



Citation: *AE v Canada Employment Insurance Commission*, 2023 SST 332

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

Decision

Appellant: A. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (502963) dated June 27, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference

Hearing date: November 30, 2022

Hearing participant: Appellant

Decision date: February 7, 2023

File number: GE-22-2497 & GE-22-2499

Decision

[1] I am dismissing A. E.'s appeal number GE-22-2497.

[2] The Canada Employment Insurance Commission (Commission) has proven that his employer suspended him for not following its mandatory COVID vaccination policy. And this counts as misconduct under the *Employment Insurance Act* (EI Act).

[3] So he isn't entitled to Employment Insurance (EI) regular benefits.

[4] At the hearing he said he isn't appealing the Commission's availability decision. So I don't have to decide appeal number GE-22-2499.

Overview

[5] The Claimant was suspended from his job working for the X (employer) as a cardiology stress technician.¹

[6] The employer says it suspended him because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] He doesn't dispute this.

[8] The Commission accepted the employer's reason for the suspension. And it decided his employer suspended him for a reason the EI Act considers to be misconduct. So the Commission could not pay him EI regular benefits.

[9] The Claimant disagrees. He says there is no misconduct. He is still employed and tried every avenue to keep on working. He says his employer is guilty of misconduct for failing to respect his human rights. His employer denied his request for a religious exemption without giving any reasons and didn't accommodate his religious beliefs.

¹ In this decision, I refer to A. E. as the "Claimant". I do this because the *Employment Insurance Act* (EI Act) uses the word "claimant", meaning the person who has made a claim for EI benefits. And he is appealing the Commission's decision to deny his EI claim.

[10] I have to decide whether the Claimant was suspended from his job for misconduct under the EI Act.

Matters I have to consider first

The Tribunal joined two appeals

[11] The Claimant filed his appeal with the Tribunal. The Tribunal opened two appeal files for him, one for each issue in the Commission's reconsideration decision letter:

- GE-22-2497 (suspension for misconduct)
- GE-22-2499 (availability for work)

[12] It made legal and practical sense to join the two appeals, so that I can hear and decide them together. So that's what I decided to do.

[13] And I sent the Claimant and the Commission a letter with my reasons for joining the appeals.²

The Claimant isn't appealing the Commission's availability decision

[14] A claimant for regular benefits has to show they are available for work. In other words, a claimant has ongoing duty to look for work.

[15] The Commission decided that the Claimant is disentitled from receiving EI regular benefits because he wasn't available for work from March 14 to March 16, 2022.³ It says he was only cleared to return from a medical leave on March 17, 2022.

[16] The Claimant didn't make an argument about availability in his notice of appeal.

[17] At the hearing he confirmed he is not appealing the Commission's availability decision.

² See GDJ2.

³ See the Commission's reconsideration decision at GD3-29 and its representation at GD4-3, in GE-22-2499.

[18] This means I don't have to decide appeal GE-22-2499.

Issues

[19] Was the Claimant suspended from his job for a reason the EI Act considers to be misconduct?

Misconduct⁴

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

[21] A suspension under the EI Act means the same thing as being put on a leave (or a leave of absence) without pay by an employer.

[22] I have to decide two things:

- the reason the Claimant was suspended from his job
- whether the EI Act considers that reason to be misconduct

The reason the Claimant was suspended

[23] I find the Claimant's employer suspended him because he didn't comply with its vaccination policy.

[24] The Claimant and the Commission agree about this. It's what:

- the Claimant wrote in his EI application and told the Commission⁵
- he wrote in his notice of appeal⁶
- he testified to at the hearing

⁴ References to GD documents in the rest of this decision refer to the documents in appeal file GD-22-2497.

⁵ See the Claimant's EI application at GD3-8, where he says, "I was cleared to return to work on March 17, 2022, but my employer instead put me on unpaid leave because I was unable to receive a COVID-19 vaccination. I filed a religious exemption to the vaccination which was denied by the employer, and is currently being considered for grievance by my union." Also see the Commission's notes of its phone calls with the Claimant at GD3-21 and GD3-27.

⁶ See his notice of appeal at GD2-128.

- his employer wrote on his record of employment (Code N, leave of absence) and in the suspension letter it sent to him⁷
- his employer told the Commission⁸

[25] The Claimant's employer also told the Commission it considered his unpaid leave a suspension.⁹

[26] I accept the evidence of the Claimant and the Commission. I have no reason to doubt what the Claimant and his employer said and wrote. And there is no evidence that goes against what they said and wrote.

The reason is misconduct under the law

[27] The Claimant's refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[28] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the issues I have to consider when making my decision.

[29] The Commission has to prove it's more likely than not the Claimant was suspended from his job because of misconduct, and not for another reason.¹⁰

[30] I have to focus on what the Claimant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.¹¹ I can't consider whether the employer's policy is reasonable, or whether a suspension was a reasonable penalty.¹²

⁷ See the record of employment at GD3-19. And see the suspension letter at GD3-65 (dated March 18, 2022).

⁸ See the Commission's notes of its call with the employer at GD3-48.

⁹ See the Commission's notes of its call with the employer at GD3-22.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ This is what sections 30 and 31 of the EI Act say.

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

[31] The Claimant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.¹³ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.¹⁴ And misconduct also includes conduct that is so reckless that it is almost wilful.¹⁵

[32] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out a duty he owed to his employer, and knew or should have known there was a real possibility of being suspended because of that.¹⁶

[33] I can only decide whether there was misconduct under the EI Act.

[34] I can't make my decision based on other laws.¹⁷ I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or decide whether an employer breached a collective agreement.¹⁸ I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.¹⁹ And I can't decide whether an employer breached a claimant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Claimant say

[35] The Commission and the Claimant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Claimant's conduct is misconduct under the EI Act.

¹³ See *Attorney General of Canada v Secours*, A-352-94.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁵ See *McKay-Eden v His Majesty the Queen*, A-402-96.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.

¹⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[36] The Commission says that there was misconduct under the EI Act because the evidence shows:²⁰

- the employer had a vaccination policy and communicated that policy to all staff in October 2021²¹
- the Claimant was on a medical leave of absence from November 17, 2021 and was cleared to return to work on March 17, 2022
- under the vaccination policy, the Claimant had to be partially or fully vaccinated and disclose his vaccination status to his employer by November 30, 2021²²
- he knew what he had to do under the policy²³
- he also knew his employer could suspend him under the policy if he didn't get vaccinated by the deadline²⁴
- on October 19, 2021 he applied for an exemption on religious grounds, but his employer denied his application at the end of October 31, 2021²⁵
- he made a conscious and deliberate personal choice not to get vaccinated by the deadline, for religious reasons²⁶

²⁰ See the Commission's Representations at GD4.

²¹ See X, *COVID-19 Vaccination for Team Members* (approved October 18, 2021; effective October 19, 2021) at GD3-50 to GD3-64 (vaccination policy). See also the Commission's notes of its phone calls with the Claimant at GD3-22 and GD3-27.

²² See the vaccination policy at sections 1 and 2 of *Appendix B: Consequences for Medical Staff who aren't Fully Vaccinated against COVID-19*, at GD3-62.

²³ See the Commission's notes of its phone calls with the Claimant at GD3-21 and GD3-27.

²⁴ See the vaccination policy at section 1 of *Appendix B: Consequences for Medical Staff who aren't Fully Vaccinated against COVID-19*, at GD3-62.

²⁵ See his EI application at GD3-9 and GD3-10. See also the Commission's notes of its phone call with the Claimant at GD3-27. And see the email from the employer to the Claimant denying his exemption request, at GD3-67.

²⁶ He told the Commission and testified at the hearing that he didn't get vaccinated because it went against his religious beliefs.

- his employer suspended him effective March 17, 2022 because he didn't comply with its vaccination policy²⁷

[37] At the hearing the Claimant didn't contradict or challenge the evidence the Commission relied on. He testified that he followed the employer's vaccination policy the best he could without going against his religious beliefs. He said his employer didn't give him a reason for refusing his exemption application. And it seems to him his employer didn't plan on giving any religious exemptions. He believes his employer should have given him a religious exemption or accommodated his religious beliefs.

The Commission has proven misconduct under the EI Act

[38] The evidence in this appeal is consistent and straightforward. I believe and accept the Claimant's evidence and the Commission's evidence for the following reasons.

[39] I have no reason to doubt the Claimant's evidence (what he said to the Commission and at the hearing, and what he wrote in his EI application and notice of appeal). His evidence is consistent. He said the same thing to the Commission and the Tribunal. And his story stayed the same from his EI application right through the hearing.

[40] I accept the Commission's evidence because it's consistent with the Claimant's evidence. The employer's vaccination policy and its suspension letter reflect what the Claimant and the employer said to the Commission. And there is no contradictory evidence about the key facts in this appeal.

[41] Based on the evidence I have accepted, I find that the Commission has proven the Claimant's conduct was misconduct under the EI Act because it has shown that he:

- knew about the vaccination policy
- knew about his duty to get fully vaccinated (or get an exemption)

²⁷ See above where I reviewed the evidence about the reason his employer suspended him. And I found he was suspended because he didn't comply with his employer's vaccination policy.

- knew that his employer could suspend him if he didn't get vaccinated
- consciously, deliberately, and intentionally made a personal decision not to get vaccinated by the deadline, for religious reasons
- was suspended from his job because he didn't comply with his employer's vaccination policy

The Claimant's other arguments

[42] In his appeal notice and at the hearing the Claimant said his conduct wasn't misconduct, so the Commission should pay him EI regular benefits, because:²⁸

- His employer failed to accommodate his religious beliefs under Nova Scotia human rights law. For example, instead of mandating COVID vaccination, his employer could have allowed him to wear personal protective equipment (PPE) and get tested for COVID.
- I should follow an arbitration decision in favour of a Nova Scotia nurse. In that case the arbitrator decided the employer (a hospital) had a duty to accommodate the nurse's Christian beliefs that prevented her from getting vaccinated against COVID.²⁹

[43] Unfortunately for the Claimant I am not going to accept these arguments. I can't apply Nova Scotia human rights law. And I don't have to follow an arbitrator's decision made under Nova Scotia labour law and a collective agreement. The courts have clearly said that I can only consider the EI Act when I decide whether his conduct is misconduct under that Act.

[44] The Federal Court recently confirmed the "important, but narrow and specific role" of the Tribunal in misconduct appeals.³⁰ In that case the Commission had denied

²⁸ See his notice of appeal at GD2-126 and GD2A.

²⁹ See *Nova Scotia Nurses Union v IWK Health Centre* (Arbitrator Hollett, June 8, 022) (Mackie Grievance).

³⁰ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

regular benefits to a claimant who didn't follow their employer's mandatory COVID vaccination policy. The Court said the Tribunal's role was to determine two things: why the claimant was dismissed and whether that reason is "misconduct" under the EI Act.³¹

[45] And that is what I have done in this appeal.

Summary of my finding about misconduct

[46] After considering and weighing the documents and testimony, I find the Commission has proven the Claimant was suspended from his job for a reason the EI Act considers to be misconduct.

Conclusion

[47] The Commission has proven the Claimant was suspend for misconduct under the EI Act.

[48] This means he isn't entitled to get EI regular benefits. And this is what the Commission decided.

[49] So I am dismissing his appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

³¹ See paragraphs 46 to 48 in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.