Citation: *KJ v Canada Employment Insurance Commission*, 2025 SST 256

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. J.
Representative:	Jody Wells
Respondent:	Canada Employment Insurance Commission
Representative:	Erin Tzvetcoff

Decision under appeal:	General Division decision dated September 24, 2024 (GE-23-318)

Tribunal member:	Solange Losier
Type of hearing:	Teleconference
Hearing date:	January 10, 2025
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	March 20, 2025
File number:	AD-24-646

Decision

[1] K. J.'s (Claimant) appeal is allowed in part. The General Division made errors of law and errors of fact in its decision.

[2] I have substituted with my own decision. The Claimant is not disentitled or disqualified from getting Employment Insurance regular benefits (benefits) for the period from January 9, 2022, to May 31, 2022. Her conduct did not amount to wilful misconduct while she had an approved religious exemption from the employer's "Immunization of Workers for Covid-19 Policy" (policy) until May 31, 2022.

[3] The Claimant is disentitled to benefits from June 1, 2022, to July 3, 2022, and disqualified to benefits from July 4, 2022. The Claimant didn't comply with the policy after being directed to comply and that conduct led to her suspension from work and subsequent dismissal. Her conduct amounted to wilful misconduct. She did not have an approved religious exemption from the employer as of June 1, 2022.

Overview

[4] The Claimant worked at a nursing home in housekeeping. She stopped working and applied for Employment Insurance regular benefits (benefits) on January 12, 2022.[1]

[5] The Canada Employment Insurance Commission (Commission) decided that the Claimant was suspended from her job from January 10, 2022, to July 1, 2022. It also decided that she lost her job due to misconduct on July 3, 2022.[2] This resulted in a notice of debt for the overpayment of benefits.[3]

[1] See application for benefits at pages GD3-3 to GD3-15.
[2] See Commission's reconsideration decision at pages GD3-51 to GD3-52.
[3] See notice of debt at pages GD3-54 to GD3-55.

[6] The General Division dismissed the Claimant's appeal.[4] It decided that the Claimant lost her job because of misconduct, so she was disqualified from getting benefits for the entire period.

[7] There was some procedural history with this file.[5] The Federal Court (FC) returned the file to the Appeal Division for redetermination. Following that, I gave the Claimant permission to appeal because she had an arguable case that the General Division made reviewable errors.[6]

[8] I have found that the General Division made errors of law and errors of fact.[7] To fix the errors, I will substitute with my own decision on the misconduct issue.

Preliminary matters

– The Claimant submitted new evidence

[9] New evidence is evidence that the General Division didn't have when it made its decision. The Appeal Division generally doesn't accept new evidence.[8] This is because the Appeal Division isn't the fact finder or rehearing the case. It's a review of the General Division's decision based on the same evidence.[9]

[10] There are some exceptions where new evidence is allowed.[10] For example, I can accept new evidence if it provides one of the following:

- general background information only
- if it highlights findings made without supporting evidence
- shows that the Tribunal acted unfairly.

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[4] See General Division's decision at pages AD1A-1 to AD1A-7. If you lose your job due to your own misconduct, you are disqualified to benefits under section 30(1) of the *Employment Insurance Act* (EI Act).
[5] The Federal Court in *Jeglum v Canada (Attorney General),* 2024 FC 1499 granted the Claimant's judicial review and returned the matter to the Appeal Division for redetermination.
[6] See application to the Appeal Division at pages AD1-1 to AD1-12.
[7] See sections 58(1)(b)(c) of the *Department of Employment and Social Development Act* (DESD Act).
[8] See *Tracey v Canada (Attorney General),* 2015 FC 1300 at paragraphs 29 and 34; *Parchment v Canada (Attorney General),* 2017 FC 354, at paragraph 23.
[9] See *Gittens v Canada (Attorney General),* 2019 FCA 256, at paragraph 13.
[10] See *Sharma* v *Canada (Attorney General),* 2018 FCA 48 and *Sibbald v Canada (Attorney General),* 2022 FCA 157, at paragraphs 37–39.

[11] The Commission says that the Claimant submitted new evidence that was not before the General Division. It argues that the new evidence shouldn't be accepted by the Appeal Division because it doesn't fall within any of the above exceptions. The Commission also notes that the case "doesn't turn on the new evidence" submitted.

[12] The specific documents (coded by the Tribunal) are as follow:[11]

	Description of document	Page numbers
1	Employee request for accommodation dated September 11, 2021	AD5-57 to AD5-58
2	Claimant's email to the employer dated November 30, 2021	AD5-67 to AD5-68
3	Employer memo dated January 5, 2022	AD5-71
4	Employer policy and procedures	AD5-72 to AD5-74
5	Employer letter dated February 7, 2022 (re: accommodation)	AD5-79 to AD5-82
6	Employer memo dated March 31, 2022	AD5-83
7	Employer letter dated April 20, 2022 (re: accommodation)	AD5-84 to AD5-85
8	Employee request for accommodation & supporting documents	AD5-86 to AD5-93

[13] The Claimant argues that the documents above are not "new." She says that they were before the General Division by way of "parallel documentary evidence" and they point to facts already set out in file documents (coded as GD3 and GD6), as well as from her own testimony at the General Division hearing. To support her position, she provided an unofficial written transcript from the General Division hearing.[12]

[14] The Claimant acknowledges that some of the above evidence is "more relevant" and some of it is "less relevant." Specifically, she agrees that the email to her employer dated November 30, 2021, located at pages AD5-67 to AD5-68 is not relevant.

[11] See page AD7-7.
[12] See pages AD8-27 to AD8-28, at paragraphs 126 to 128.

– I am not accepting the Claimant's new evidence

[15] I find that the documents submitted by the Claimant and listed in the chart above is new evidence. I've listened to the General Division audio recording and reviewed the file record. These documents were not before the General Division.

[16] I also find that new evidence submitted by the Claimant doesn't meet any of the exceptions set out in law. It isn't general background information, it doesn't highlight findings made without supporting evidence and it doesn't show that the Tribunal acted unfairly. Even if the new documents submitted are "parallel documentary evidence" and similar to other evidence that was already part of the record, that isn't an exception.

[17] An appeal to the Appeal Division isn't a "redo" based on updated evidence of the hearings before the General Division. Instead, they are reviews of the General Division based on the **same evidence**. This means I can't consider the Claimant's new evidence (listed in paragraph 12 above) when making my decision.

Issues

[18] I have focused on the following issues:

a) Did the General Division make an error of law and/or error of fact by failing to consider the period of time the Claimant had an approved religious exemption from her employer?

b) Did the General Division make an error of law and/or error of fact by failing to consider whether a disentitlement to benefits was applicable for the period it found she was suspended from work?

c) If so, how should the error or errors be fixed?

Analysis

[19] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[13]

[20] An error of fact happens when the General Division bases its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[14]

[21] This involves considering some of the following questions:[15]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[22] Any of these types of errors would allow me to intervene in the General Division decision.[16]

The General Division decided that the Claimant was suspended and lost her job due to misconduct

[23] The General Division's decision identifies that there were two distinct periods in this case.[17] It found that the Claimant's employer had granted her request for religious exemption from the policy by putting her on an administrative leave of absence. It noted that the employer accommodated the Claimant by allowing her to work from home.

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[13] See section 58(1)(b) of the DESD Act.
[14] See section 58(1)(c) of the DESD Act.
[15] This is a summary of the Federal Court of Appeal's decision in *Walls v* Canada (Attorney General), 2022 FCA 47 at paragraph 41.
[16] See section 59(1) of the DESD Act.
[17] See paragraphs 3, 10, 11, 22 and 23 of the General Division decision.

[24] The General Division also found that the employer had "rescinded" the accommodation, that she was suspended on June 1, 2022, and was dismissed on July 4, 2022, due to her own misconduct.[18] It decided that she had breached the employer's policy and knew the consequences if she refused to comply once her accommodation period had ended.[19] It concluded that she was disqualified from getting benefits because she lost her job due to misconduct.[20]

The General Division made errors of law and errors of fact

[25] The Claimant argues that the General Division made an error of law and error of fact when it concluded that she committed misconduct and was disqualified from benefits.

[26] The Claimant explained that the employer had granted her request for a religious exemption and accommodation for the period from December 1, 2021, to May 31, 2021. She reiterates that her conduct was not wilful misconduct for the period she had an approved religious exemption, as well as the subsequent period after June 1, 2022.

[27] The Commission agrees that the General Division made an error of law and an error of fact because it failed to address the period when the Claimant had an approved religious exemption and accommodation from the employer up to May 31, 2022.

[28] The Commission also submits that the General Division made another error of law and error of fact. It says that the General Division failed to address whether a disentitlement to benefits was applicable for the period that it determined the Claimant was suspended from work between June 1, 2022, to July 3, 2022.

[29] First, I find that the General Division made an error of law and an error of fact by failing to specifically address the Claimant's entitlement to benefits for the period from January 9, 2022, to May 31, 2022.[21]

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[18] See paragraph 11 of the General Division decision.
[19] See paragraph 30 of the General Division decision.
[20] See paragraphs 2, 33–34 of the General Division decision.
[21] See section 58(1)(b)(c) of the DESD Act. The Federal Court identified there were two distinct time periods in *Jeglum v Canada (Attorney General),* 2024 FC 1499, at paragraph 18.

[30] The General Division found that the Claimant should be disqualified to benefits for the **entire** period because she lost her job due to misconduct.[22] In doing so, it failed to consider the distinct period of time where the Claimant had an approved religious exemption and accommodation from her employer.

[31] Second, I find that the General Division made another error of law and error of fact by failing to consider whether a **disentitlement** to benefits was applicable for the period from June 1, 2022, to July 3, 2022. This is the period it found the Claimant was suspended from work for not complying with the employer's policy.[23]

[32] There is a different provision in the EI Act that applies when a person has been suspended from work due to misconduct. The law says that a suspension due to misconduct results in a **disentitlement** to benefits, **not a disqualification** to benefits.[24] The General Division erred by concluding that the Claimant was disqualified to benefits for the period of time it found she was suspended.

[33] Since I have already found two reviewable errors, I don't need to consider any other alleged errors. I can intervene on that basis.

How to Fix the Error

[34] There are two options for fixing an error by the General Division. I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.[25] If I substitute, I can make any necessary findings of fact.[26]

[35] The main factor that I have to consider is whether the parties have had a full and fair opportunity to present their evidence before the General Division on all relevant issues.

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[22] See paragraph 34 of the General Division decision.
[23] See section 58(1)(b)(c) of the DESD Act and paragraphs 10–11 of the General Division decision.
[24] See section 31 of the EI Act.
[25] See section 59(1) of the DESD Act.
[26] See section 64 of the DESD Act.

[36] To fix the error, the Claimant and Commission agree that I should substitute and give the decision the General Division should have given. However, the parties disagree on what the substituted decision should be.

[37] I am satisfied that the Claimant has had a full and fair opportunity to present her evidence before the General Division on all relevant issues. So, I will substitute with my own decision.

[38] I'll start by reviewing the law around misconduct and relevant case law for the purposes of EI benefits.

Misconduct according to the Employment Insurance Act (EI Act) and relevant case law

[39] The EI Act says that a person is disqualified from benefits if they lose their job because of their own misconduct.[27] If a person is suspended from work due to misconduct, then you are disentitled to benefits.[28]

[40] The Commission has to prove that it was more likely than not that the Claimant was suspended and lost her job because of misconduct.[29]

[41] The term "misconduct" is not defined in the EI Act, but the Federal Court of Appeal (FCA) has described the legal test for misconduct. To be misconduct, the conduct has to be wilful. This means that the conduct is conscious, deliberate, or intentional. [30] It also includes conduct that is so reckless, it is almost wilful.[31]

[42] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[32]

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[27] See section 30(1) of the EI Act.
[28] See section 31 of the EI Act.
[29] See *Minister of Employment and Immigration* v *Bartone*, A-369-88.
[30] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[31] See McKay-Eden v Her Majesty the Queen, A-402-96.
[32] See *Mishibinijima,* at paragraph 14.

[43] The Claimant doesn't need to have wrongful intent for her behaviour to be misconduct under the law.[33]

[44] The employer's conduct is not a relevant consideration because the focus is on the Claimant's act or omission and whether it amounted to misconduct based on the meaning of the EI Act.[34]

[45] There is a long line of recent case law from the Federal Court and FCA that confirms the specific and narrow role of this Tribunal. These cases involve the denial of benefits where employees were either suspended and/or dismissed for their failure to comply with their employer's Covid-19 vaccination policies.[35]

[46] The Tribunal doesn't have jurisdiction and shouldn't consider the soundness or reasonableness of the employer's policy.[36] Again, the focus is on the conduct of the person seeking benefits—not the employer's policy, its compliance with the *Canadian Charter of Rights and Freedoms*, applicable human rights law, federal or provincial labour law, or common law of wrongful dismissal.[37]

The Claimant's benefit period started on January 9, 2022

[47] At the Appeal Division hearing, the Claimant's representative indicated that the Claimant had stopped working in November 2021 and wasn't sure whether she could get benefits from that date.

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[33] See *Canada (Attorney General)* v *Secours*, A-352-94.
[34] See *Canada (Attorney General) v McNamara*, 2007 FCA 108, at paragraphs 22–23 and *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraphs 30–31.
[35] See *Francis v Canada (Attorney General),* 2023 FCA 217, at paragraph 13; *Sullivan* v Canada *(Attorney General),* 2024 FCA 7, *Zhelkov v Canada (Attorney General)*, 2023 FCA 240; *Lalancette c Canada (Procureur général)*, 2024 CAF 58; *Khodykin v Canada (Attorney General)*, 2024 FCA 96; *Kuk v Canada (Attorney General)*, 2024 FCA 74; *Cecchetto v Canada (Attorney General)*, 2024 FCA 102; *Murphy c Canada (Procureur général)*, 2024 CF 1356.
[36] See *Matti v Canada (Attorney General),* 2023 FC 1527 at paragraph 21; *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraphs 32 and 48; *Milovac v Canada (Attorney General),* 2023 FC 1120, at paragraph 27 and *Kuk v Canada (Attorney General),* 2023 FC 1134, at paragraph 27; *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraphs 30–31.
[37] See *Sturgeon v Canada (Attorney General),* 2024 FC 1888, at paragraph 38.

[48] The Claimant did in fact stop working in November 2021, but she only applied for benefits on January 12, 2022.[38] Her benefit period became effective January 9, 2022—the beginning of that week.

[49] I don't have jurisdiction to consider the period prior to January 9, 2022. The relevant period starts from January 9, 2022, because that's when the Claimant's benefit period began (and the date the Commission decided that she couldn't get benefits from).

The period from January 9, 2022, to May 31, 2022

– The Claimant is neither disentitled nor disqualified to benefits for the period from January 9, 2022, to May 31, 2022

[50] The Claimant worked at a nursing home. The employer imposed a vaccination policy on September 13, 2021, in response to a mandate from *Alberta Health Services.*[39]

[51] The employer's policy required employees to be fully vaccinated for Covid-19 by October 31, 2021. It warned that a failure to comply with the policy would result in an "unpaid administrative leave" on November 1, 2021.[40]

[52] The employer ended up extending the deadline for employees to comply. It was extended to November 30, 2021. It warned that a failure to comply would result on an unpaid leave of absence, except where a workplace accommodation has been approved for an employee.[41]

[53] The policy warned that if an employee had no intention to become fully vaccinated, then after January 10, 2022, their employment would be terminated. [42]

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[38] The Claimant could ask the Commission to antedate her application to an earlier date (to the date she stopped working) based on section 10(4) of the EI Act.
[39] See pages GD3-24 to GD3-25 and GD3-28 to GD3-30.
[40] See page GD3-26.
[41] See page GD3-27.
[42] See page GD3-29.

[54] The policy provided the possibility of an exemption for employees who couldn't be vaccinated for religious or medical reasons, or other protected grounds based on the *Alberta Human Rights Act*.[43]

[55] The Claimant asked the employer for a religious exemption from the policy on October 12, 2021. She explained that the vaccines were developed using fetal cell lines and this went against her religious beliefs as a Christian Lutheran.[44]

[56] The employer met with the Claimant on November 26, 2021, and **approved** her request for religious exemption. They wrote to her and offered her the following accommodation as of November 29, 2021:[45]

- Effective December 1, 2021, she would be placed on an unpaid leave of absence until February 28, 2022.
- The unpaid leave of absence would be re-evaluated to determine if a continued unpaid leave of absence can be accommodated up to the point of undue hardship.
- A record of employment identifying that she was on a leave of absence would be issued.
- The employer reserved the right to reassess her need for accommodation prior to February 28, 2022, if there were new circumstances that either change the requirements of the policy, or if new vaccinations became available, or if different options for accommodation than those that presently exist.

[43] See page GD3-25.
[44] See pages GD3-22 to GD3-23.
[45] See November 29, 2021, letter at pages GD6-10 to GD6-12.

[57] The employer modified the Claimant's accommodation sometime in February 2022. The Claimant was now permitted to work from home 2 days per week on clerical tasks.[46]

[58] Things started changing for the Claimant in April 2022. The employer sent her a letter on April 20, 2022, advising that a new vaccine was available that didn't use any fetal cell lines (called "Novavax"). The employer set up a meeting with the Claimant to discuss whether she still qualified for an accommodation on April 27, 2022.[47]

[59] The Claimant disagreed with the employer and believed that the Novavax vaccine was still linked to fetal cell lines. So, she submitted another request to the employer asking for a religious exemption.

[60] The employer rejected the Claimant's religious exemption request on May 17, 2022. They wrote to her explaining that her accommodation (working from home 2 days per week) would officially end on May 31, 2022. They explained that "there is no basis by which you continue to require accommodation from the requirements of the Policy."[48] Finally, they warned her that she would be put on an unpaid administrative leave of absence to allow her time to be fully immunized and that a failure to comply with the policy would result in her termination on July 4, 2022.

[61] The Claimant didn't comply with the employer's direction to comply with the policy and get fully vaccinated. She was put on an unpaid administrative leave of absence as of June 1, 2022. Following that, she was dismissed from her job on July 4, 2022, for the same reason.

[62] I find that the Claimant's conduct for the period from January 9, 2022, to May 31, 2022, was **not wilful misconduct** for the purposes of EI benefits. She is not disentitled or disqualified to benefits for this period.

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[46] See pages GD2-8; GD3-46.
[47] See April 20, 2022, letter at pages GD6-3 to GD6-4.
[48] See pages GD6-8 to GD6-9.

[63] The Claimant wasn't in breach of the policy during the period from January 9, 2022, to May 31, 2022. The policy permitted religious exemptions. The Claimant did what she was supposed to do. She asked the employer for a religious exemption and the evidence shows that it was approved until May 31, 2022. Her conduct was not wilful misconduct for the period that she had an approved religious exemption from the policy.

The period from June 1, 2022, to July 3, 2022

– **The Claimant is disentitled to benefits from June 1, 2022, to July 3, 2022**

[64] The Claimant argues that she wasn't "suspended" for misconduct, but that it was an "unpaid administrative leave of absence" from June 1, 2022, to July 3, 2022.

[65] The Commission argues that the Claimant was suspended from work due to misconduct from June 1, 2022, to July 3, 2022.

[66] I disagree with the Claimant. The employer may have characterized it as an unpaid administrative leave of absence, but I'm not bound by that characterization. I have to look at the evidence and decide for myself.

[67] The employer's letter, dated May 17, 2022, said three important things:[49]

- First, that her religious exemption and accommodation was ending on May 31, 2022, and effective June 1, 2022, she would be placed on an unpaid administrative leave of absence to allow her time to get vaccinated.

- Second, that a vaccine was now available that does not contain any human fetal-derived cell lines or tissue used in its development, manufacturing or testing. She was expected to comply with the policy going forward and be fully vaccinated.

[49] See May 17, 2022, letter at pages GD6-8 to GD6-9.

- Third, if she has no plan and/or intention to become fully vaccinated, her job would be terminated for failure to comply with the policy on July 4, 2022.

– **The Claimant was suspended from work from June 1, 2022, to July 3, 2022**

[68] In my view, the leave of absence imposed by the employer on June 1, 2022, was disciplinary in nature and akin to a suspension for misconduct for the purposes of EI benefits. The Claimant may not have had wrongful intent when she decided not to comply with the policy, but wrongful intent isn't needed for her behaviour to be misconduct.[50]

[69] In deciding that she was suspended, I've considered the following factors: that the employer initiated and imposed the leave on the Claimant; it was unpaid; she had no choice and couldn't go back to work at the nursing home; she could not continue working on a part-time basis doing clerical tasks at home either; the employer ended the accommodation on May 31, 2022; she did not have an approved religious exemption after May 31, 2022; there was no return to work date and she was warned that she would be terminated on July 4, 2022, for continued non-compliance.

[70] The employer may have had their own reasons for calling it an "unpaid administrative leave of absence" instead of a suspension, but the evidence supports that the Claimant was suspended from work due to misconduct because she didn't comply with the policy when she was directed to. The suspension period was imposed to essentially give her time to get fully vaccinated and be in compliance with the policy before the dismissal date on July 4, 2022.

[71] I also find the facts of this case are distinguishable from those cases where an employee **voluntarily** takes a period of leave from their job and there is an agreed upon return date.[51] So, I don't agree with the Claimant when she says that the administrative leave of absence was something different than a suspension for misconduct.

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[50] See *Canada (Attorney General)* v *Secours*, A-352-94.
[51] A suspension for misconduct is different from voluntarily taking a period of leave without just cause, but both of them result in a disentitlement to benefits. See sections 31 and 32 of the EI Act.

[72] The employer (rightly or wrongly) retained the right to decide when her accommodation would end. They decided that it would end on May 31, 2022. While the employer had previously granted the religious exemption, it's clear from their letters that it wasn't an indefinite accommodation and they retained the right to reassess the accommodation plan. The employer had already reassessed it once in February 2022 when they offered her part-time work from home 2 days a week. They reassessed it again in April 2022 when they became aware of a vaccine they said was not linked to fetal cell lines.

[73] The Claimant argues that I have the jurisdiction to find that the employer made a "mistake" when it concluded that the Novavax was not tested on fetal cell lines. She restated that I am not being asked if the employer should have accommodated her because the employer already decided that issue.

[74] I think the Claimant is asking me to focus on the employer's conduct when she says that I can decide that the employer made a "mistake." I'm not an expert in vaccines, so I don't know whether the Novavax vaccine was linked or not linked to fetal cell lines. I don't know if the employer made a mistake when they concluded that the vaccine was not linked to fetal cells.

[75] In my view, the Claimant is essentially asking me to dig deeper into the employer's rationale and decision to end the accommodation on May 31, 2022. However, the FC and FCA have clearly stated that the focus is on the Claimant's conduct, not the employer's conduct.[52] So, I can't focus on whether the employer made a mistake.

[76] If the Claimant has been wronged by the employer because they rejected her religious exemption on the basis of a mistaken belief about the Novavax vaccine, this Tribunal is not the forum to address that issue.[53]

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[52] See *Canada (Attorney General) v McNamara*, 2007 FCA 108, at paragraphs 22–23 and *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraphs 30–31.
[53] See *Abdo v Canada (Attorney General)*, 2023 FC 1764, at paragraphs 18 and 32.

[77] The relevant question for me to consider is whether the Claimant knew or ought to have known that her decision to not get vaccinated **after** May 31, 2022 (in the absence of an approved exemption and accommodation) might result in her suspension from work.

[78] The answer to that question is yes. The Claimant knew or ought to have known that her decision to not get vaccinated **after** May 31, 2022, would result in her suspension from work.

[79] The exemption from the policy and accommodation ended on May 31, 2022. Her subsequent request for a religious exemption was denied by the employer. She got notice of the denial and was given enough time to comply with the policy.

[80] Despite the Claimant's knowledge of the consequences, she chose not to comply with the employer's policy and that led to her suspension from work from June 1, 2022, to July 3, 2022.

– **The Claimant's conduct was voluntary and amounted to wilful misconduct for the purposes of benefits**

[81] The Claimant argues that misconduct must be voluntary conduct. She says that her religious beliefs and religious conduct are constructively immutable characteristics that do not cease to be immutable characteristics in the context of employment insurance, so it cannot be misconduct based on the EI Act.[54]

[82] The Claimant says that the element of wilfulness is necessary to ground a finding of misconduct. I've reviewed and considered her arguments on this issue.

[83] I was not persuaded by the Claimant's argument that her decision not to be vaccinated was not voluntary**.** There is evidence that supports that her decision to not

[54] See pages AD8-10 to AD8-26. The Claimant referred to several cases, including *Syndicat Northcrest v Anselem*, 2004 SCC 47, *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203; *Quebec (Attorney General) v A,* 2013 SCC 5.

vaccinate for Covid-19 was a voluntary decision that she made, versus something that was not a “true choice.”

[84] For example, in the Claimant’s letter to the employer asking for a religious exemption, she wrote, “informed consent means **I am free to make a decision without coercion**….”[55] The letter from her pastor says, “**we affirm the freedom of each individual to make their own decision** through prayer and the study of God’s word regarding **whether or not they will receive the vaccination. Every individual needs to be guided by their conscience** and God’s word in making their **personal decision regarding the vaccine.”**[56] (emphasis added)

[85] I find that the Claimant made a conscious, voluntary and deliberate decision not to comply with the employer’s policy which required her to be vaccinated. The language above tells me that she was **free to make a personal choice** and decide whether or not she gets vaccinated. She was **free to choose** to vaccinate or not. This tells me that her decision not to comply with the policy was voluntary.

[86] The FCA recently issued a decision called *Zagol v Canada (Attorney General),* 2025 FCA 40 after this Appeal Division hearing took place. The *Zagol* decision confirms that a finding of misconduct is a “low bar” and it is sufficient if the conduct in question is undertaken with the knowledge that dismissal might result. It doesn’t require moral blame, but just awareness of the consequences.[57]

[87] I don’t see how the Claimant’s case is different or distinguishable from any of the other vaccine related EI decisions from the FC and FCA (for example, see decisions listed in footnotes 35–37). Aside from having an approved religious exemption for a short period, the evidence clearly shows that she didn’t have an approved religious exemption as of June 1, 2022. She was directed to comply with the policy and knew the consequences. I can’t ignore those facts. I have to follow binding decisions from the FC and FCA.

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[55] See page GD3-31.
[56] See page GD3-32.
[57] See *Zagol,* at paragraph 28.

[88] I find that the Claimant was suspended for misconduct from June 1, 2022, to July 3, 2022, for failing to comply with the employer's vaccination policy. She knew the consequences of non-compliance would lead to her suspension on June 1, 2022. She did not have an approved religious exemption and her accommodation period ended on May 31, 2022. Despite that, she made a voluntary, conscious and deliberate decision not to comply with the policy. The low bar for misconduct has been met in this case.

[89] Accordingly, the Claimant's conduct amounts to wilful misconduct for the purposes of EI benefits and she is disentitled to benefits from June 1, 2022, to July 3, 2022. [58]

– The benefit of the doubt argument must fail

[90] The Claimant's argument that she should be given the "benefit of the doubt" must also fail. The law allows the Commission to give the benefit of the doubt to a Claimant when they are disqualified or disentitled from EI benefits because of misconduct or because they voluntarily left a job.[59] The benefit of the doubt provision is applied by the Commission when the evidence on each side of the issue is equally balanced. The Court has held that this provision applies only to the Commission, and not by the Tribunal.[60]

The period from July 4, 2022, and onwards

– The Claimant is disqualified to benefits from July 4, 2022

[91] The Claimant was dismissed from her job on July 4, 2022. The employer told her this would happen if she didn't comply with the vaccination policy. She was told this in their letter dated May 17, 2022.[61]

[92] The termination letter dated July 4, 2022, identifies that the employer spoke with the Claimant and she confirmed that she had no plan or intention to become fully

[58] See section 31 of the EI Act.
[59] See section 49(2) of the EI Act.
[60] See C*haoui* v *Canada (Attorney General)*, 2005 FCA 66.
[61] See pages GD6-8 to GD6-9.

immunized. As a result, the letter stated, “your employment is terminated effective today for your failure to comply with the policy.”[62]

[93] For many of the same reasons noted in the preceding paragraphs, I find that the Claimant was dismissed for wilful misconduct on July 4, 2022, for failing to comply with the employer’s vaccination policy.

[94] The Claimant knew the consequences of non-compliance would lead to her dismissal. She was suspended on June 1, 2022, and knew that she would be dismissed on July 4, 2022. She made a voluntary, conscious and deliberate decision not to comply with the policy. That conduct led to her dismissal.

[95] I find that the Claimant’s conduct amounts to wilful misconduct for the purposes of EI benefits and she is disqualified to benefits from July 4, 2022.[63]

Conclusion

[96] The Claimant’s appeal is allowed in part. The General Division made errors of law and errors of fact in its decision.

[97] I have substituted with my own decision. There was no misconduct for the period that the Claimant had an approved religious exemption and accommodation by the employer. She is not disentitled or disqualified to benefits from January 10, 2022, to May 31, 2022.

[98] The Claimant is disentitled to benefits from June 1, 2022, to July 3, 2022, because she was suspended from work due to misconduct.

[99] The Claimant is also disqualified to benefits from July 4, 2022, because she lost her job due to her own misconduct.

Solange Losier
Member, Appeal Division

[62] See July 4, 2022, letter at pages GD6-6 to GD6-7.
[63] See section 30(1) of the EI Act.