Federal Court  Cour fédérale

Date: 20241002

Docket: T-2210-23

Citation: 2024 FC 1544

[ENGLISH TRANSLATION]

Montréal, Quebec, October 2, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

ANNA BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Anna Brown, is an employee of the Canadian Food Inspection Agency [CFIA]. She is seeking judicial review of a decision rendered on September 21, 2023 [Decision] by the Appeal Division of the Social Security Tribunal of Canada [SST] with respect to an application for leave to appeal. Ms. Brown filed this application for leave to appeal following a

decision by the General Division of the SST confirming the rejection of her application for employment insurance benefits. The SST's General Division concluded that Ms. Brown had been suspended from her employment as a result of her own misconduct, since she failed to comply with her employer policy, having refused to provide her vaccination status and having failed to apply for an exemption as required by the policy. The SST's Appeal Division refused Ms. Brown's application for leave to appeal because her appeal had no reasonable chance of success.

[2] Ms. Brown maintains that the SST's General and Appeal divisions applied the jurisprudence on the concept of misconduct in a mechanical manner, without taking into account the specific facts of her case and without considering other decisions of the Federal Court of Appeal [FCA] that ran counter to the reasoning adopted by the tribunal. According to Ms. Brown, the SST was required to address those decisions and to explain why it was of the opinion that they should not be followed. Ms. Brown contends that the SST's Appeal Division erred in its interpretation of the concept of misconduct by upholding the decision of the General Division, which had allegedly failed to address some of the criteria necessary for a finding of misconduct. In addition, Ms. Brown argues that the SST also erred in fact by concluding that the CFIA had followed the terms of the existing policy.

[3] For the following reasons, Ms. Brown's application for judicial review will be dismissed. Taking into account the findings of the SST's Appeal Division, the evidence presented to it, and the applicable law, the Decision contains no serious shortcomings that would require the Court's intervention. Ms. Brown has not shown that the Decision was unreasonable.

II. Background

A. *Facts*

[4] Ms. Brown works in the federal public service at the CFIA. On October 6, 2021, the Prime Minister of Canada announced that all employees of the Government of Canada would be subject to a mandatory vaccination policy, the *COVID-19 Vaccination Policy Applicable to the Core Public Administration, including the Royal Canadian Mounted Police*. The federal policy required all employees to be fully vaccinated against COVID-19, unless an accommodation was warranted, and to notify their employer of their vaccination status. The vaccination requirement applied to both employees who were teleworking and those who worked on site in a federal government facility. To comply with the Government of Canada's federal policy, the CFIA adopted and communicated its own internal policy requiring all employees to attest to their vaccination against COVID-19 by November 22, 2021 [CFIA Policy or Policy].

[5] The CFIA Policy came into effect on November 8, 2021 and applied to all CFIA employees, whether or not they were working remotely. It authorized requests for exemptions for medical or religious reasons or for other grounds covered by the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], subject to the manager's approval. The Policy also established that an employee's failure to disclose his or her vaccination status could result in disciplinary action against the employee concerned, including placement on unpaid leave starting two weeks after the attestation deadline of November 22, 2021. In cases where a person had duly applied for an exemption, the two-week period opening the door to unpaid leave only began to run from the date the employee was notified of the refusal of the exemption request.

[6] On November 22, 2021, the date on which her vaccination attestation was due, Ms. Brown refused to disclose her vaccination status on the online form. She also refused to acknowledge receipt of the privacy notice statement on the employer's form, which meant that the CFIA could not process her form online. Instead, she submitted a PDF attestation form that turned out to be incomplete. She also modified the PDF form by adding a fourth option to the vaccination status question, as she did not wish to disclose her vaccination status. She also included a request for accommodation based on a ground that was not specified in the CHRA. Ms. Brown would later explain that her request for accommodation was based on a [TRANSLATION] "moral objection to the mandate" that was not rooted in a specific religion and on a [TRANSLATION] "moral philosophy".

[7] Between November 25 and December 7, 2021, the CFIA contacted Ms. Brown by email regarding her incomplete and amended attestation form and her request for accommodation. On more than one occasion, the CFIA explained that it could not consider her request for accommodation because she had refused the preliminary step of reviewing the privacy notice statement on the form. The CFIA warned Ms. Brown that she would be placed on unpaid leave if she refused to disclose her vaccination status and accept the privacy notice statement contained in the employer's form.

[8] Following Ms. Brown's decision to maintain her refusal, the CFIA found that she had expressly refused to comply with the Policy by not accepting the privacy notice statement and not disclosing her vaccination status. Thus, on December 7, 2021, the CFIA placed Ms. Brown on unpaid leave. Shortly thereafter, however, the CFIA indicated that it would consider her request for accommodation in spite of its irregularities.

[9] On December 10, 2021, Ms. Brown applied to the Canada Employment Insurance Commission [Commission] for regular employment insurance benefits [Claim] under the *Employment Insurance Act*, SC 1996, c 23 [EIA]. On February 17, 2022, the CFIA confirmed to Ms. Brown that her request for accommodation — which the CFIA had nonetheless agreed to process despite the imposed leave without pay — was not approved, that she had not complied with the CFIA Policy by the December 7, 2021 deadline, and that she would remain on leave without pay until she complied with the Policy.

[10] As Ms. Brown continued not to comply with the Policy, she remained on unpaid leave until the vaccination requirement was lifted.

B. *The Commission's decision*

[11] On March 28, 2022, the Commission dismissed Ms. Brown's Claim under sections 29 to 31 of the EIA, as it determined that Ms. Brown had been suspended from her employment as a result of her own misconduct. Given that her departure was voluntary, she was not entitled to employment insurance benefits.

[12] Following a request for reconsideration of the Commission's decision, the latter upheld the initial decision on June 30, 2022.

[13] Meanwhile, on June 20, 2022, Ms. Brown returned to work at the CFIA after the federal government lifted the vaccination requirement.

[14] On July 28, 2022, Ms. Brown appealed the Commission's reconsideration decision to the General Division of the SST.

C. *The SST's General Division decision*

[15] On March 10, 2023, the SST's General Division rejected the appeal of the Commission's decision. The General Division in turn concluded that Ms. Brown had been suspended as a result of her own misconduct. In particular, the tribunal noted that Ms. Brown testified that she was well aware of the CFIA Policy and the deadline for providing proof of vaccination.

[16] The General Division further concluded that the CFIA had clearly notified Ms. Brown that a request for accommodation required her to complete the privacy notice statement and the attestation of vaccination status, but that she refused to complete either document. According to the General Division, Ms. Brown thus made a conscious decision not to follow the CFIA Policy and her employer's requests, which included repeated warnings of the consequences of her non-compliance.

[17] The General Division therefore determined that Ms. Brown knew or should have known that her failure to comply with the CFIA Policy could result in her suspension. On the basis of its findings, the General Division concluded that these facts constituted misconduct within the meaning of the EIA.

[18] Ms. Brown later applied to the SST's Appeal Division for leave to appeal the General Division's decision.

D. *The SST's Appeal Division Decision*

[19] In support of her application for leave to appeal, Ms. Brown alleged errors of fact and law. She first raised an error of law, alleging that the General Division had applied a separate federal court case law instead of a — now overturned — SST's General Division decision entitled *AL v Canada Employment Insurance Commission*, 2022 SST 1428 [*AL*]. She also identified a factual error whereby the General Division failed to take into account elements of the CFIA Policy concerning the attestation deadline.

[20] The Appeal Division refused leave to appeal on September 21, 2023, finding that the appeal had no reasonable chance of success.

[21] According to the Appeal Division, the General Division provided detailed reasons for not following *AL*, noting in passing that SST members are not bound by other tribunal decisions and are not required to comply with them. Furthermore, the Appeal Division concluded that the General Division had correctly considered and followed binding federal court case law that contradicted the *AL* decision.

[22] Lastly, the Appeal Division determined that the General Division had committed no error of fact because, among other things, it had addressed the details of the CFIA Policy in a manner consistent with the record, having regard to the evidence supported by the record. In light of these facts, the Appeal Division concluded that Ms. Brown has raised no reviewable error on the part of the General Division under section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA].

E. *Relevant statutory provisions*

[23] The relevant statutory provisions can be found in the DESDA and the EIA.

[24] With respect to the DESDA, the relevant provision is section 58. It reads as follows:

Grounds of appeal — Employment Insurance Section	**Moyens d'appel — section de l'assurance-emploi**
58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**58 (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants :
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[25] With respect to the EIA, the relevant provisions are found in sections 30 and 31, which read, in part, as follows:

Disqualification — misconduct or leaving without just cause	**Exclusion : inconduite ou départ sans justification**
30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless	**30 (1)** Le prestataire est exclu du bénéfice des prestations s'il perd un emploi en raison de son inconduite ou s'il quitte volontairement un emploi sans justification, à moins, selon le cas :
(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or	**a)** que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;
(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.	**b)** qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.
…	…
Disentitlement — suspension for misconduct	**Inadmissibilité : suspension pour inconduite**
31 A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until	**31** Le prestataire suspendu de son emploi en raison de son inconduite n'est pas admissible au bénéfice des prestations jusqu'à, selon le cas :
(a) the period of suspension expires;	**a)** la fin de la période de suspension;

(b) the claimant loses or voluntarily leaves the employment; or	**b)** la perte de cet emploi ou son départ volontaire;
(c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.	**c)** le cumul chez un autre employeur, depuis le début de cette période, du nombre d'heures d'emploi assurable exigé à l'article 7 ou 7.1.

F. *Standard of review*

[26] There can be no doubt that the standard of review applicable to decisions of the SST's Appeal Division is that of reasonableness (*Cecchetto v Canada (Attorney General)*, 2024 FCA 102 at para 4 [*Cecchetto FCA*]; *Khodykin v Canada (Attorney General)*, 2024 FCA 96 at para 12 [*Khodykin FCA*]; *Palozzi v Canada (Attorney General)*, 2024 FCA 81 at para 3 [*Palozzi FCA*]; *Kuk v Canada (Attorney General)*, 2024 FCA 74 at para 5 [*Kuk FCA*]; *Francis v Canada (Attorney General)*, 2023 FCA 217 at para 4 [*Francis FCA*]; *Bhamra v Canada (Attorney General)*, 2023 FCA 121 at para 3; *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paras 20–21 [*Cecchetto FC*]; *Gauvreau v Canada (Attorney General)*, 2021 FC 92 at paras 24–27 [*Gauvreau FC*]; *Malonga v Canada (Attorney General)*, 2020 FC 913 at para 10; *Marcoux v Canada (Attorney General)*, 2020 FC 609 at para 10; *Astolfi v Canada (Attorney General)*, 2020 FC 30 at para 15).

[27] Moreover, the framework for judicial review of the merits of an administrative decision is now that established by the Supreme Court of Canada in *Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 [*Vavilov*] and (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]). This framework is based on the presumption that the applicable standard of review in all cases is now that of reasonableness.

[28] When the applicable standard of review is that of reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Mason* at para 64; *Vavilov* at para 85). The reviewing court must therefore ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

[29] It is not sufficient for the decision to be justifiable. In cases where reasons are required, the decision "must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [italics in original] (*Vavilov* at para 86). Thus, a review on a standard of reasonableness is concerned as much with the outcome of the decision as with the reasoning followed (*Vavilov* at para 87). Such a review must include a rigorous evaluation of administrative decisions. However, a reviewing court must begin its inquiry into the reasonableness of a decision by taking a "reasons first" approach, examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt a posture of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). I underline that the reasonableness standard always finds its starting point in

the principle of judicial restraint and deference and requires reviewing courts to show respect for the distinct role that the legislature has chosen to confer on administrative decision makers rather than on the courts (*Mason* at para 57; *Vavilov* at paras 13, 46, 75).

[30] The burden is on the party challenging the decision to show that it is unreasonable. To set aside an administrative decision, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be considered reasonable (*Vavilov* at para 100).

III. Analysis

[31] Ms. Brown maintains that the SST's General and Appeal divisions applied the case law on the concept of misconduct in a mechanical manner, without taking into account the specific facts of her case and without considering other decisions of the FCA that would run counter to the reasoning adopted by the tribunal.

[32] Ms. Brown also maintains that in light of this case law, the SST erroneously identified the act complained of as having voluntarily violated the CFIA Policy. According to Ms. Brown, by failing to correctly identify the act complained of (which she describes as a refusal to get vaccinated) and the consequence of that act (i.e., non-compliance with the CFIA Policy), the SST was unable to find that the act complained of is a right guaranteed and protected by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Ms. Brown believes that if the SST did not

correctly identify the act complained of, its entire analysis of the misconduct suffers, and this error is fatal to the reasonableness of the Decision.

[33] Lastly, Ms. Brown argues that the Appeal Division failed to address several relevant arguments in its Decision. Thus, Ms. Brown submits that the Appeal Division failed to consider that the accommodation policy provided took precedence over the CFIA's vaccination Policy, failed to address the causal link clearly invoked by the latter, and disregarded the absence of a breach of her specific employment obligations. In this sense, Ms. Brown argues that the SST failed to understand that the act complained of was in fact the exercise of rights protected under the *Charter*, and that it was not a reprehensible act in the nature of misconduct.

[34] I do not agree with Ms. Brown.

[35] Like the respondent, the Attorney General of Canada [AGC] on behalf of the Minister of Employment and Social Development Canada [Minister], I am of the opinion that the SST's Appeal Division reasonably refused Ms. Brown's application for leave to appeal.

[36] The Appeal Division carefully considered the wording and factors set out in section 58 of the DESDA before dismissing Ms. Brown's application. The Appeal Division explained its reasons in detail, basing them on the consistent case law of the federal courts on which the General Division had itself based its decision on misconduct. In particular, the Appeal Division set out the reasons why it disagreed with the *AL* decision and lacked jurisdiction to review and enforce Ms. Brown's collective agreement. Lastly, the Appeal Division ruled that the General

Division had correctly concluded that members of the SST are not bound to follow other tribunal decisions.

[37] The SST's Decision, it should be noted, is now supported by recent, abundant, and unanimous case law of this Court and the FCA which confirmed, in the context of cases dealing directly with mandatory vaccination policies, the tribunal's narrow role in appeals involving issues of misconduct (see in particular: *Cecchetto FCA*; *Khodykin FCA*; *Palozzi FCA*; *Kuk FCA*; *Lalancette v Canada (Attorney General)*, 2024 FCA 58 [*Lalancette FCA*]; *Sullivan v Canada (Attorney General)*, 2024 FCA 7 [*Sullivan FCA*]; *Zhelkov v Canada (Attorney General)*, 2023 FCA 240 [*Zhelkov FCA*]; *Francis FCA*; *Hazaparu v Canada (Attorney General)*, 2024 FC 928 [*Hazaparu FC*]; *Boskovic v Canada (Attorney General)*, 2024 FC 841 [*Boskovic FC*]; *Spears v Canada (Attorney General)*, 2024 FC 329 [*Spears FC*]; *Butu v Canada (Attorney General)*, 2024 FC 321 [*Butu FC*]; *Cecchetto FC*).

[38] Incidentally, each and every one of these decisions contradicts Ms. Brown's erroneous understanding of the misconduct test.

A. *The test for granting leave to appeal*

[39] The test for granting leave to appeal to the SST's Appeal Division is found in the DESDA. Thus, an application for leave to appeal a decision of the General Division can only be granted if the applicant succeeds in demonstrating that at least one of the three grounds for appeal set out in subsection 58(1) of the DESDA has a reasonable chance of success (*Cecchetto FCA* at para 5).

[40] According to subsection 58(1) of the DESDA, the only grounds of appeal are if the General Division:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[41] Subsection 58(2) of the DESDA provides that leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success". A reasonable chance of success, in other words, is having "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12).

B. *The Decision was reasonable*

[42] The role of the Court is to determine whether the Decision of the SST's Appeal Division was reasonable. For the reasons that follow, I find that it was.

(1) No error of fact

[43] In her submissions, Ms. Brown first argued that she had complied with CFIA Policy. With respect, that was clearly not the case.

[44] The CFIA Policy clearly required Ms. Brown to disclose her vaccination status to her employer and agree to the privacy notice statement, which she clearly did not do. As a result, she

found herself in violation of CFIA Policy. Conversely, in acting as it did, the CFIA followed the parameters of its Policy, which required disclosure of vaccination status and acceptance of the privacy notice statement to avoid being placed on unpaid leave. These were prerequisites for processing a request for exemption or accommodation. Given that Ms. Brown refused to comply with these prerequisites, the CFIA was within its rights to follow the Policy and relieve her of her employment.

[45] Ms. Brown claims that the CFIA Policy gave her the right to receive a response to her request for accommodation before being forced to fill out the vaccination status attestation form or give up her privacy regarding her vaccination status. She would then have had two weeks to complete the attestation following the potential refusal of her request, all in order to study or review her position on the vaccination requirement. In short, she submits that the CFIA was required to deal with her request for accommodation before laying her off.

[46] I am not persuaded by Ms. Brown's argument.

[47] The issue, I reiterate it, is whether it was reasonable for the SST's Appeal Division to interpret the CFIA Policy as it did. In the eyes of the Court, and considering the wording of the Policy, the CFIA's interpretation was undeniably reasonable. The CFIA Policy clearly stated that consideration of a request for exemption or accommodation required two prerequisites: disclosure of vaccination status and acquiescence to the privacy notice statement. Ms. Brown failed to meet those prerequisites. Ms. Brown was aware of the CFIA Policy, and was no doubt well aware of what was required of her in order to comply with it.

[48] Moreover, I see nothing unreasonable in the SST's Decision to take into account the emails sent by the CFIA on the prerequisites to be met in order to submit a request for accommodation, or in its ultimate conclusion that Ms. Brown had not complied with the Policy. The CFIA made it clear what Ms. Brown was required to do first to submit her accommodation form, and explained to her on at least two occasions that she would be suspended at the beginning of December 2021 if she failed to comply with the parameters of the Policy. Nevertheless, Ms. Brown continued to refuse to comply with those parameters.

[49] In short, there was no error of fact in the Decision of the SST's Appeal Division.

(2) No error of law

[50] Nor do I find any error of law in the Decision. It was entirely reasonable for the SST's Appeal Division (and for the General Division before it) to rely on the decisions of the federal courts in *McNamara v Canada (Attorney General)*, 2007 FCA 107, *Paradis v Canada (Attorney General)*, 2016 FC 1282 [*Paradis FC*], and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 [*Mishibinijima FCA*] in its interpretation of the term "misconduct".

(a) Al *decision*

[51] First, it was entirely open to the General Division and the Appeal Division not to follow *AL*, a decision made by another member of the SST.

[52] It is not disputed that the SST is not bound by its own decisions. In detailed reasons, the General Division explained how the facts of the present case differed from those in *AL* and, more importantly, why it preferred to follow the unanimous case law of the federal courts that was contrary to *AL* on the concept of misconduct in the context of mandatory vaccination policies. Ms. Brown raised no meritorious argument that would invalidate the approach taken by the SST regarding the *AL* decision.

(b) *The SST did not apply the case law on the concept of misconduct in a mechanical manner*

[53] Ms. Brown maintains that the SST's General and Appeal Divisions applied the case law on the concept of misconduct in a mechanical manner, without taking into account the specific facts of her case and without considering other FCA decisions that would run counter to the reasoning adopted by the tribunal. According to Ms. Brown, the SST erroneously identified her alleged action as a wilful violation of CFIA policy. Ms. Brown opined that there was a lack of a causal relationship between the [TRANSLATION] "so-called reprehensible act", which in this case would be the refusal to get vaccinated, and the termination of her employment.

[54] With respect, Ms. Brown's arguments have no merit. The Appeal Division's Decision is now supported by abundant and unanimous case law that confirms the narrow role of the SST in misconduct appeals and in no way supports Ms. Brown's reading of the misconduct test (see in particular: *Cecchetto FCA*; *Kuk FCA*; *Francis FCA*; *Sullivan FCA*; *Spears FC*; *Butu FC*; *Abdo v Canada (Attorney General)*, 2023 FC 1764 at paras 19–33 [*Abdo FC*]; *Milovac v Canada (Attorney General)*, 2023 F 1120 at paras 22–29 [*Milovac FC*]; *Matti v Canada (Attorney General)*, 2023 FC 1527 at paras 17–24).

[55] Although they were all directly relevant to the present case, since they concern mandatory vaccination policies, Ms. Brown's memorandum surprisingly omitted all these recent federal courts decisions, which systematically run counter to what she has pleaded and argued before the Court. At the hearing before the Court, Ms. Brown's counsel finally addressed them in an attempt to distinguish them, while suggesting that these decisions should be set aside in favour of older FCA decisions on the concept of misconduct. The Court is not persuaded by these submissions, concluding instead that these precedents highlight Ms. Brown's misunderstanding of the misconduct test.

(c) *Concept of misconduct*

[56] First, let us discuss the concept of misconduct. The description and parameters of misconduct developed over the years by the FCA continue to apply (*Gauvreau FC* at para 27, citing *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 21 [*Nelson FCA*]).

[57] Misconduct within the meaning of the EIA occurs when "the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility" (*Mishibinijima FCA* at para 14). *Mishibinijima FCA* teaches that there is misconduct in an employment insurance claim where (1) the misconduct was wilful; (2) the claimant knew or ought to have known that his or her conduct was such as to impair the performance of the duties owed to his or her employer; and (3) there is a causal relationship between the said misconduct and the termination of employment.

[58] It is therefore sufficient to demonstrate the intentional commission of an act contrary to his or her employment obligations (*Sullivan FCA* at para 6).

[59] In *Canada (Attorney General) v Lemire*, 2010 FCA 314 [*Lemire FCA*], the FCA reiterated that a causal element is required to determine whether misconduct could lead to dismissal. Thus, "there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment" (*Lemire FCA* at para 14). However, adds the FCA, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal (*Lemire FCA* at para 15; see also *Khodykin FCA*).

[60] The concept of misconduct under the EIA therefore has a special meaning: it includes any conscious contravention of a measure put in place by an employer. It does not require a degree of blame or fault on the part of the employee; it simply requires a reprehensible action, i.e., an action that deserves to be reprimanded, taken back, or sanctioned. It is also well established that deliberate non-compliance with an employer's policy is considered misconduct within the meaning of the EIA (*Canada (Attorney General) v Bellavance*, 2005 FCA 87 at para 7 [*Bellavance FCA*]; *Canada (Attorney General) v Gagnon*, 2002 FCA 460 at paras 2–5). Contrary to what some might believe, misconduct does not require that the employee act with malicious intent (*Cecchetto FC* at para 37).

[61] Misconduct is a failing of such a scope that the employee could normally foresee that it would be likely to result in dismissal. The breach is not reprehensible in the sense of malicious: it is reprehensible in the sense that it can be blamed or condemned and can lead to a sanction such as a layoff or dismissal.

[62] In *Francis FCA*, the FCA recently refused to review the misconduct test developed by case law. And it confirmed in the same breath that the voluntary refusal to comply with a mandatory COVID-19 vaccination policy leading to the dismissal of an employee who was unable to obtain an exemption for religious reasons may constitute misconduct (*Francis FCA* at para 6; see also *Palozzi FCA* at para 6; *Kuk FCA* at paras 8–9; *Sullivan FCA* at paras 4–7; *Lalancette FCA* at para 2; *Zhelkov FCA* at para 5; *Nelson FCA* at para 21; *Bellavance FCA* at para 9; *Cecchetto FC* at paras 32–33). In *Cecchetto FCA*, the FCA also reconfirmed the misconduct test that this Court had summarized in *Cecchetto FC* (*Cecchetto FCA* at para 10; *Cecchetto FC* at para 39). I point out that, in all of these FCA cases, claimants had been denied employment insurance benefits after failing to comply with their employer's COVID-19 vaccination policies.

[63] In *Cecchetto FC*, affirmed by *Cecchetto FCA*, the Court reaffirmed that the SST's role was limited. Thus, the Court in that case noted that the fact that the SST did not address issues concerning bodily integrity, consent to medical testing, the safety and efficacy of COVID-19 vaccines or antigen tests did not make the Appeal Division's decision unreasonable, since the law did not authorize the tribunal to address such issues (*Cecchetto FC* at para 32).

[64] There can be no doubt that the recent case law of this Court and the FCA unreservedly supports the interpretation of misconduct adopted by the SST's Appeal Division in Ms. Brown's case. Thus, this Court recently reiterated that arguments to the effect that the General Division committed errors of fact or law regarding the employer's adoption of a vaccination policy have no reasonable chance of success, as the SST has no authority to address these issues and the misconduct test does not focus on the employer's conduct (*Spears FC* at paras 26–27). On the basis of *Nelson FCA* and *Bellavance FCA*, the Court has also observed that failure to get vaccinated when an employee is aware of a vaccination policy and deliberately chooses not to follow it constitutes misconduct (*Abdo FC* at para 22). The Court clarified that, in such a circumstance, it is reasonable for the Appeal Division to uphold the General Division's findings 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 therefore was a form of misconduct (*Abdo FC* at para 23).

[65] These findings were recently reiterated by this Court in *Butu FC*, which again concluded that the matter of whether a vaccination policy was reasonable was not within the jurisdiction of either the Commission, the SST's General Division or the SST's Appeal Division (*Butu FC* at para 89, citing *Cecchetto FC* at para 32). As in Ms. Brown's case, the applicant in that proceeding alleged an infringement of her privacy and other *Charter* rights. The Court once again found that the General Division and Appeal Division had identified the appropriate tests and reasonably applied federal court case law to determine that the employee had been suspended and then terminated as a result of her own misconduct (*Butu FC* at para 91). And, as in the present case, that case involved a failure to comply with the preliminary stages of a

vaccination policy, which was deemed sufficient to constitute misconduct within the meaning of the EIA.

[66] Given the unanimous case law of this Court and the FCA, it was eminently reasonable for the SST's Appeal Division to conclude as it did.

(d) *Employer's policies*

[67] I underline that the SST is not the place to question an employer's policies. The misconduct test focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies.

[68] The FCA has recently provided a precise framework for the role of the SST's Appeal Division. In *Sullivan FCA*, the FCA established that it was reasonable for the Appeal Division to conclude that the test for misconduct focuses on the employee's knowledge and actions, and not on the employer's behaviour or the reasonableness of its work policies, adding that a claimant could pursue remedies elsewhere if he considered that his employer treated him inappropriately (*Sullivan FCA* at paras 4–5). Justice David Stratas also observes that such a conclusion is supported by the applicable case law (*Sullivan FCA* at para 5). To that end, he noted that:

> [6] We would add that the court jurisprudence makes sense. Were the applicant's submissions to be upheld, the Social Security Tribunal would become a forum to question employer policies and the validity of employment dismissals. Under any plausible reading of the legislation that governs the Tribunal, it is a forum to determine entitlement to social security benefits, not a forum to adjudicate allegations of wrongful dismissal. We note that the applicant in fact has pursued remedies elsewhere for wrongful dismissal and has made a human rights complaint.

(*Sullivan FCA* at para 6.)

[69] Since then, the federal courts have issued multiple decisions establishing that the SST is not the appropriate forum to challenge the merits or propriety of a vaccination policy (*Pallozi FCA* at para 6; *Kuk FCA* at para 7; *Hazaparu FC* at para 16). There are other avenues for this, such as a wrongful dismissal action or a human rights complaint.

[70] In three recent cases decided by this Court, *Spears FC*, *Hazaparu FC*, and *Butu FC* — all situations where, like Ms. Brown, the applicants were challenging the wisdom or appropriateness of a vaccination policy —, it is clearly established that these are not issues that the Appeal Division can consider, nor are they grounds on which this Court could find the decision unreasonable.

[71] Ms. Brown has submitted no convincing argument to distinguish this case law from the facts of the present case.

(e) *The link with employee obligations*

[72] Ms. Brown contends, in claiming to rely on *Canada (Attorney General) v Cartier*, 2001 FCA 274 at paragraph 12 [*Cartier FCA*], that it is not just any unfulfilled work obligation that can result in misconduct, but rather only those that prevent the employee from performing his or her duties. Ms. Brown maintains that, in the present case, her failure to comply with the vaccination requirement and/or her failure to waive the confidentiality of medical information

were completely unrelated and did not hinder the performance of her duties with the CFIA. For this reason, she says, they could not constitute misconduct.

[73] With respect, this is a misunderstanding of the test established by case law. Ms. Brown distorts the scope of the case law by limiting work obligations to the strict duties of an employee. It is in fact incorrect to say that the reprehensible behaviour must hinder the performance of the employee's specific work obligations. The case law refers rather to a hindrance to the employer-employee relationship, which goes far beyond the mere duties performed by an employee. In other words, the question is not whether a failure to comply with an employer's policy affects the performance of duties. Rather, the question is whether the non-compliance hinders the employee's obligations to his or her employer.

[74] As the Minister notes, the Court has already ruled on Ms. Brown's argument that the SST was required to produce evidence that non-vaccination had an impact on her particular duties. The Court clearly concluded that the SST was not required to do so (*Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 37, aff'd *Kuk FCA*). Similarly, the tribunal did not need to analyze the employment context or causation because the misconduct test focused on Ms. Brown's objective knowledge of the consequences of her actions (*Sullivan FCA* at paras 4–5).

[75] Thus, the concept of misconduct is not limited to an employee's duties alone. Rather, it refers to the more general duty of employees to their employers, to the employer-employee relationship in the broadest sense. Moreover, in paragraphs 10 and 11 of its reasons, *Cartier FCA* speaks of a link between misconduct and duties "[related] to his or her employment". For its part,

Nelson FCA refers to "an express or implied term of the Applicant's employment" (*Nelson FCA* at para 26; see also *Mishibinijima FCA* at para 14 and *Butu FC* at para 83). As the FCA stated in *Locke v Canada (Attorney General)*, 2003 FCA 262 at paragraph 8, misconduct is a departure from that fundamental point that the employee knew or ought to have known that he or she was in danger of losing his or her job. This is a situation where the employee knew or should have known that his or her conduct could interfere with his or her obligations to his or her employer (*Lemire FCA* at paras 13–14). It is in this sense that we speak of essential job functions.

[76] In other words, the case law speaks of the performance of "duties" to the employer in a broad sense, and not of the performance of the "functions" limited to the employee, as Ms. Brown attempts to narrow it down to. One of the obligations employees have towards their employer is to comply with the rules and policies put in place by the latter.

[77] Contrary to Ms. Brown's assertion, the issue is not whether there was a lack of evidence that non-vaccination had an impact on her performance or ability to perform her duties. Rather, misconduct occurs when behaviour interferes with the performance of the employee's more general obligations to the employer. Moreover, the objective definition of misconduct formulated by the FCA in *Mishibinijima FCA* states that "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility" (emphasis added) (*Mishibinijima FCA* at para 14; see also *Cecchetto FCA* at paras 8, 10; *Palozzi FCA* at para 7; *Nelson FCA* at para 21).

(f) *Causal relationship between act and job termination*

[78] Ms. Brown complains that the SST misjudged the act or omission that led to her suspension. I do not share that view. On the contrary, that is precisely what the SST did in asking and answering this question: Ms. Brown's act was to refuse to disclose her vaccination status and to complete the confidentiality attestation, despite her employer's direct and explicit requests to comply with these requirements.

[79] In *Canada (Attorney General) v Granstrom*, 2003 FCA 485 [*Granstrom FCA*], the Court established that it is not the breach of a condition of employment that constitutes misconduct but rather the act that led to the breach of the condition of employment, thus concluding that not every breach of a condition of employment constitutes misconduct (*Granstrom FCA* at para 7). Thus, the effect of misconduct cannot be confused with the cause of that misconduct.

[80] Ms. Brown claims that her action was her choice not to be vaccinated, which she believes represents a protected and legal right that, at its very core, is not objectionable, as it is protected by the *Charter*. The violation of the CFIA Policy was merely the unfortunate consequence of exercising a legal and protected act.

[81] I disagree and do not share Ms. Brown's interpretation of the misconduct test. Ms. Brown's reprehensible act was her refusal to declare her vaccination status, to correctly complete the required form, and to comply with confidentiality requirements, as prescribed by the CFIA Policy. The reprehensible act is not the choice not to be vaccinated, because this choice does not exist in the CFIA Policy. In other words, it was not the exercise of a right that would

otherwise be guaranteed by the *Charter* that was considered to be misconduct by the SST; it was the failure to comply with the requirements of the CFIA Policy.

[82] In her submissions, Ms. Brown attempted to distinguish between the act complained of and the consequence of the act (which would be the violation of the Policy). But, in fact, Ms. Brown was not referring to the action she had taken and which the CFIA had complained of. Rather, she was referring to the motivation and *raison d'être* behind her act. The question of choosing not to be vaccinated, of protected rights, and of not wanting to relinquish one's right to privacy is not the reprehensible act at issue here; rather, it is the motive underlying and justifying that act. The offending act was the refusal to provide her vaccination status or to waive confidentiality of her vaccination status. It is this act that constitutes misconduct and a reprehensible act, as it contravenes the CFIA Policy.

[83] There is clearly a link between Ms. Brown's actions and the CFIA Policy.

(g) *The SST does not have to deal with* Charter *issues*

[84] Ms. Brown also complains that the SST did not adequately address her *Charter* arguments. With respect, the tribunal was not required to. In *Khodykin FCA* and *Sullivan FCA*, the FCA clearly reiterated as much and confirmed that the SST has no jurisdiction to consider the constitutionality of a vaccination policy or its compliance with the *Charter* (*Khodykin FCA* at para 8; *Sullivan FCA* at para 12).

[85] I understand that Ms. Brown firmly believes that the CFIA's Policy is an overreaction to the COVID-19 pandemic and that the Policy has been unfairly applied to her, given her health history and impeccable performance as an employee. I also note her deep conviction that the SST (both the General Division and the Appeal Division) failed to address her concerns about the violation of her rights guaranteed and protected by the *Charter* and her employment contract. However, these are matters that the SST is not legally authorized to consider (*Milovac FC* at para 27; *Cecchetto FC* at para 32). The SST has a limited role to play in deciding whether or not to grant leave to appeal a General Division decision.

[86] Furthermore, Ms. Brown argues that in asserting her motivation behind her refusal to comply with the CFIA Policy, she was not challenging the validity of the Policy; rather, she was asking the SST to proceed with an interpretation of the concept of misconduct by considering the rights protected by the Charter. I am not convinced by the arguments and distinctions Ms. Brown attempts to make. By invoking her *Charter* rights, it is undeniable, in my view, that Ms. Brown was in fact challenging the merits and *raison d'être* of the CFIA Policy, which she is not entitled to do before the SST.

[87] The SST does not have the jurisdiction to conclude that the CFIA Policy infringed Ms. Brown's rights, as such a conclusion would be outside its field of expertise and outside the proper exercise of its legal authority. Thus, the Appeal Division's decision cannot be characterized as being unreasonable for not addressing these constitutional issues since the tribunal lacks the jurisdiction to do so (*Zhelkov FCA* at para 5; *Boskovic FC* at para 30; *Cecchetto FC* at paras 46–47). Whether a policy is contrary to the *Charter* is a matter for another forum (*Boskovic FC* at para 57).

[88] I reiterate that the SST is not the appropriate forum for questioning employers' policies and the validity of dismissals. Rather, it is a forum for determining entitlement to social security and employment insurance benefits, not a forum for adjudicating allegations of wrongful dismissal (*Sullivan FCA* at para 6). In this case, the SST's General Division and Appeal Division have considered and addressed the right legal issue. The issue was not whether the CFIA Policy was reasonable or too severe, or whether the suspension or dismissal was justified (*Paradis FC* at paras 30–34). The issue was whether Ms. Brown could normally foresee that her conduct would interfere with her obligations to the CFIA and result in her suspension or dismissal.

[89] Moreover, in a case similar to Ms. Brown's, the FCA recently affirmed that it is appropriate for the Appeal Division to refer to relevant case law and decline to consider certain arguments that fall outside its jurisdiction (*Zhelkov FCA* at para 5, citing *Cecchetto FC*). This includes, in particular, questions relating to the appropriateness of a vaccination policy (*Zhelkov FCA* at paras 1–3).

(h) *Collective agreement*

[90] Lastly, in *Nelson FCA*, the FCA rejected the argument that an employer's written policy had to appear in an initial employment contract to justify misconduct. Courts have upheld this conclusion in the context of mandatory vaccination, confirming that the SST is not required to focus on contractual language when determining misconduct, contrary to Ms. Brown's assertions.

(i) *Conclusion*

[91] In sum, the Appeal Division reasonably refused leave to appeal because Ms. Brown did not raise a reviewable error under subsection 58(1) of the DESDA. The General Division correctly identified the appropriate legal test for determining misconduct under the EIA: the employee knew or ought to have known that her conduct could lead to her suspension. The General Division then applied this test to Ms. Brown's situation. There is no error of law or fact in the decisions of either the General Division or the Appeal Division.

[92] It is clear that Ms. Brown was notified that she could not submit her request for accommodation without first complying with other requirements of the Policy, namely attesting to her vaccination status and completing the form and privacy notice statement.

(3) The SST has amply dealt with Ms. Brown's arguments

[93] Ms. Brown also contends that the Appeal Division failed to address several of her arguments in its Decision. Thus, Ms. Brown submits that the Appeal Division failed to consider that the accommodation policy provided took precedence over the CFIA's vaccination Policy, failed to address the causal link clearly invoked in her submissions, to respond to her arguments on protected rights, or to consider the fact that there was no breach of her specific work duties.

[94] As discussed above, these arguments are completely unfounded.

[95] Ms. Brown writes in her submissions that failing to adhere to an employer policy that infringes her *Charter* rights cannot constitute misconduct within the meaning of the EIA. She adds that the CFIA's vaccination Policy, as applied in her case, infringes not only on her right to

liberty and security, but also on her right to life and freedom of conscience. She argues that she could not, according to her conscience and convictions, fulfill the requirements of the CFIA Policy, invoking her right to refuse medical treatment. She explains that her request was based on deep convictions, that her free and informed consent to this treatment was necessary to maintain an ethical medical system. She refers more generally to the rights protected under the *Charter*, the "Bill of Rights" and the CHRA — and to the fact that an employer cannot limit them — and then to privacy laws and the Nuremberg Code.

[96] At the SST hearing, Ms. Brown reiterated these assertions, including her fundamental right not to accept medical treatment, including vaccination, and that such a refusal cannot constitute misconduct.

[97] Once again, Ms. Brown misunderstands the essence of the Appeal Division's Decision. The SST did not assert that choosing not to get vaccinated constituted misconduct. Rather, it stated that failure to meet the prerequisites set out in the CFIA Policy was misconduct. The question is not whether the exercise of a protected right is right or wrong. The question is whether or not Ms. Brown complied with the CFIA Policy.

[98] Although she tries to paint her *Charter* argument from what she claims is a new angle, Ms. Brown is in fact attacking the merits of the CFIA Policy as unreasonable and unjust, invoking rights she claims are protected. This issue of protected rights was addressed and considered by the Commission and by both divisions of the SST, all of which refuted

Ms. Brown's arguments with extensive reasons, indicating that these concerns were not relevant to the assessment of misconduct under the EIA.

[99] The SST therefore amply addressed Ms. Brown's arguments regarding protected rights, and the Decision contains no errors. It was open to the Appeal Division, on the basis of the record before it, to conclude that Ms. Brown's deliberate conduct constituted misconduct within the meaning of the EIA.

IV. Conclusion

[100] The onus was on Ms. Brown to show that the decision was unreasonable. Any shortcomings or deficiencies identified by Ms. Brown could not have been merely superficial or incidental to the substance of the decision, but rather had to be significant enough as to render the Decision unreasonable (*Vavilov* at para 100). That was not the case.

[101] For the reasons above, the application for judicial review is dismissed. Under the standard of reasonableness, the reasons for the Decision had to demonstrate that the findings of the SST's Appeal Division were based on an intrinsically coherent and rational analysis, were justified in light of the legal and factual constraints to which the administrative decision-maker was subject, and had followed a fair process. That was the situation in the case at bar. The Appeal Division's analysis bears all of the requisite hallmarks of transparency, justification, and intelligibility, and the Decision was not tainted by any reviewable error.

[102] In the particular circumstances of this case, I agree with Ms. Brown that there should be no award as to costs.

JUDGMENT in T-2210-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

"Denis Gascon"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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