



[TRANSLATION]

Citation: *GL v Canada Employment Insurance Commission*, 2024 SST 1416

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:**  
**Representatives:**

G. L.  
D. P.  
J. T.

**Respondent:**  
**Representative:**

Canada Employment Insurance Commission  
Yanick Bélanger

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**Decision under appeal:**

General Division decision dated  
March 21, 2023 (GE-22-2580)

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**Tribunal member:**

Pierre Lafontaine

**Type of hearing:**

In writing

**Decision date:**

November 15, 2024

**File number:**

AD-23-377

## Decision

[1] The appeal is dismissed. The Appellant (Claimant) was suspended because of misconduct.

## Overview

[2] The Claimant was placed on an unpaid leave of absence (suspended from her job). She applied for Employment Insurance (EI) benefits. The Respondent (Commission) found that the Claimant was suspended because of misconduct, namely, for not complying with her employer's vaccination policy. The Commission disqualified her from receiving EI benefits.

[3] The Claimant asked for her application to be reconsidered. The Commission denied her application for benefits again. The Claimant appealed to the Tribunal's General Division.

[4] The General Division found that the Claimant refused to comply with the employer's vaccination policy. It found that the Claimant knew that the employer was likely to suspend her in these circumstances and that her refusal was wilful, conscious, and deliberate. The General Division found that the Claimant was placed on a leave of absence from her job because of misconduct.

[5] The Appeal Division gave the Claimant permission to appeal the General Division decision. She argues that the General Division refused to exercise its jurisdiction and that it made an error of law in its interpretation of misconduct.

[6] I have to decide whether the General Division refused to exercise its jurisdiction and whether it made an error of law when it found that the Claimant was suspended because of misconduct.

[7] I am dismissing the Claimant's appeal.

## Issues

[8] No. 1: Did the General Division make an error of jurisdiction by refusing to take into account the work context of the employer's vaccination policy, and accordingly, decide whether its application was reasonable?

[9] No. 2: Did the General Division make an error by holding only the employee responsible for the behaviour that led to misconduct without applying the contextual test to interpret the legality, rationality, or logic of the policy's application leading to the suspension?

[10] No. 3: Did the General Division make an error when it found that the Commission had proven that the Claimant breached a duty under her employment contract?

[11] No. 4: Was there a breach of procedural fairness or a reasonable apprehension of bias?

## Preliminary remarks

[12] On September 21, 2023, the parties attended a management conference. The Claimant asked for the case to be suspended until the higher courts addressed the issue of misconduct related to refusing to follow a vaccination policy unilaterally imposed by an employer. The Commission didn't object to the request. I granted the Claimant's request.

[13] On November 6, 2024, there was a second management conference. It was agreed that I would make a final decision on the Claimant's file.

## Analysis

### Misconduct

[14] The General Division had to decide whether the Claimant was suspended because of misconduct under the *Employment Insurance Act* (EI Act).<sup>1</sup>

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<sup>1</sup> See sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[15] The General Division's role isn't to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by suspending the Claimant in such a way that her suspension was unjustified, but rather to determine whether the Claimant was guilty of misconduct and whether this misconduct led to her suspension.

[16] The notion of misconduct doesn't say that the breach of conduct has to be the result of wrongful intent; misconduct in an EI claim is when the following applies:

- 1) The misconduct was wilful.
- 2) The claimant knew or should have known that their conduct was such as to impair the performance of the duties owed to their employer.
- 3) There is a causal relationship between that misconduct and the termination of employment.<sup>2</sup>

[17] The General Division found that the Claimant was suspended because she didn't comply with the employer's policy. The Claimant was told about the employer's policy and was given time to comply. She didn't ask the employer for an accommodation or an exemption. The General Division found that the Claimant wilfully refused to follow the policy. That led directly to her suspension.

[18] The General Division found that the Claimant knew that refusing to comply with the policy could lead to her suspension, since she had been told about the consequences of not complying with the policy. The General Division found, on a balance of probabilities, that the Claimant's behaviour was misconduct under the EI Act.

[19] It should be noted that the General Division decision is now supported by an abundance of unanimous case law from the Federal Court (Court) and the Federal Court of Appeal that confirms, in cases dealing directly with mandatory vaccination

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

policies, the narrow role of the Social Security Tribunal (SST) in appeals dealing with misconduct.<sup>3</sup>

[20] The recent Court decision in *Murphy* provides an in-depth review of the case law on mandatory vaccination and the notion of misconduct. The Court tells us that an employee's deliberate voluntary decision not to get vaccinated constituted a breach of the express duty set out in the vaccination policy and was therefore a form of misconduct.<sup>4</sup>

[21] The Court points out that case law refers to carrying out "duties," broadly speaking, for the employer, and not just to performing the employee's specific "tasks." In other words, the issue isn't whether non-compliance with an employer's policy affects the performance of tasks. Instead, the issue is whether the non-compliance interferes with the duties the employee owes their employer.<sup>5</sup>

[22] The Court reiterated that the SST isn't a forum for questioning an employer's policies. The test for misconduct should focus on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies.<sup>6</sup>

[23] Similarly, the SST didn't need to analyze the employment context because the test for misconduct focuses on a claimant's objective knowledge of the consequences of their actions.<sup>7</sup>

[24] Finally, the Court reiterated that the SST is a forum for determining entitlement to social security and EI benefits, not a forum for adjudicating allegations of wrongful

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<sup>3</sup> For example, see *Wong v Canada (Attorney General)*, 2024 FC 686; *Spears v Canada (Attorney General)*, 2024 FC 329; *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; and *Abdo v Canada (Attorney General)*, 2023 FC 1764.

<sup>4</sup> See *Murphy v Canada (Attorney General)*, 2024 FC 1356, at para 63.

<sup>5</sup> See *Murphy v Canada (Attorney General)*, 2024 FC 1356, at para 78.

<sup>6</sup> See *Murphy v Canada (Attorney General)*, 2024 FC 1356, at para 68.

<sup>7</sup> See *Murphy v Canada (Attorney General)*, 2024 FC 1356, at para 79.

suspension/dismissal. There are remedies available to penalize an employer's behaviour other than through EI benefits.<sup>8</sup>

[25] In this case, I am of the opinion that the General Division addressed and answered the correct legal issue. The issue was whether the Claimant could reasonably have foreseen that her conduct would negatively interfere with her duties to her employer and result in her suspension.

[26] It wasn't for the General Division to decide whether it was reasonable for the employer to apply the vaccination policy to the Claimant taking her work context into account. The General Division didn't have jurisdiction to assess the merits, legitimacy, or legality of the employer's policy.<sup>9</sup>

[27] I see no error made by the General Division when it decided the issue of misconduct solely within the parameters set out by the higher courts, which have defined misconduct under the EI Act. The evidence supports the General Division's finding that the Claimant was suspended because of misconduct.

### **Breach of procedural fairness or reasonable apprehension of bias**

[28] The Claimant submits that the General Division decision is an exact copy—except for one paragraph—of another decision made on the same date, by the same member, but about hearings that didn't take place on the same date.<sup>10</sup>

[29] In some situations, this ground of appeal could be accepted. However, the General Division had to deal with a lot of appeals on the issue of misconduct related to claimants' refusal to follow their employer's vaccination policy. So, it wasn't unusual to find repetition in the decisions' language, since the appeals raised similar issues.

[30] After reviewing the file, I can't find that this breached procedural fairness or that it proves that there was a reasonable apprehension of bias.

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<sup>8</sup> See *Murphy v Canada (Attorney General)*, 2024, FC 1356, at para 69; and *Sullivan v Canada (Attorney General)*, 2024 FCA 7, at para 5.

<sup>9</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at para 48.

<sup>10</sup> See AD1B-2 to AD1B-6.

## **Conclusion**

[31] The appeal is dismissed. The Claimant was suspended from her job because of misconduct.

Pierre Lafontaine  
Member, Appeal Division