



Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 232

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: A. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (467398) dated May 16, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: February 14, 2023

Hearing participant: Appellant

Decision date: February 17, 2023

File number: GE-22-3884

Decision

[1] I am dismissing the appeal, with modification.

[2] The Canada Employment Insurance Commission (Commission) has shown the Appellant lost his job because of misconduct (in other words, because he did something that caused him to be suspended and then dismissed).

[3] The Appellant is disentitled from receiving Employment Insurance (EI) benefits from Tuesday, November 23, 2021, to Friday to June 3, 2022, during the period of suspension.¹ He was dismissed effective June 9, 2022, due to misconduct. This means the Appellant is disqualified from receiving EI benefits as of Sunday, June 5, 2022.²

Overview

[4] The Appellant was put on unpaid leave (suspended) and then dismissed from his job. The Appellant's employer says he was let go because he didn't comply with the employer's mandatory COVID-19 vaccination policy. He refused to disclose his vaccination status.

[5] Even though the Appellant doesn't dispute this happened, he says that going against the employer's policy isn't misconduct.

[6] The Commission accepted the employer's reason for the suspension. The Commission decided the Appellant stopped working due to misconduct. Because of this, the Commission decided the Appellant wasn't entitled to receive EI benefits.

¹ Section 31 of the *Employment Insurance Act* (EI Act) states that, if a Appellant is suspended due to misconduct, they are not entitled to receive EI benefits during the period of suspension. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be payable or paid.

² Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.

[7] The Appellant disagrees with the Commission's decision to deny him EI benefits. He appealed to the Social Security Tribunal (Tribunal) General Division.

[8] On October 7, 2022, a Member of the Tribunal's General Division (GD) summarily dismissed the Appellant's appeal. The Appellant appealed the GD's decision to the Tribunal's Appeal Division (AD). The AD Member found the previous GD Member made an error by summarily dismissing the appeal. The AD allowed the appeal and returned the matter to be heard by a different GD Member. I am that GD Member. So I will now proceed with determining the merits of the appeal.

Matters I have to consider first

Potential added party

[9] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. 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. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

English as a second language

[10] At the outset of the hearing, the Appellant explained that English is his second language. He said he may explain things differently. He also said he may not understand everything I said in English. He agreed that he would tell me if there was anything he didn't understand so I could repeat or rephrase it for him. I also agreed to speak slowly to assist him with understanding what I said in English.

[11] Throughout the hearing, the Appellant spoke clearly in English. At times, I rephrased what he had said in English to confirm I understood what he was saying. He was fully responsive to everything I said in English.

[12] At the end of the hearing, the Appellant confirmed he understood everything that had been said and he didn't need further clarification. So, I find the Appellant had a full and fair opportunity to be heard.

Issues

[13] Was the Appellant suspended and then dismissed because of misconduct?

Analysis

[14] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.³

[15] To answer the question of whether the Appellant was suspended and then dismissed because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended and later dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[16] There is no dispute that the Appellant was put on leave without pay (suspended), and later dismissed, because he refused to disclose his vaccination status by the deadline(s) set out by the employer's mandatory COVID-19 vaccination policy.

[17] There is nothing in the file that could make me find otherwise. So, I find the Appellant was suspended and then dismissed from his job because he refused to disclose his vaccination status, as required by the employer's mandatory COVID-19 vaccination policy.

Is the reason for the Appellant's suspension and dismissal misconduct under the law?

[18] Yes. I find the Commission has proven the reason for the Appellant's suspension and dismissal is misconduct. Here is what I considered.

³ See sections 30 and 31 of the EI Act.

[19] To be misconduct, the conduct has to be wilful. This means the Appellant's conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵

[20] The Appellant 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.⁶

[21] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and there was a real possibility of being let go because of that.⁷

[22] The Commission has to prove the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Appellant was suspended and then dismissed because of misconduct.⁸

[23] The Commission says there was misconduct for the following reasons:

- On October 5, 2021, the employer notified the Appellant of the requirement to disclose his vaccination status.
- The Appellant was aware that all employees were required to disclose they were fully vaccinated by November 22, 2021.
- The Appellant knew he would be placed on unpaid leave (suspended), if he failed to disclose that he was fully vaccinated by November 22, 2021.
- The employer notified the Appellant that if he continued to refuse to disclose his vaccination status, his employment may be terminated.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Appellant didn't apply for a medical or religious exemption from the policy.

[24] The Appellant says he didn't commit misconduct because the employer unilaterally changed the terms of his employment. He referred to a FAQ document the employer issued on March 29, 2021, which states that vaccination for COVID-19 will not be mandatory. This document also states employees would not have to disclose their private medical history. He says the employer unilaterally changed those answers when it implemented the November 1, 2021, policy. The November 1, 2021, requires him to disclose his vaccination status and be vaccinated against COVID-19.

[25] The Appellant argued the employer constructively dismissed him. He didn't voluntarily go on a leave of absence or quit. He was placed on leave without pay November 23, 2021, and then terminated effective June 9, 2022. He filed a grievance through his union, but it was denied.

[26] The Appellant confirmed he had several discussions with his manager about the requirements to comply with the policy. He agrees that he received the manager's November 5, 2021, email setting out the dates for compliance with reporting vaccination status. The Appellant responded to that email on November 19, 2021, setting out five questions he wanted answers to, before he would agree to comply.

[27] During the hearing, the Appellant referred to a decision issued by this Tribunal in *AL v CEIC*, in which a Member of this Tribunal allowed the appeal.⁹ He says his appeal should also be allowed because his circumstances were similar. Specifically, *AL* was a unionized employee whose collective agreement didn't require vaccination against COVID-19. *AL*'s employer unilaterally changed the terms of her employment, and it was determined that she had the right not to accept a vaccination.

⁹ The Appellant submitted a copy of the Tribunal's decision, *AL v Canada Employment Insurance Commission (AL v CEIC)*, GE-22-1889.

[28] I am not bound by other decisions made by this Tribunal.¹⁰ This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[29] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on his findings regarding the employer's unilateral actions to impose the policy and whether that Appellant was legally justified in refusing to get vaccinated against COVID-19. I also wish to note that the *AL v CEIC* decision has been appealed.

[30] The law doesn't say I have to consider how the employer behaved.¹¹ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.¹²

[31] I further note that the Federal Court recently issued a decision in *Cecchetto v Attorney General of Canada*. In that decision the Court dismissed an application for judicial review in a matter with similar facts as those in *AL v CEIC*.¹³

[32] The claimant in *Cecchetto* worked at a hospital and was denied EI benefits because they were found to have been suspended and then dismissed from their job due to misconduct. They failed to comply with the provincial directive requiring mandatory COVID-19 vaccination for hospital workers.

[33] In *Cecchetto*, the Court confirmed that it is not within the mandate or jurisdiction of the Social Security Tribunal to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy. Put another way, as a Member of this Tribunal I can't make decisions about whether the Appellant had other options under other laws or whether the employer should have made reasonable arrangements (accommodations)

¹⁰ I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis*.

¹¹ See section 30 of the Act.

¹² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ See *Cecchetto v Attorney General of Canada*, 2023 FC 102.

for the Appellant.¹⁴ I can consider only one thing: whether the Appellant's action or inaction is misconduct under the EI Act.

[34] Whether or not the Appellant worked from home is irrelevant. This is because the duty owed to his employer was to comply with the mandatory vaccination policy, which was a condition of continued employment.¹⁵

[35] I acknowledge the Appellant may have a right to decide whether to be vaccinated or to disclose his vaccination status. But he knew there were consequences if he refused to follow the employer's policy, which in this case was a suspension and then dismissal from his employment.

[36] The Appellant argued that his Record of Employment (ROE) was unlawful because it shows a reason for separation as "N" for leave of absence, not "M" for misconduct or dismissal. Although the ROE may list a different reason for separation, I must consider the facts of the case to determine whether there is misconduct.

[37] As stated in a recent Federal Court of Appeal decision, "There is no mechanism by which, this Court or the Social Security Tribunal can compel [the claimant's] employer to correct his ROE."¹⁶

[38] Based on the facts set out above, I find the Commission has proven misconduct because the Appellant's refusal to disclose his vaccination status was deliberate or intentional and a breach of the employer's mandatory vaccination policy. There was a cause-and-effect relationship between his refusal to disclose whether he was vaccinated, his suspension, and dismissal. So, I find the Appellant was suspended and then dismissed from his job because of misconduct.

¹⁴ See *Cecchetto v Attorney General of Canada*, 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁵ See *MN v Canada Employment Insurance Commission*, AD-22-628.

¹⁶ See paragraph [8] in *Vuong v Canada (Attorney General)*, 2021 FCA 221.

Period of disentitlement and disqualification

[39] I find the Appellant is disentitled and then disqualified from receiving EI benefits because he was suspended and then dismissed due to misconduct. Here is what I considered.

[40] The law says that, in cases of misconduct, a disentitlement imposed during the period of suspension doesn't prevent (preclude) a disqualification when the disentitlement period expires because of a dismissal.¹⁷

– Disentitlement

[41] I find the Appellant is disentitled from receiving EI benefits from Tuesday, November 23, 2021, to Friday, June 3, 2022.¹⁸

[42] I disagree with the Commission's decision that the Appellant is disentitled as of November 21, 2021.¹⁹ Here is what I considered.

[43] The Appellant presented evidence to the Tribunal that he worked a full day on November 22, 2021. He also did some emails on the morning of November 23, 2021, before losing access to his computer. The ROE on file shows the last day paid was November 22, 2021. The effective date of suspension listed in the communications issued by the employer is November 23, 2021. So, I find the Appellant was suspended as of November 23, 2021.

[44] The Appellant's benefit period began on Sunday, November 21, 2021. A disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid during a benefit period. He was suspended as of November 23, 2021. So, the Appellant is disentitled from receiving EI benefits from Tuesday, November 23, 2021, to Friday, June 3, 2022.²⁰

¹⁷ See *Thibodeau v Canada (Attorney General)* 2015 FCA 16.

¹⁸ Section 31 of the EI Act provides that a disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid during a benefit period.

¹⁹ November 21, 2021, is the date listed in the reconsideration letter found at page GD3-42.

²⁰ Section 31 of the EI Act provides that a disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid during a benefit period.

– Disqualification

[45] I find the Appellant is disqualified from receiving EI benefits as of Sunday, June 5, 2022.²¹

[46] I recognize the Appellant's employment was terminated after the Commission issued its reconsideration decision on May 16, 2022. But as set out above, the law says that, in cases of misconduct, a disentitlement imposed during the period of suspension doesn't prevent (preclude) a disqualification when the disentitlement period expires because of a dismissal.²²

[47] The Appellant provided a copy of his termination letter which states his employment was terminated as of June 9, 2022. The letter states his employment was terminated because he continued to refuse to disclose whether he had been vaccinated against COVID-19.

[48] The Appellant was dismissed effective Thursday, June 9, 2022. Disqualifications begin on the Sunday of the week in which a claimant is dismissed. This means the Appellant is disqualified from receiving EI benefits as of Sunday, June 5, 2022.²³

Conclusion

[49] The Commission has proven the Appellant lost his job because of misconduct.

[50] The appeal is dismissed, with modification.

Linda Bell

Member, General Division – Employment Insurance Section

²¹ Section 30(2) of the EI Act provides that a disqualification starts on the Sunday of the week in which the Appellant was dismissed.

²² See *Thibodeau v Canada (Attorney General)* 2015 FCA 16.

²³ Section 30(2) of the EI Act provides that a disqualification starts on the Sunday of the week in which the Appellant was dismissed.