's vaccination practice. She said that she was approved to go back to work because she agreed to test for COVID-19 twice a week while waiting to receive documents to request accommodation for religious reasons.

[95] The Appellant showed that although she wasn't able to obtain alternatives or accommodations because she didn't want to be vaccinated against COVID-19, she was still able to go back to work in late December 2021 by testing for the illness every week, in addition to abiding by the other public health measures that the employer had in place (for example, mask wearing and hand hygiene).

[96] In my opinion, this situation suggests that the application of the employer's mandatory vaccination practice wasn't reasonable in the context of the Appellant's workplace.

[97] I find that the Appellant's explanations show that the alleged act doesn't constitute misconduct within the meaning of the Act.

[98] In summary, I find that the Appellant's failure to comply with the employer's mandatory vaccination practice does not amount to a conscious, deliberate, or intentional act that can be considered misconduct.<sup>96</sup>

[99] I am of the view that objectively, the Appellant's act of failing to comply with this practice didn't amount to careless and negligent conduct, or that by acting that way, she wilfully disregarded the effects her actions would have on job performance.<sup>97</sup>

#### Commission's evidence

[100] The Commission hasn't proven that the Appellant was intentionally suspended from her job. I am of the view that in this case, the Commission didn't discharge its burden of demonstrating that the Appellant's act amounts to misconduct.

[101] The Court teaches us that the Commission has to prove that there is evidence showing a claimant's misconduct.<sup>98</sup>

[102] In my view, the Commission's analysis is incomplete, in part because it failed to examine the Appellant's workplace context, even though a directive that it produced states that it must perform this analysis when handling cases of misconduct relating to an employer's mandatory vaccination practice. The Commission also failed to explain why it didn't consider the medical and religious reasons as valid.

[103] I find that the Commission's evidence is inadequate and not detailed enough to find, on a balance of probabilities, that the Appellant was suspended because of her misconduct.

[104] The Court also tells us that it must be established that the claimant was let go because of misconduct.<sup>99</sup>

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<sup>96</sup> See the Court's decision in *Mishibinijima*, 2007 FCA 36.

<sup>97</sup> See the Court's decisions in the following: *Tucker*, A-381-85; and *McKay-Eden*, A-402-96.

<sup>98</sup> The Court established this principle in *Mishibinijima*, 2007 FCA 36.

<sup>99</sup> The Court established or reiterated this principle in the following decisions: *Bartone*, A-369-88; *Davlut*, A-241-82; *Crichlow*, A-562-97; *Meunier*, A-130-96; *Joseph*, A-636-85; *Lepretre*, 2011 FCA 30; and *Granstrom*, 2003 FCA 485.

[105] I find that the Appellant wasn't let go because of acts she committed wilfully and deliberately.

[106] The reason for the Appellant's dismissal isn't misconduct under the Act.

## **Conclusion**

[107] The Commission hasn't proven that the Appellant was suspended from her employment because of her misconduct.

[108] As a result, the Commission's decision to disqualify her from receiving Employment Insurance regular benefits from November 29, 2021, to December 24, 2021, isn't justified.

[109] This means that the appeal is allowed.

Normand Morin  
Member, General Division – Employment Insurance Section