Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 233

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 8, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	January 18, 2023
Hearing participant:	Appellant
Decision date:	February 20, 2023
File number:	GE-22-3638

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.[1]

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to lose his job).

[3] This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits during the period of the suspension.[2]

Overview

[4] The Claimant's employer put in a place a policy that required all employees to attest to their COVID-19 vaccination status. Employees who were not vaccinated by November 14, 2021, and who did not have an approved exemption to vaccination would be placed on an administrative leave without pay. The Claimant's employer placed him on administrative leave without pay because he did not comply with its policy.[3]

[5] The Commission looked at the reasons the Claimant was not working. It decided the Claimant was suspended from his job because of misconduct within the meaning of the Employment Insurance Act (EI Act).[4] Because of this, the Commission decided the Claimant is disentitled from receiving EI benefits.

[6] The Claimant does not agree with the Commission. He says the Commission has not met its burden to prove misconduct. The Claimant says his conduct was not misconduct as that term is defined. There is no requirement in his collective agreement or offer of employment requiring him to be vaccinated. The Claimant says there has been no change in his circumstances and he has returned to work.

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[1] In this decision the Appellant is called the Claimant and the Respondent is called the Commission.
[2] Section 31 of the EI Act says claimants who are suspended from their job because of misconduct are disentitled from receiving EI benefits for the duration of the suspension.
[3] The Record of Employment (ROE) shows the last day for which the Claimant was paid was November 12, 2021.
[4] See section 31 of the EI Act

Matters I considered first

The Claimant's appeal was returned to the General Division

[7] The Claimant first appealed the denial of EI benefits to the Tribunal's General Division in May 2022. His appeal was summarily dismissed.[5] The Claimant appealed that decision to the Tribunal's Appeal Division.

[8] The Tribunal's Appeal Division ordered the appeal be returned to the General Division for a hearing on the merits by a different Tribunal member.[6]

[9] This decision is a result of the hearing on the merits.

The employer is not an added party to the appeal

[10] Sometimes the Tribunal sends a claimant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[11] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a leave of absence

[12] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.[7]

[13] In the Claimant's case, his employer initiated the stoppage of his employment when he was placed on unpaid leave.

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[5] See *RL v. Canada Employment Insurance Commission*, GE-22-1784, decided October 3, 2022. Unpublished at time of writing.
[6] See *RL v. Canada Employment Insurance Commission*, AD-22-789, decided November 7, 2022. Unpublished at time of writing
[7] See section 32 of the EI Act.

[14] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of unpaid leave from his employment. He testified he did not agree to taking a period of unpaid leave.

[15] The section of the EI Act on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.[8]

[16] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the vaccine policy that led to him not working after November 12, 2021. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances the period of unpaid leave after November 12, 2021, can be considered as a suspension.[9]

I am accepting documents sent in after the hearing

[17] At the hearing the Claimant referred to the offer of employment he received from his employer and sent it to the Tribunal after the hearing. He also sent a copy of a document titled "Hearing Points" that he relied upon to make his argument at the hearing.

[18] I have decided to accept the documents into evidence as the information they contained was referenced in the hearing and is relevant to the issue under appeal.

[19] The Commission was sent a copy of the documents. As of date of writing this decision, it has not provided any submissions on these documents.

Issue

[20] Was the Claimant suspended from his job because of misconduct?

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[8] See section 31 of the EI Act.
[9] A suspension under the EI Act does not necessarily mean a suspension from a disciplinary perspective.

Analysis

[21] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has dismissed you or suspended you.[10]

[22] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then, I have to determine whether the law considers the reason the Claimant was suspended from his job to be misconduct.

Why was the Claimant suspended from his job?

[23] I find the Claimant was suspended from his job because he did not comply with his employer's COVID-19 vaccination policy.

[24] The Claimant's employer adopted a COVID-19 vaccination policy. The policy required all employees to attest to their COVID-19 vaccination status by October 29, 2021, and to be fully vaccinated by within two weeks of that date.

[25] The Claimant testified he did not attest to his vaccination status.

[26] The appeal file has a Record of Employment (ROE) issued for the Claimant on December 3, 2021. It says the reason for issuing is "Other" and in the comments section it says "Leave due to non-compliance with the employer's vaccination policy, please treat as code M." Code "M" is the code for a "Dismissal or suspension."

[27] The evidence tells me the Claimant was suspended from his job because he failed to be fully vaccinated as required by the employer's policy.

Is the reason for the Claimant's suspension misconduct under the law?

[28] Yes, the reason for the Claimant's suspension is misconduct under the law and within the meaning of the EI Act.

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[10] See sections 30 and 31 of the EI Act.

– What the law says

[29] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the EI Act. Case law sets out the legal test for misconduct - the questions and criteria I can consider when examining the issue of misconduct.

[30] Case law says to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.[11] Misconduct also includes conduct that is so reckless that it is almost wilful.[12] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[13] Put another way, misconduct as the term is used in the context of the EI Act and EI Regulations, does not require an employee to act with malicious intent, as some might assume.

[31] There is misconduct if the Claimant knew or should have known his conduct could get in the way of him carrying out his duties toward his employer and there was a real possibility of being suspended or let go because of that.[14]

[32] A deliberate violation of the employer's policy is considered to be misconduct.[15]

[33] The Commission has to prove the Claimant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show it is more likely than not the Claimant was suspended from his job because of misconduct.[16]

– What I can decide

[34] I only have the power to decide questions under the EI Act. I can't make any decisions about whether the Claimant has other options under other laws or in other

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[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[13] See *Attorney General of Canada v Secours*, A-352-94.
[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.

venues. Issues about whether the Claimant's Collective Agreement or his offer of employment was violated, or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[17] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[35] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[18] Mr. McNamara, dismissed from his job under his employer's drug testing policy, argued he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[36] In response to these arguments, the FCA stated it has consistently said the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the EI Act." The Court went on to note the focus when interpreting and applying the EI Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[37] A more recent decision is *Paradis v. Canada (Attorney General)*.[19] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. He argued he was wrongfully dismissed, the test results showed he was not impaired at work, and he said the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the EI Act.[20]

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[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[18] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[19] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[20] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[38] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[21] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued his employer was obligated to provide an accommodation because alcohol dependence has been recognized as a disability. The Court again said the focus is on what the employee did or did not do, and the fact the employer did not accommodate its employee is not a relevant consideration.[22]

[39] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant.

[40] There is a very recent Federal Court decision, *Cecchetto v Attorney General of Canada,* 2023 FC 102, (*Cecchetto*), which does relate to an employer's COVID-19 vaccination policy. Mr. Cecchetto, the Applicant, argued his questions about the safety and efficacy of the COVID-19 vaccines and antigen tests were never satisfactorily answered by the Tribunal's General Division and Appeal Division. He also said that no decision-maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[23]

[41] In dismissing the case, the Federal Court wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen testing … The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[24]

[42] The Federal Court also wrote:

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[21] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[22] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[23] *Cecchetto v Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[24] *Cecchetto v Attorney General of Canada,* 2023 FC 102, at paragraph 32.

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[25]

[43] Case law makes it clear my role is not to look at the employer's conduct or policies and determine whether they were right in placing the Claimant on an unpaid leave of absence (suspension), failed to accommodate him, if the vaccination policy was in conflict with other employer policies or violated the Claimant's Collective Bargaining Agreement or offer of employment. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the EI Act.

– **The Commission's submissions**

[44] The Commission says the Claimant was made aware of the employer's COVID-19 Vaccination Policy, including the consequences for non-compliance. It says, in his case because the Claimant's refusal was not due to any medical or religious reasons, it can conclude that he caused his own suspension of his employment. The Commission says because the Claimant was made aware of the policy, including the consequences of non-compliance, well in advance of the deadline, the Commission could therefore only conclude that his suspension constitutes misconduct within the meaning of the EI Act.

– **The Claimant's submissions**

[45] The Claimant argues the Commission has not provided any evidence to show he committed misconduct. He says he did not commit misconduct as that term is defined and the Commission has not met the legal test for misconduct. The Claimant argued he was working from home at the time the employer introduced its policy and his non-compliance with the employer's policy did not impair his ability to perform the duties owed to his employer. The Clamant said he has returned to work with nothing changed in his status, only the politics have changed when the policy was suspended.

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[25] *Cecchetto v Attorney General of Canada,* 2023 FC 102, at paragraph 47.

[46] The Claimant argued the jurisprudence relied upon by the Commission is does not apply to the context of his situation. He noted in *AL vs. Canada Employment Insurance Commission, 2022 SST 14* a Tribunal member acknowledged that an employee's decisions to not get vaccinated or attest to vaccination does not constitute misconduct.[26] He says there was no breach of duty in his contract of employment. He says the policy requires an intrusive medical procedure. The Claimant argues that as a Canadian citizen the decision to preserve his medical autonomy and privacy is a right. He says exercising these rights does not equate to misconduct resulting in the denial of EI entitlements.

[47] The Claimant argues that to be misconduct his action has to be wilful or to affect performance of work. The policy was imposed by the employer. He says it is a slippery slope if you don't do something and his non-attestation, his non-action in this case, does not meet the test of misconduct. He does not think that non-action can be wilful, so the Commission has not met every element of the misconduct test.

[48] The Claimant argues he has paid into the EI plan and should receive the benefits when he needs them.

– **The Claimant's testimony**

[49] The Claimant testified he became aware of the employer's policy through emails. He said he did not attest to his vaccination status. The Claimant said he has a right to privacy with respect to his medical information and a right to bodily autonomy as a Canadian citizen. The Claimant testified he read in the policy he needed to attest to his vaccination status, or he would be placed on leave.

[50] The Claimant testified he worked from home. When asked, he said he has an interim work agreement and if that was not in place he could be required to work in the office. The Claimant noted the work agreement was not rescinded. He said when he was hired, he signed an offer of employment that did not include a vaccination

[26] The Claimant referred to this decision by the file number assigned by the Tribunal. This is the neutral citation for the decision.

requirement. The Claimant testified his collective agreement does not contain a vaccination requirement. The Claimant was a member of union when his employer placed him on the unpaid leave of absence. He contacted his union, but it refused to represent him.

– **My findings**

[51] I find the Commission has proven the Claimant was suspended from his job due to his own misconduct. My reasons for this finding follow.

[52] I have to follow the Federal Court's decisions. I would be making an error of law if I focused on the employer's conduct, which includes making determinations under other laws or a collective agreement as to whether the employer was correct or it was legal for the employer to create, implement and enforce a policy. I do not have the jurisdiction to do that. The Tribunal has expertise in the interpretation and the application of the EI Act and EI Regulations to a claimant's circumstances and the Commission's decision. The Federal Courts' decisions, including its most recent decision in *Cecchetto,* has said this is all the Tribunal should do.

[53] Fundamental legal, ethical, and factual questions about COVID vaccines and COVID mandates put in place by governments and employers are beyond the scope of appeals to the Tribunal.

[54] I do not have the mandate or jurisdiction to assess or rule on the merits, legitimacy, or legality of government directives and employer's policies aimed at addressing the COVID pandemic. There are other ways a claimant can challenge these directives and policies.

[55] The provisions of the Claimant's Collective Agreement are not relevant to the issue before me. This is because an allegation of a violation of a collective agreement is made and decided using a process contained in the collective agreement (as agreed to by the parties to that collective agreement). The legal tests applied in arbitrations to

decide disciplinary penalties are different from the legal test applied when deciding whether misconduct has occurred within the meaning of the EI Act.[27]

[56] I would note as well, while the Collective Agreement does contain terms and conditions of employment there are, in my opinion, other documents, such as job descriptions and policies, that can impose a duty on an employee.

[57] The Claimant submitted his offer of employment (Offer) in support of his position that he did not need to comply with the policy because it was not in the Offer. I have reviewed the offer and agree that is the case. However, the Offer does note that the Claimant's "position is subject to the relevant collective agreement and the *Directive on Terms and Conditions of Employment*." Neither of these two documents have been submitted into evidence. Nonetheless, if I were to base my decision on the contents of the Offer, and whether the employer violated the terms and conditions of the Offer, I would be committing an error of law because to do so would mean that I am using the terms and conditions in that document to reach my decision. This is something the courts have clearly said I cannot do.

[58] The Claimant has argued I should follow *AL v. CEIC*, a decision made by another Tribunal member.

[59] In *AL v. CEIC* the claimant was employed by a hospital when her employer introduced a policy requiring all employees to be vaccinated for COVID-19. The Tribunal member allowed *AL's* appeal based on the member's interpretation of the collective agreement provisions to determine there had been no misconduct and a determination that *AL* had a "right to bodily integrity."

[60] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.[28]

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[27] The legal test for misconduct within the meaning of the EI Act is stated above. It does not require a determination as to whether suspension and / or dismissal was imposed with just cause or was the appropriate penalty.

[28] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I have

[61] I am not going to follow *AL v CEIC* for two reasons. First, the circumstances of *AL* are not the same as those of the Claimant.[29] Second, in my opinion, the findings and reasoning relied upon by the member do not follow the Federal Court's rules I am required to apply when deciding whether a claimant was suspended from or has lost their employment due to their own misconduct. If I were to follow the reasoning in *AL v CEIC*, by examining whether the employer's policy complied with the collective agreement or was mandated by legislation, I would be committing an error of law because my focus would be on the employer's actions – something which the courts have been very clear that I am not allowed to do.

[62] I think an employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the Claimant's employer implemented its COVID-19 vaccination policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.[30]

[63] The Claimant argued he does not have to comply with the employer's policy because he has a right to privacy and to his bodily autonomy. The Federal Court has said in *Cecchetto* that in law, I am not permitted to address this argument.[31]

[64] The Claimant argued he was working from home and as such his non-compliance with the employer's policy did not impair his ability to perform his duties. It is not for me to decide whether it was reasonable or necessary for the employer to extend the attestation and vaccination requirements to those employees, like the Claimant, who has a work from home arrangement. This lies outside of my jurisdiction and expertise.

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to follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[29] The Claimant does not work with *AL*. He is a member of a different union and he is governed by a different collective agreement.

[30] See *Attorney General of Canada v. Secours*, A-352-94; *Canada (Attorney General) v Bellavance*, 2005 FCA 87, *Canada (Attorney General) v Gagnon*, 2002 FCA 460, and *Canada (Attorney General) v. Lemire*, 2010 FCA 314.

[31] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.

– **The Claimant was suspended due to his misconduct**

[65] The Claimant's employer introduced a policy on October 6, 2021, requiring all employees to attest to their COVID-19 vaccination status by the attestation deadline of October 29, 2021 and to be fully vaccinated for COVID-19. The policy provided for an exemption to vaccination for medical reasons or for religious reasons. Two weeks after the attestation deadline, employees who had not completed the attestation, who were not fully vaccinated and/or were not granted an exemption to vaccination would be placed on administrative leave without pay.

[66] The Claimant did not complete the attestation form.

[67] The Claimant testified he read the employer's policy. He was aware his employer required him to complete the attestation form, to be vaccinated and exemptions to the policy could be granted. He was aware that if he did not complete the attestation he would be placed on an unpaid administrative leave of absence. The evidence clear the Claimant was aware he would be suspended (placed on an unpaid administrative leave of absence) if did not attest to his vaccination status by the attestation deadline.

[68] The Claimant did not complete the attestation form and he did not have an exemption to vaccination. As a result, I find the Claimant made the conscious, deliberate and wilful choice to not comply with the employer's policy when he knew that by doing so there was a real possibility he could be suspended (placed on an unpaid leave of absence) and not be able to carry out the duties owed to his employer. Accordingly, I find the Commission has proven the Claimant was suspended due to his own misconduct within the meaning of the EI Act and the case law described above.

So, was the Claimant suspended from his job because of misconduct?

[69] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

Other arguments

[70] The Claimant said it took over four months for the Commission to decide it was not going to pay him EI benefits. This was outside of the Commission's service standards. The Claimant argued that he paid into the EI plan and should be paid benefits when he needs them. The loss of income during the suspension has caused him stress and financial difficulties.

[71] Paying into the EI program does not automatically entitle a person to receive EI benefits when they are unemployed. Like other insurance programs, the individual must qualify for the benefits. The Claimant does not qualify because he was suspended from his job due to misconduct, so he does not meet the requirements of the law.

Conclusion

[72] The Commission has proven the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits during the period of the suspension.

[73] This means the appeal is dismissed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section