Federal Court  Cour fédérale

Date: 20240228

Docket: T-1312-23

Citation: 2024 FC 321

Ottawa, Ontario, February 28, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ADINA BUTU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Adina Butu [Ms. Butu], seeks judicial review of the Social Security Tribunal Appeal Division's [SST-AD] decision refusing to grant leave to appeal the decision of the Social Security General Division [SST-GD]. The SST-GD upheld the Canada Employment Insurance Commission's [the Commission] decision to deny her employment insurance [EI] benefits and agreed that Ms. Butu was terminated from her employment at the Toronto Public Library [TPL] due to her own misconduct. The misconduct at issue is Ms. Butu's failure to comply with the TPL's COVID-19 vaccination policy.

[2] On this Application for Judicial Review, Ms. Butu raises many of the same arguments she raised with the Commission, SST-GD, and SST-AD. Ms. Butu submitted a voluminous record of approximately 700 pages. Ms. Butu also filed an outline record of her oral argument.

[3] Ms. Butu's many arguments arise from her general opposition to the TPL's vaccination policy, which she asserts was not a condition of her employment or collective agreement, achieved little given the lack of evidence of the vaccine's effectiveness, and did not interfere with her ability to do her job safely. She submits that she did comply with the policy because she submitted a request for accommodation, which TPL failed to address. Ms. Butu also disputes that she was aware of the consequences of non-compliance with the policy and suggests that TPL's communication about the policy was ambiguous. She submits that several other factors, including inconsistent jurisprudence from the SST-GD, supported her disbelief that the failure to provide proof of her vaccination status would result in the termination of her employment.

[4] Ms. Butu has represented herself well throughout the appeal process and in this Court. She has raised many issues, compiled a lengthy record, scrutinized the documents on the record, and researched the jurisprudence in support of her position that she should not be disqualified from EI benefits.

[5] Ms. Butu challenges the decision of the SST-AD, which she argues erred in not finding that there were grounds for a successful appeal, and indirectly challenges the decision of the SST-GD, which she argues contains errors of fact and law. However, despite her arguments and for the reasons set out below, her Application for Judicial Review must be dismissed.

[6] As noted by the SST-AD and by this Court in many other cases, it is not the role of the Commission, the SST-GD, or the SST-AD to determine the reasonableness of an employer's policy. The SST-GD and SST-AD applied the governing jurisprudence in finding that the Commission did not err in determining that Ms. Butu was not eligible for EI benefits due to her non-compliance with her employer's policy, which amounted to misconduct. Other fora exist to challenge employment related policies and allegedly wrongful dismissals.

I. Background

[7] Ms. Butu was employed by the TPL as a clerk/caretaker. TPL introduced a COVID-19 vaccination policy on September 2, 2021 requiring all employees to provide proof of their vaccination status by September 20, 2021 and to be fully vaccinated or obtain an exemption by October 30, 2021.

[8] TPL advised their employees that if an employee failed to upload their vaccination status, they would be placed on suspension without pay from November 1, 2021 to December 13, 2021 (later extended to January 2, 2022).

[9] Ms. Butu did not confirm her vaccination status and was suspended without pay on November 1, 2021.

[10] On December 21, 2021, Ms. Butu submitted a request to TPL by registered mail for accommodation on religious grounds. She resubmitted the request by email on December 30, 2021. TPL appears to have no record of the accommodation request.

[11] Ms. Butu's employment was terminated on January 2, 2022.

A. *The EI Commission's Decision*

[12] On January 8, 2022, Ms. Butu applied for EI benefits. The Commission found that she was disqualified due to her own misconduct pursuant to section 30 of the *Employment Insurance Act*, SC 1996, c 23 [*EI Act*]. Ms. Butu sought reconsideration of the Commission's decision. The Commission again found that Ms. Butu was disqualified due to her own misconduct.

B. *The SST-GD's decision*

[13] Ms. Butu appealed the Commission's decision to the SST-GD. On January 15, 2023, the SST-GD issued a written decision denying her appeal.

[14] The SST-GD identified the issue before it; namely, whether Ms. Butu lost her job due to her own misconduct, which in turn would disqualify her from receiving EI benefits. The SST-GD first considered why Ms. Butu lost her job, and second, whether the reason she lost her job constituted misconduct.

[15] The SST-GD set out the chronology of communications between the TPL and Ms. Butu regarding the COVID-19 vaccination policy from September 2021 to January 2022. The SST-GD noted, among other things, that the policy set out a two-step approach requiring employees first to disclose their vaccination status by September 20, 2021, and second, to provide proof of vaccination or to obtain an exemption from the vaccine requirement by October 30, 2021.

[16] TPL also advised employees that those who were unable to obtain the vaccine for a reason related to the TPL's Human Rights and Anti Harassment/Discrimination Policy could request an accommodation.

[17] TPL advised that employees who did not comply may be subject to discipline, including dismissal.

[18] The SST-GD further noted that Ms. Butu corresponded directly with her manager and that her manager and the Director of Human Resources both reminded her that the policy required all staff to disclose their vaccination status. Ms. Butu was sent correspondence (including on October 2, 15, and 25, 2021), noting that compliance was required and that she had not yet disclosed her vaccination status. The October 15, 2021 correspondence reiterated the requirements of the policy and noted that the TPL's records indicated that Ms. Butu had not yet complied. The correspondence noted that compliance with the policy was a condition of continued employment. The October 25, 2021 letter reiterated that if Ms. Butu failed to comply with the policy, she would be suspended until she complied or until December 12, 2021, at which time she would be terminated.

[19] The SST-GD noted that on November 1, 2021, the TPL advised Ms. Butu that she was suspended without pay. On November 30, 2021, the TPL advised Ms. Butu that the deadline for providing proof of vaccination had been extended from October 30, 2021 to January 2, 2022, and that she would be terminated at that date if she failed to comply.

[20] The SST-GD acknowledged that Ms. Butu sent a request for accommodation on December 21, 2021 and resent the request again on December 30, 2021 but received no response.

[21] The SST-GD noted Ms. Butu's submission that she did not breach the policy because she had submitted a request for accommodation.

[22] The SST-GD found that it was not necessary to determine whether Ms. Butu complied with the second stage (to provide proof of vaccination or obtain an exemption) because she clearly did not comply with the requirement to disclose her vaccination status by September 20, 2021, which she acknowledged. The SST-GD concluded that Ms. Butu was terminated for failing to comply with the policy.

[23] The SST-GD then considered whether Ms. Butu's non-compliance amounted to misconduct. The SST-GD cited the jurisprudence that establishes that misconduct must be wilful, conscious, deliberate, or intentional. The SST-GD noted Ms. Butu's argument that her non-compliance was due to the TPL's failure to answer her questions about the safety of the vaccine and failure to respond to her late request for accommodation. The SST relied on Ms. Butu's acknowledgement that she knowingly refused to disclose her vaccination status to TPL and found that this was sufficient to establish misconduct.

[24] The SST-GD addressed Ms. Butu's argument that her failure to disclose her vaccination status or be vaccinated did not interfere with her ability to do her job safely. The SST-GD found that an employer has a right to manage their operations, including implementing policies in the workplace. The SST-GD further found that the TPL's implementation of the policy as a

requirement for all employees resulted in it becoming a condition of continued employment. The SST-GD found that Ms. Butu breached the policy by non-compliance and this interfered with her ability to fulfill her duty to her employer.

[25] The SST-GD found that the policy and the consequences of non-compliance were clearly communicated; there was no ambiguity. The SST-GD noted the series of correspondence, all of which made it clear that termination would occur if Ms. Butu did not comply. The SST-GD concluded that Ms. Butu was aware that she was required to first disclose her status and subsequently obtain the vaccination or an exemption.

[26] The SST-GD also addressed other arguments raised by Ms. Butu, including that: her termination was not justified; TPL's vaccination policy was contrary to her union's collective agreement, original employment contract, and other laws, including the *Canadian Charter of Rights and Freedoms*; the Commission's decision was inconsistent with other decisions; and, as she had been a long contributor to EI, she should receive benefits when unemployed.

[27] The SST-GD explained that its role is to assess whether an applicant is eligible for EI benefits under the *EI Act*. The SST-GD also noted the principles from the jurisprudence that confirm that the issue is whether there is misconduct in the context of the *EI Act*, and that issues about wrongful dismissal or the reasonableness of a particular policy should be challenged *via* grievances or other legal recourse.

[28] The SST-GD concluded that Ms. Butu was terminated because of her misconduct; her actions were deliberate and she knew that refusing to disclose her vaccination status would lead to her termination.

[29] Ms. Butu appealed the SST-GD's decision to the SST-AD.

II. The Decision under Review

[30] In her appeal to the SST-AD, Ms. Butu argued that the SST-GD misinterpreted the meaning of misconduct under the *EI Act* and ignored her evidence, including: that the law did not require the TPL to implement the policy; her employment contract and collective agreement did not include a vaccination requirement; the TPL imposed a new condition of employment; and, she did not expect to be dismissed because she asked for accommodation but the TPL did not respond.

[31] On May 26, 2023, the SST-AD issued a written decision refusing to grant leave to appeal the SST-GD's decision.

[32] The SST-AD noted that pursuant to subsection 58(1) of the *Department of Employment and Social Development Canada Act*, SC 2005, c 34 [DESDA], decisions of the SST-GD can only be appealed if the SST-GD failed to observe a principle of natural justice, erred in law, or based its decision on erroneous findings of fact. The SST-AD added that in order to grant leave to appeal, there must be a reasonable chance of success on one of the grounds set out in subsection 58(1).

[33] The SST-AD noted Ms. Butu's argument that no law required her to disclose her vaccination status and that by forcing her to do so under the threat of suspension or dismissal, the TPL had infringed upon her privacy and other rights. The SST-AD found that the SST-GD correctly interpreted the law, again noting that the role of the Commission and the SST-GD is to determine whether an employee's suspension was due to their own misconduct, and not whether an employer's policies are reasonable, justifiable, or legal. The SST-AD found that the SST-GD correctly summarized the jurisprudence on misconduct in the EI context.

[34] The SST-AD dismissed Ms. Butu's argument that her employment contract did not explicitly require her to be vaccinated or disclose her vaccination status. The SST-AD found that the SST-GD correctly assessed whether Ms. Butu knowingly or deliberately disregarded the employer's policy. The SST-AD noted that misconduct may manifest as a policy violation, which may mean that an employee has not met an express or implied condition of their employment (citing *Canada (Attorney General) v Brissette (CA)*, 1993 CanLII 3020 (FCA) [*Brissette*]).

[35] The SST-AD considered Ms. Butu's claim that the SST-GD did not address her argument that the TPL's policy was ambiguous. The SST-AD summarized the factual findings made by the SST-GD, including that the TPL's COVID-19 vaccination policy was clearly communicated to employees and was mandatory, Ms. Butu had received warnings on multiple occasions that she would be suspended and/or dismissed for failure to comply, and that she did not ask for an exemption until seven weeks after her suspension.

[36] The SST-AD explained that the only questions the SST-GD were required to answer were whether Ms. Butu breached the TPL's COVID-19 vaccination policy, and whether she knew that breach was likely to result in her dismissal. The SST-AD found that the SST-GD addressed both questions.

[37] The SST-AD concluded that the SST-GD correctly interpreted the *EI Act* and that Ms. Butu's appeal did not have a reasonable chance of success.

[38] Ms. Butu now seeks judicial review of the decision of the SST-AD.

III. The Statutory Framework

[39] In *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 14 [*Kuk*], the Court explained:

> [14] SST-AD will only grant leave in limited situations, and it will not grant leave unless the appellant can demonstrate that the appeal has a reasonable chance of success: *Bhamra* at para 15, citing 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 (the "DESDA").

[40] The grounds to appeal decisions of the SST-GD regarding EI are set out in subsections 58(1) and (2) of the DESDA. The reference to the "Employment Insurance Section" refers to a branch of the General Division.

58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**58.2 (1)** La division d'appel accorde ou refuse la permission d'en appeler d'une décision rendue par la division générale.

(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
[Emphasis added]	[Je souligne]

IV. The Standard of Review

[41] The standard of review for SST-AD decisions denying leave to appeal is reasonableness: *Bhamra v Canada (Attorney General)*, 2023 FCA 121 at para 3 [*Bhamra*]; *Davidson v Canada*, 2023 FC 1555 at para 35 [*Davidson*]; *Milovac v Canada (Attorney General)*, 2023 FC 1120 at para 26 [*Milovac*]; *Kuk* at para 13; *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at para 20 [*Cecchetto*]; *Cameron v Canada (Attorney General)*, 2018 FCA 100.

[42] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85, 102, 105–07 [*Vavilov*]) and where the reasons for the decision are justifiable, intelligible, and transparent (*Vavilov* at para 95).

[43] For a decision to be set aside, the reviewing court must satisfy itself that "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

V. The Applicant's Submissions

[44] Ms. Butu reiterates many of the arguments made to and considered by the Commission, SST-GD, and SST-AD. She also notes decisions of the SST-GD and other tribunals related to non-compliance with other employers' COVID-19 vaccination policies yielding different results.

[45] Ms. Butu submits that the SST-AD erred in law by not granting her leave to appeal. In particular, Ms. Butu takes issue with the SST-AD's conclusion that the SST-GD's finding that her conduct was wilful and that her behaviour breached an express or implied duty arising out of her employment contract.

[46] Ms. Butu first argues that she did comply with TPL's vaccination policy given that she sought an exemption on religious grounds, which was an option pursuant to the policy. She submits that the EI Commission and the SST-GD focused only on her failure to upload her

vaccination status by September 20, 2021 and ignored that she made inquiries to the TPL after that date about the safety of the vaccine and ultimately sought an accommodation. She argues that the Commission wrongly assumed that her accommodation had not been or would not be granted and, therefore, found that she had not complied with the policy. She now submits that there was no time limit on requesting this exemption and, as a result, the finding that she failed to comply with the policy is an error that was repeated by the SST-GD. Ms. Butu submits that the SST-AD should have found that error was a valid ground for appeal.

[47] With respect to the SST-GD's finding that her failure to disclose her vaccination status was sufficient to find non-compliance with the overall policy, Ms. Butu now argues that it was not possible to upload her vaccination status by September 20, 2021 because the applicable form did not permit an employee to set out other options or information (for example, whether an employee was partially vaccinated or had a medical or other reason for not being vaccinated). She also argues that the policy did not provide sufficient time for an employee to comply fully by October 30, 2021 because the second vaccine could only be obtained several weeks after the first vaccine.

[48] Second, Ms. Butu argues that her actions did not constitute misconduct because compliance with the COVID-19 vaccination policy was not an express or implied condition of her employment nor part of her collective agreement. She notes that she worked safely for months prior to the availability of any vaccine and questions how her failure to upload proof of her vaccination status could cause any harm or impact her ability to continue to perform her duties. She adds that her union filed a policy grievance regarding TPL's policy.

[49] Ms. Butu submits that misconduct occurs when an employee willfully engages in conduct they know will impair their duties to their employer (*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14 [*Mishibinijima*], and that the misconduct must also constitute a breach of an express or implied duty arising in their contract of employment to the degree that the employee knew it would likely result in their dismissal (*Canada (Attorney General) v Lemire*, 2010 FCA 314 at paras 14-15 [*Lemire*]).

[50] Third (and related to her second argument), Ms. Butu argues that the SST-AD failed to analyze whether her actions actually constituted misconduct. Ms. Butu submits that the SST-GD and SST-AD did not address whether her actions breached an express or implied duty arising from her employment contract. She notes that the TPL has since amended its policy, and vaccination is no longer a condition of employment.

[51] Ms. Butu submits that the SST-AD erred by relying on *Cecchetto*, because the vaccination policy at issue in *Cecchetto* required the employee to be vaccinated or to submit to antigen tests. Ms. Butu notes that, unlike *Cecchetto*, she had no alternative option. She argues that in *AL v Canada Employment Insurance Commission*, 2022 SST 1428 [*AL*] – a decision of the SST-GD that was distinguished by the Court in *Cecchetto* – better reflects her circumstances. In *AL*, the SST-GD found that the employer's vaccination policy did not constitute an express or implied duty arising out of the employment contract, but rather imposed a new condition that must first be negotiated.

[52] Ms. Butu also submits that there are several SST-GD decisions finding that non-compliance with a vaccination policy does not constitute a breach a condition of

employment and is not misconduct and, therefore, the SST-AD erred in finding that her appeal had no chance of success.

[53] Ms. Butu also points to labour arbitration cases (*Toronto Professional Fire Fighters' Association, IAAF Local 3888 v Toronto (City)*, 2022 CanLII 78809 (ON LA) at paras 314-316; *Electrical Safety Authority v Power Workers' Union*, 2022 CanLII 343 at para 92) that have found that disciplining or discharging an employee for failure to get vaccinated is unreasonable.

[54] Ms. Butu submits the SST-GD erred in finding that her non-compliance with the policy interfered with her ability to carry out her duties, and the SST-AD ignored this error. Ms. Butu submits that misconduct means "conduct that is incompatible with the due or faithful discharge of the duties that the respondent was required to perform" (*Canada (Attorney General) v Bellavance*, 2005 FCA 87 at para 6 [*Bellavance*]).

[55] Ms. Butu again submits that from September 2021 when the policy was introduced to the date of her dismissal, she continued to perform her duties, and that her vaccination status had no effect on others in the workplace. She submits that in *Parmar v Tribe Management Inc*, 2022 BCSC 1675 at para 109 [*Parmar*], the British Columbia Supreme Court took judicial notice that COVID-19 vaccines do not prevent infection, reinfection, or transmission of COVID-19.

[56] Fourth, Ms. Butu argues that she could not foresee that her non-compliance with the TPL's vaccination policy would lead to her dismissal. She submits that the SST-AD erred in law in not analyzing whether she could reasonably foresee this result, as this is a key element of misconduct.

[57] Ms. Butu reiterates that, in her view, she complied with the policy because she submitted a request for accommodation, which went unanswered. She also again submits that the policy was not an express or implied term of her employment or collective agreement, but rather, was unilaterally imposed. She points to other factors that she submits support her disbelief that she would be terminated, including that research did not establish the effectiveness of the vaccine, other employees had obtained an accommodation and continued to work, and other SST-GD decisions had inconsistently found that non-compliance was not misconduct and not a reason for termination. Ms. Butu also submits that because she had worked since July 2020 unvaccinated, she could not have anticipated that in September 2021 the TPL would suddenly determine that continuing to work unvaccinated was unsafe. Ms. Butu states that she believed that the TPL would rely on logic and change its policy before terminating her employment.

[58] Finally, Ms. Butu argues more generally that the COVID-19 vaccination policy was unreasonable – even in the pandemic context – and that non-compliance with an unreasonable policy cannot constitute misconduct. She submits that the SST-AD, SST-GD, and Commission failed to assess the reasonableness of the application of the COVID-19 vaccination policy to her in her workplace.

[59] Ms. Butu again submits that the lack of evidence of the effectiveness of the vaccine undermines the reasonableness of the policy. She also notes that the members of the public were permitted to enter the library and were not asked to provide proof of vaccination, which further demonstrates that the TPL policy for its employees was not reasonable.

VI. The Respondent's Submissions

[60] The Respondent does not specifically address all of Ms. Butu's arguments, but rather, relies on the binding jurisprudence that has established that misconduct in the EI context focuses on whether an employee's action was conscious, deliberate, or intentional, and causally linked to their employment (*Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 21 [*Nelson*]).

[61] The Respondent also points to several documents in both Ms. Butu's and Respondent's large records to clarify some of the factual findings relied on by the SST-GD and SST-AD.

[62] The Respondent submits that an employer's mandatory vaccination policy and/or practices do not require that the policy or compliance with the policy form part of an employee's employment contract. The Respondent submits that an employer's written policy communicated clearly to employees is sufficient. A finding of misconduct can result from an employee's objective knowledge that termination or dismissal is real possibility of their failure to comply (*Kuk* at paras 9, 23, 25; *Milovac* at para 27).

[63] The Respondent notes the recent decision of the Federal Court of Appeal in *Sullivan v Attorney General of Canada* 2024 FCA 7 at paras 3-6 [*Sullivan*], which found that the SST-AD did not err in finding that the test for misconduct focuses on the employee's knowledge and actions, not on the reasonableness of an employer's policies.

[64] The Respondent submits that the SST-AD's decision refusing Ms. Butu's leave to appeal because she had not raised an error as set out in subsection 58(1) of the DESDA is reasonable.

The SST-AD confirmed that the SST-GD identified and applied the correct test for misconduct; that Ms. Butu knew or ought to have known that her conduct would interfere with carrying out her duty to her employer (i.e., to be able to report for work at the TPL). In addition to the communications from the TPL regarding the policy, the Respondent also notes that Ms. Butu's Union Representative made her aware of the possibility that she would be dismissed for failing to prove her vaccination status. Because the SST-GD applied the correct test, the SST-AD reasonably found that there were no grounds to appeal and no reasonable chance of success.

[65] The Respondent notes that in the event that the Application is dismissed, the Respondent does not seek costs.

VII. The Decision of the SST-AD is Reasonable

[66] The Court's role focuses only on whether the decision of the SST-AD is reasonable.

[67] A judicial review is not a "do over". Ms. Butu has had her many arguments considered by the Commission, the SST-GD, and the SST-AD. Contrary to her submission, the SST-GD and SST-AD did not overlook any of her arguments.

[68] The concept of reasonableness in judicial review does not reflect what an applicant may regard as a reasonable outcome for them. Reasonableness in the administrative law context focuses on whether the decision is justified in accordance with the law that constrains the decision-maker (in this case, the DESDA) and the facts, and is transparent and intelligible.

[69] The SST-AD may only grant leave to appeal when an appellant can demonstrate that their appeal has a reasonable chance of success based on one of the grounds set out in subsection 58(2) of the DESDA: *Davidson* at para 74; *Kuk* at para 14; *Cecchetto* at para 23; *Bhamra* at para 15; *O'Rourke v Attorney General of Canada*, 2019 FCA 60 at para 9.

[70] Ms. Butu has not established that any of the grounds she raised as alleged errors by the SST-GD had a reasonable chance of success. The SST-AD reasonably found that Ms. Butu's appeal had no reasonable chance of success. The SST-AD's decision is justified and its reasons are transparent and intelligible.

[71] The SST-GD did not ignore Ms. Butu's submission that she made a request for accommodation before she was officially terminated. However, the SST-GD noted that Ms. Butu acknowledged that she did not comply with TPL's policy because she did not upload her vaccination status as required by September 20, 2021. Contrary to Ms. Butu's submission, the SST-GD did not ignore the subsequent events and communications. The SST-GD concluded that Ms. Butu's non-compliance with the first stage of the policy was sufficient to find misconduct, and went on to document that Ms. Butu was clearly aware of the consequences of her non-compliance.

[72] Ms. Butu's current argument – that it was impossible to upload her status because the form did not permit other options – does not absolve her failure to comply. She had several communications and a meeting with HR; at which times she could have raised this alleged impossibility. There is no evidence that she did so or that she made any effort to upload the form.

[73] Ms. Butu's contention that the policy was ambiguous is not supported by the record. The policy was communicated in a series of correspondences to all employees and to Ms. Butu directly. The policy required that the employee upload their vaccination status by September 20, 2021, and subsequently provide proof of vaccination status or obtain an exemption by October 30, 2021 (which was later extended). Although the TPL's failure to receive and respond to Ms. Butu's request for religious accommodation is a mystery, the SST-GD found that Ms. Butu did not comply with the first requirement of the policy, which as noted was sufficient to find non-compliance.

[74] The Court does not agree with Ms. Butu that her request for accommodation, weeks after her suspension, constituted compliance with the policy.

[75] Nor does the Court agree that the SST-AD erred in not finding a ground for appeal in the SST-GD's decision that confirmed the Commission's finding that Ms. Butu did not comply with the policy, which amounted to misconduct.

[76] The SST-AD considered whether the SST-GD had applied the correct test for determining misconduct. The SST-AD and SST-GD both correctly identified and applied the legal test for misconduct in accordance with the governing jurisprudence.

[77] The Federal Court of Appeal's decision in *Lemire* explains why the test for misconduct is different under the *EI Act* compared to a labour law context:

> [14] To determine whether the misconduct could result in dismissal, 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 [citations omitted].
>
> [15] However, 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: *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377 at paragraph 2.
>
> [16] This legal test established in the case law to circumscribe the notion of misconduct set out in section 30 of the Act must be viewed within the general context of the Act. Indeed, this Act seeks, above all, to protect Canadian workers from involuntary job losses related to the financial difficulties of the businesses they work for or economic troubles. That is the primary purpose of this legislation, to which were added, as time went by, certain additional employment-related programs. Thus, employment insurance contributors need not bear the burden of those who leave their employment voluntarily without just cause or lose their employment because of their misconduct. That is the specific legislative framework within which the notion of misconduct must be considered.
>
> [Emphasis added.]

[78] An objective assessment of the evidence supports the SST-GD's finding that Ms. Butu could foresee the consequences of her non-compliance. The SST-AD did not err in agreeing with this finding.

[79] With respect to Ms. Butu's submission that there was no misconduct because compliance with the policy was not an express or implied condition of her employment, the SST-AD relied on the governing jurisprudence that misconduct can relate to a policy violation.

[80] In *Brissette*, the Federal Court of Appeal noted that an express or implied term of employment may be concrete or a more abstract requirement. In *Nelson* and *Kuk*, the Federal Court of Appeal and the Federal Court found that an employer's written policy need not be included in an employee's original contract to ground a finding of misconduct (see paras 23-26 of *Nelson* and para 34 of *Kuk*).

[81] The SST-AD noted that misconduct may manifest as a policy violation. The Court also notes that on October 15, 2021, the TPL had advised Ms. Butu that compliance with the policy was a condition of continued employment.

[82] Ms. Butu's argument that the SST-AD failed to analyze whether her actions constituted misconduct overlooks the reasons of the SST-AD and the more detailed reasons of the SST-GD. The SST-AD specifically addressed Ms. Butu's argument that the SST-GD had misinterpreted the meaning of misconduct. The SST-AD found that the SST-GD had accurately summarised the law on misconduct and also addressed her evidence disputing her misconduct. The SST-AD concluded that "there is no case that the General Division disregarded evidence", adding that the findings reflected Ms. Butu's testimony and the documents on file regarding her deliberate actions.

[83] With respect to Ms. Butu's submission that the SST-GD and SST-AD did not consider her evidence that her failure to comply with TPL's vaccination policy did not interfere with her ability to carry out her work duties, Ms. Butu appears to mischaracterize the relevant findings and the jurisprudence. The SST-GD found that "the Claimant breached the policy when she chose not to comply with it. I find that this interfered with her ability to carry out her duty to her

employer" (at para 36). The SST-GD did not need to determine whether she could not perform her specific job duties without being vaccinated, but rather, whether she could not fulfill her duty to her employer to be able to show up for work, which required that all employees comply with the policy. In *Mishibinijima* at para 14 (relied on by Ms. Butu), the Federal Court of Appeal referred to misconduct as impairing "the performance of the duties owed to his employer". This does not mean only the ability to perform the tasks of the particular job, but is the broader duty owed to the employer to be able to report for work by complying with the policies and rules in the workplace.

[84] Ms. Butu's argument in essence focuses on whether the policy was reasonable, which as explained below, is not an issue to be determined by the Commission, or the SST-GD, or SST-AD.

[85] Ms. Butu's submission that the SST-AD failed to analyze an essential element of misconduct – i.e., that she could not foresee that her non-compliance with the TPL's vaccination policy would lead to her dismissal for various reasons – is without merit. The SST-AD noted the SST-GD's recitation of the extensive correspondence from TPL to all employees and to Ms. Butu directly advising her of the requirements and the consequences. Ms. Butu also had a meeting with a manager and HR representative, attended by her Union Representative, at which the TPL policy and consequences were reiterated.

[86] The facts on the record demonstrate that Ms. Butu was aware of her employer's COVID-19 vaccination policy and the consequences of failing to comply. In Ms. Butu's submissions

appealing the EI Commission's decision, she acknowledged that it is a fundamental term of her employment to obey her employer's instructions.

[87] While Ms. Butu may have hoped that TPL would change its policy before she was dismissed on January 2, 2022, there was no objective reason for her to believe so.

[88] The SST-AD did not err in finding that her appeal did not have a reasonable chance of success despite Ms. Butu's assertion that the vaccination policy itself was unreasonable. This is not a ground for appeal under subsection 58(1) of the DESDA and had no reasonable chance of success.

[89] Whether the vaccination policy was reasonable is not within the jurisdiction of the Commission, the SST-GD, or the SST-AD (*Cecchetto* at para 32; *Davidson* at para 77). Nor is a determination whether an employee was wrongfully dismissed within the jurisdiction of the EI Commission, the SST-GD, or the SST-AD (*Sullivan* at para 6; *Davidson* at para 77).

[90] The EI Commission must determine whether an individual is eligible for EI or if they are disqualified due to their own misconduct. On appeal, the SST-GD determines whether the Commission erred. The SST-AD then determines whether there are grounds to appeal the decision of the SST-GD in accordance with the DESDA.

[91] In the present case, the SST-AD and SST-GD identified the correct tests for determining misconduct and reasonably applied the jurisprudence from the Federal Courts to determine that Ms. Butu had been suspended and then terminated due to her misconduct. The other SST-GD

decisions regarding other applicants relied on by Ms. Butu (that found non-compliance with their own employers' vaccination policies did not constitute misconduct), are not binding on the SST-AD and are not binding on this Court. The SST-AD relied on and applied the correct governing jurisprudence. On judicial review, this Court is guided by decisions of this Court and is bound by decisions of the Federal Court of Appeal.

[92] Ms. Butu seeks to distinguish *Cecchetto* on the basis that the policy at issue provided an option for an employee to be vaccinated or to submit to an antigen test. However, the basis for the Court's decision in *Cecchetto* did not hinge on this distinction. The Court noted the options within the policy at issue in that case only in response to the applicant's reference to the decision of the SST-GD in *AL*, which the Court was not bound by in that case, or in this one. In *Cecchetto*, the Court relied on the same jurisprudence cited by the SST-AD, including *Nelson* and *Bellavance*, regarding the interpretation of misconduct.

[93] In *Sullivan*, the Federal Court of Appeal found that the SST-AD did not err in following the applicable jurisprudence – including *Cecchetto* – to interpret misconduct.

[94] In *Sullivan*, the applicant was denied EI benefits because he failed to comply with his employer's COVID-19 vaccination policy. The SST-GD and SST-AD confirmed the decision of the Commission. The SST-AD rejected Mr. Sullivan's argument that he did not engage in misconduct, including because of the invalidity of the policy. In *Sullivan*, the Federal Court of Appeal states at paras 4-6:

> [4] The Appeal Division rejected the applicant's argument. Following applicable court jurisprudence (e.g., *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at paras. 22-23, *Paradis v.*

> *Canada (Attorney General)*, 2016 FC 1282 at paras. 30-31 and *Cecchetto v. Canada (Attorney General)*, 2023 FC 102), the Appeal Division held that the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies. It added that the applicant could pursue remedies elsewhere if he considered that his employer treated him improperly.
>
> [5] In our view, the Appeal Division's decision is reasonable. It is supported by the evidentiary record before it and applicable court jurisprudence.
>
> [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.
>
> [Emphasis added.]

[95] In other words, the Federal Court of Appeal confirmed the principles from the jurisprudence relied on by the SST-AD in the present case – that it is not the role of the Commission, SST-GD, or SST-AD to determine whether an employer's policies are reasonable or whether findings of dismissal based on non-compliance with those policies are wrongful, but rather, to determine eligibility for EI benefits under the *EI Act* and governing jurisprudence.

[96] Although the reasonableness of the policy is not the issue for the SST-AD or this Court, the Court must point out that Ms. Butu's reliance on *Parmar* in support of her view that the vaccination policy is unreasonable is misplaced. Ms. Butu cites only a part of one sentence in *Parmar*, which is very misleading. The relevant paragraphs provide the context:

> [108] In the context of COVID-19, this Court and other courts have taken judicial notice that COVID-19 is a potentially deadly

> virus that is easily transmissible. Symptoms of the virus may vary from person to person according to age, health, and other comorbidity factors. The virus can mutate. Asymptomatic carriers of the virus can infect others. There is no known immunity to contracting the virus and no verifiable evidence of natural immunity to contracting it, or a known mutation, a second or more time: *Steiner v. Mazzotta*, 2022 BCSC 827 at para. 5, citing *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441 at para. 22.
>
> [109] In addition, courts have taken judicial notice of the fact that vaccines work. While they do not prevent infection, reinfection, or transmission, they reduce the severity of symptoms and bad outcomes: see, *e.g.*, *A.T. v. C.H.*, 2022 BCPC 121 at paras. 38–39, 41; *A.C. v. L.L.*, 2021 ONSC 6530 at para. 28; *Saint-Phard v. Saint-Phard*, 2021 ONSC 6910 at paras. 5, 7; *O.M.S. v. E.J.S.*, 2021 SKQB 243 at paras. 112–114.
>
> [Emphasis added.]

[97] The SST-AD reasonably found that Ms. Butu had not raised any ground for appeal that had a reasonable chance of success.

[98] The Court notes that Ms. Butu indicated that the TPL policy is the subject of a policy grievance by her union and that the policy is also awaiting the decision of an arbitrator. These may be more appropriate fora to address Ms. Butu’s concerns.

JUDGMENT in file T-1312-23

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed

2. No costs are ordered.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1312-23
STYLE OF CAUSE:	ADINA BUTU v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 13, 2024
JUDGMENT AND REASONS:	KANE J.
DATED:	FEBRUARY 28, 2024

APPEARANCES:

Adina Butu	ON HER OWN BEHALF
Sandra Doucette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT