Citation: *AS v Canada Employment Insurance Commission*, 2023 SST 234

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 7, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	January 17, 2023
Hearing participant:	Appellant
Decision date:	February 20, 2023
File number:	GE-22-3636

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 be suspended from his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits during the period of the suspension.[2]

Overview

[3] 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]

[4] 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.

[5] The Claimant does not agree with the Commission. He says he was working remotely from his home and his non-compliance with the employer's policy did not impair the performance of his duties owed to his employer. He also says that his employer has confirmed that he was not put on suspension for misconduct.

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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 period 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

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

[7] 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]

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

The employer is not an added party to the appeal

[9] 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.

[10] 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

[11] 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]

[12] 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 *AS v. Canada Employment Insurance Commission*, 2022 SST 1160
[6] See *AS v. Canada Employment Insurance Commission*, 2022 SST 1159
[7] See section 32 of the EI Act.

[13] 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.

[14] 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]

[15] 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

[16] At the hearing the Claimant referred to his employer's Code of Conduct and sent it to the Tribunal after the hearing.

[17] I have decided to accept the document into evidence as the information it contained was referenced in the hearing.

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

Issue

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

Analysis

[20] 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]

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

[21] To answer the question of whether the Claimant was suspended from 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?

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

[23] 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 within two weeks following that date.

[24] The Claimant testified the vaccination attestation was to be completed using an on-line tool. He said he did not use the on-line tool to attest to his vaccination status. He was not vaccinated for COVID-19 by the deadline.

[25] The employer confirmed in an email the Claimant was sent a letter on November 15, 2021, stating the reason he was placed on an administrative leave without pay was for non-compliance with the employer's policy. The Claimant does not dispute that he was placed on an administrative leave for not complying with the employer's policy.

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

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

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

– What the law says

[28] 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 Act. Case law sets out the legal test for misconduct - the questions and criteria I can consider when examining the issue of misconduct.

[29] 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.

[30] 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]

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

[32] 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 that it is more likely than not that the Claimant was suspended from his job because of misconduct.[16]

– What I can decide

[33] 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 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.

[34] 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.

[35] 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.

[36] 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.

[37] 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 that 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]

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

[39] 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 the 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]

[40] 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]

[41] 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]

[42] 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. 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**

[43] The Commission says it concluded the Claimant's refusal to comply with the employer's vaccination policy constituted misconduct within the meaning of the EI Act because he wilfully refused to comply with the policy and there is a clear causality between that refusal and the suspension from employment. The Commission said the Claimant was aware that failure to comply with the policy would cause a loss of employment. It says therefore, on the basis of the evidence provided, the Commission considers that the claimant's behavior is the direct cause of the suspension and constitutes misconduct within the meaning of the EI Act.

– **The Claimant's submissions**

[44] The Claimant submitted his employer confirmed to him he was not suspended for misconduct. He says his boss is in the best position to decide if what he did was misconduct.

[45] The Claimant testified he heard about the employer's COVID-19 vaccination policy when it was discussed at work. He spoke to his supervisor about the policy. He said his supervisor said he could not disagree with the Claimant's position the policy

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

could not override the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*.

[46] The Claimant testified he did not attest to his vaccination status. He did look at the on-line vaccine attestation form. He found the form only had "yes" or "no."

[47] The Claimant testified the accommodation process was done on-line individually. A person would log in and the employer would be able to see the information that was entered. He read the documents on-line on how to fill out the forms. He discussed this with his supervisor. The Claimant said that system did not allow him to state his case adequately. He did not use the system to make a request for accommodation.

[48] The Claimant said he asked for an accommodation "outside the button." The Claimant testified he discussed an exemption verbally with his supervisor. He explained to the supervisor he liked to breathe and to live and so he did not want to take the COVID-19 vaccine. He was concerned he may have a negative reaction to the COVID-19 vaccine because he reacted to another vaccine in the past. He asked about alternate solutions but there were none apparent, and none were offered. The Claimant explained he did not ask for an exemption based on religious reasons because he did not think it appropriate to be questioned about his religious beliefs in the workplace.

[49] The Claimant's supervisor spoke to a Service Canada officer on March 31, 2022. The supervisor said he met with all employees, including the Claimant, to ensure they understood the policy and the repercussions for not complying. The Claimant does not dispute this.

[50] The Claimant argued his circumstances are similar to those in *A.L. v. Canada Employment Insurance Commission*, 2022 SST 1428 (*AL*).[26] He noted that in *AL* the Tribunal Member found there was nothing in that appellant's collective agreement to allow the employer to adopt a medical policy for their employees. The Claimant sent the Tribunal a copy of a Collective Agreement between the Treasury Board and the

[26] The Claimant submitted the unpublished decision which has the appellant's full name. The decision has now been published and this is its neutral citation.

Professional Institute of the Public Service of Canada (PIPSC) that covers the Claimant's classification. The Claimant is a member of the PIPSC. He submitted that his Collective Agreement does not have any provision for vaccination. As such, he thinks that his employer also cannot come up with a policy outside of the Collective Agreement.

[51] The Claimant submitted the employer's Code of Conduct (Code). He says the vaccination policy is in direct opposition to the Code and he cannot follow both. He discussed his concerns with his supervisor. The Claimant said he was in a situation to follow two policies that were in contradiction. He said the Commission is choosing which policies to follow, but when it comes to common decency, sense and courtesy it is failing.

– **My findings**

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

[53] 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.

[54] 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.

[55] 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.

[56] 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]

[57] 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. In addition, the Claimant's Collective Agreement contains a management rights clause which says, "All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this agreement are recognized by the Institute as being retained by the Employer." I am not relying on this term of the Collective Agreement in reaching my decision but am providing it here to illustrate the Collective Agreement recognizes there are managerial rights that might not be addressed by the Collective Agreement.

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

[59] In *AL,* 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."

[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.

[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]

[61] I am not going to follow *AL* 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 has lost their employment due to their own misconduct. If I were to follow the reasoning in *AL*, by examining whether the employer's policy complied with the collective agreement or its other policies, 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 his employer has said the administrative leave without pay was not due to misconduct. He says his employer is in the best position to determine if what he did was misconduct. The Federal Court of Appeal has considered this question and found that an employer's characterization of the grounds of an employee's suspension or dismissal is not determinative of whether the employee lost their job because of misconduct within the meaning of the EI Act.[31] As a result, the employer's characterization of the reason why the Claimant was not working is not determinative of the issue under appeal.

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[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 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 testified that he 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] See *Canada (Attorney General) v Boulton*, 1996 FCA 1682

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

[64] 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 within two weeks following that deadline. 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.

[65] The Claimant did not complete the attestation form. He asked about alternatives to vaccination and discussed his reasons for not being vaccinated with his supervisor, but he did not use the employer's system to request an exemption. He was not granted an exemption to vaccination and remained unvaccinated by the attestation deadline.

[66] The Claimant testified he read the employer's policy. He was aware his employer required him to be vaccinated and exemptions to the policy could be granted. While he did discuss his reasons for not being vaccinated with a supervisor, he did not apply for an exemption. He was aware that if he did not have an exemption and remained unvaccinated two weeks after the attestation deadline he would be placed on an unpaid administrative leave of absence. The evidence is clear the Claimant was aware he would be suspended (placed on an unpaid administrative leave of absence) if he was not vaccinated within two weeks of the attestation deadline.

[67] The Claimant did not complete the attestation form, he did not have an exemption to vaccination and remained not fully vaccinated for OCVID-19 within two weeks of the attestation deadline. 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 that 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?

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

Conclusion

[69] The Commission has proven the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[70] This means the appeal is dismissed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section