



Citation: *MI v Canada Employment Insurance Commission*, 2023 SST 5

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

## Decision

**Appellant:** M. I.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (485825) dated June 24, 2022 (issued by Service Canada)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** In person

**Hearing date:** November 17, 2022

**Hearing participant:** Appellant

**Decision date:** January 10, 2023

**File number:** GE-22-2307

## Decision

[1] I am dismissing M. I.'s appeal.<sup>1</sup>

[2] He didn't follow his employer's mandatory COVID-19 vaccination policy. And his employer suspended and then dismissed him because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven that he was suspended then lost his job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, he did something that caused him to get suspended and to lose his job.

[4] This means he doesn't qualify for Employment Insurance (EI) benefits.

[5] This is what the Commission decided.<sup>2</sup> So the Commission made the correct decision in his EI claim.

## Overview

[6] The Claimant lost his job working as a licenced plumber and steamfitter for a major construction and contracting company. He worked in a hospital.

[7] The Claimant's employer said that it suspended him then let him go because he didn't comply with the mandatory COVID vaccination policy that was in place in the hospital where he worked (vaccination policy).<sup>3</sup>

[8] The Claimant doesn't dispute this.

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<sup>1</sup> In this decision, I refer to M. I. 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.

<sup>2</sup> Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.

<sup>3</sup> Section 31 of the EI Act uses "suspension". In this decision, a suspension means the same thing as an unpaid leave of absence, a leave of absence without pay, and a leave of absence.

[9] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission didn't pay him EI benefits.

[10] The Claimant says his conduct wasn't misconduct. He says he lost his job through no fault of his own, because he asserted his rights. His employer broke the collective agreement when it suspended him and dismissed him. He says vaccine mandates aren't law. He had a right under various laws to refuse to get vaccinated against COVID. And a right to refuse to give his employer his health information. The COVID vaccines are experimental and haven't been properly tested. Finally, he says he should be able to get benefits because he paid into EI for 16 years and he is in extreme financial hardship.

[11] I have to decide whether the reason the Claimant lost his job is misconduct under the EI Act.

## **Matter I have to consider first**

### **Documents submitted to the Tribunal after the hearing**

[12] The Claimant and the Commission submitted documents to the Tribunal after the hearing.

[13] The Claimant sent a one-line email asking the Tribunal to change the "reason for issuing" code on his record of employment.<sup>4</sup> I am not accepting this document and I will not consider it when I make my decision, for two reasons. It isn't relevant to the decision the Claimant is appealing. And the Tribunal has no legal power to change a record of employment or to make anyone else do that.

[14] The Claimant sent a six-page document titled "legal provisions for EI".<sup>5</sup> I am not accepting this document and I will not consider it when I make my decision, for three reasons. First, the Tribunal didn't ask for this document or agree to him sending it to the

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<sup>4</sup> See GD18.

<sup>5</sup> See GD19.

Tribunal after the hearing. Second, it is identical or almost identical to information the Claimant sent to the Tribunal before the hearing.<sup>6</sup> Third, the Claimant had every opportunity to make his case before and at the hearing, so it isn't procedurally unfair and doesn't go against natural justice to refuse to accept the document.

[15] The Claimant sent the Tribunal a copy of a recent decision of the Tribunal (*AL v CEIC*).<sup>7</sup> I am accepting this decision and will consider it in my reasons (below), for three reasons. First, it was decided and released after I heard the Claimant's appeal. So he could not have sent it to the Tribunal before his hearing or referred to it at his hearing. Second, the facts in that appeal are similar to the Claimant's appeal. It is an appeal of the Commission's decision to disqualify a person from getting EI benefits for misconduct for not complying with the employer's COVID-19 vaccination policy. So the law that the Tribunal member interpreted and applied in *AL v CEIC* is very relevant to the decision I have to make in the Claimant's appeal. Third, the Commission isn't prejudiced. The Tribunal sent the decision to the Commission with an opportunity to reply.

[16] The Commission sent the Tribunal its reply, which I am accepting because I gave the Commission a chance to reply.<sup>8</sup>

## Issue

[17] Was the Claimant suspended and dismissed from his job for a reason the EI Act considers misconduct?

## Analysis

[18] 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.

[19] I have to decide two things.

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<sup>6</sup> See GD15 and GD16.

<sup>7</sup> SeeGD20. The decision hasn't been published, so it doesn't have a neutral citation and it refers to the claimant by their name. I am going to cite the decision as: *AL v CEIC* (SST file GE-22-1889, December 14, 2022, Mark Leonard). I am going to refer to the decision as: *AL v CEIC*.

<sup>8</sup> See GD22.

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

### **The reason the Claimant was suspended and lost his job**

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

[21] The Claimant and the Commission agree about this.

[22] It's what he wrote on his EI application.<sup>9</sup> It's what the Claimant told the Commission and testified to at the hearing.<sup>10</sup>

[23] His employer used code M (dismissal or suspension) on his records of employment.<sup>11</sup> His employer told the Commission it suspended and then dismissed him because he didn't comply with the vaccination policy.<sup>12</sup> And that's what his employer wrote in the suspension and termination letters it sent to him.<sup>13</sup>

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

### **The reason is misconduct under the law**

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

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<sup>9</sup> See his EI application at GD3-7 and GD3-8.

<sup>10</sup> See the Commission's notes of its phone calls with the Claimant at GD3-20 and GD3-52.

<sup>11</sup> See the original record of employment at GD3-26 (issued when he was suspended) and the amended record at GD-18 (issued when he was dismissed).

<sup>12</sup> See the Commission's notes of calls with the employer at GD3-47 and GD3-51.

<sup>13</sup> See the suspension letter at GD9-8 and GD9-9. See the termination letter at GD3-49 and GD3-50.

### ***What misconduct means under the EI Act***

[26] 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 legal questions I have to consider when I make my decision.

[27] The Commission has to prove that it is more likely than not the Claimant lost his job because of misconduct.<sup>14</sup>

[28] I have to focus on what the Claimant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.<sup>15</sup> I can't consider whether the employer's policy is reasonable, or whether suspension and dismissal were reasonable penalties.<sup>16</sup>

[29] 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.<sup>17</sup> To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.<sup>18</sup> And misconduct also includes conduct that is so reckless that it is almost wilful.<sup>19</sup>

[30] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer, and knew or should have known there was a real possibility of being let go because of that.<sup>20</sup>

[31] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.<sup>21</sup> So, for example, I can't decide whether the Claimant

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<sup>14</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>15</sup> This is what sections 30 and 31 of the EI Act say.

<sup>16</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>17</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>18</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>19</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>20</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>21</sup> 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.

was wrongfully dismissed under employment law or decide if his employer breached a collective agreement.<sup>22</sup> I can't decide whether his employer discriminated against him or should have accommodated him under human rights law.<sup>23</sup> And I can't decide whether his employer infringed his privacy or other rights in the employment context, or otherwise.

***What the Commission and the Claimant say***

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

[33] The Commission says that there was misconduct under the EI Act because the evidence shows:<sup>24</sup>

- the Claimant was subject to the hospital's vaccination policy, which his employer adopted for its employees who worked at the hospital<sup>25</sup>
- that vaccination policy became a condition of the Claimant's employment<sup>26</sup>
- under the vaccination policy he had to get two doses of COVID vaccine and give his employer proof, or get an exemption, by the deadline (November 22, 2021)<sup>27</sup>

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<sup>22</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>23</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>24</sup> See the Commission's Representations at GD4 and its Supplementary Representations at GD7, GD10, GD12, and GD14.

<sup>25</sup> See X Hospital, *Occupational Health Policy HR-OH-06: COVID-19 Health Care Worker Management Policy* (issued June 2, 2021, revised November 2, 2021) at GD3-57 to GD3-64. That policy explicitly applies to employees of contractors, including X.

<sup>26</sup> See the Commission's notes of its phone call with the employer at GD3-47.

<sup>27</sup> See the vaccination policy at GD3-59: "Employees who do not provide documentation of having received their first dose of a vaccine on or prior to November 22, 2021, and have not provided proof of a medical exemption as per section 2.4(a) will be terminated on November 23, 2021."

- his employer gave him a copy of the vaccination policy, so he knew what he had to do<sup>28</sup>
- he also knew his employer could suspend him and dismiss him if he didn't get vaccinated, or wasn't given an exemption, by the deadline<sup>29</sup>
- he didn't apply for an exemption<sup>30</sup>
- he didn't get vaccinated by the deadline, which was a wilful and deliberate decision not to comply with the vaccination policy<sup>31</sup>
- so his employer suspended then dismissed him because he didn't comply with its vaccination policy<sup>32</sup>

[34] The Claimant says his conduct wasn't misconduct.<sup>33</sup> He says he lost his job through no fault of his own, because he asserted his rights. His employer broke the collective agreement when it suspended him and dismissed him. He says vaccine mandates aren't law. He had a right under various laws to refuse to get vaccinated against COVID and to refuse to give his employer his health information. The COVID vaccines are experimental and haven't been properly tested.

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<sup>28</sup> See the Commission's notes of its phone calls with the Claimant at GD3-20 and GD3-52. See the termination letter at GD3-49 and GD3-50, which says the employer gave the Claimant a copy of the vaccination policy on September 3, October 20, November 4, and November 10, 2022.

<sup>29</sup> See the Commission's notes of its phone calls with the Claimant at GD3-52 where he says he thought his employer would accommodate him, so he didn't know *at first* that he would be suspended and terminated. But in his other phone call with the Commission he says he knew this, see GD3-20. At the hearing he testified that he knew he could be suspended or dismissed if he didn't follow the vaccination policy.

<sup>30</sup> See the Commission's notes of its phone call with the Claimant at GD3-53.

<sup>31</sup> The Claimant sent his employer a notice of liability because he didn't agree with its vaccination policy. See GD8-9 to GD8-17.

<sup>32</sup> See the Commission's notes of its phone call with the employer at GD3-47, a copy of the suspension letter at GD9-8 and GD9-9, and a copy of the termination letter at GD3-49.

<sup>33</sup> See his reconsideration request at GD3-25, GD3-27, and the Commission's notes of its call with the Claimant at GD3-52. This is also what the Claimant testified to at the hearing.



***The Commission has proven misconduct under the EI Act***

[35] I believe and accept the Claimant's evidence and the Commission's evidence for the following reasons.

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

[37] He and his employer told the Commission essentially the same thing. And there is no evidence that contradicts what he or his employer said.

[38] I accept the Commission's evidence because it's consistent with the Claimant's evidence. And there is no evidence that contradicts it.

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

- knew about the vaccination policy
- knew about his duty to get vaccinated and give proof (or get an exemption) by the deadline
- knew that his employer could suspend and dismiss him if he didn't get vaccinated
- didn't apply for an exemption
- consciously, deliberately, and intentionally made the decision not to get vaccinated by the deadline
- was suspended from his job because he didn't comply with the vaccination policy

- was terminated from his job because he didn't comply with the vaccination policy

***My reasons for not following the Tribunal's decision in AL v CEIC***

[40] The Claimant argues I should follow *AL v CEIC*, a decision of our Tribunal.<sup>34</sup> In *AL v CEIC*, AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job for a reason the EI Act considers misconduct, for two reasons:

- First, the collective agreement didn't include COVID-19 vaccination when it was signed, and the employer had not bargained with the union to include one. The Tribunal member reasoned that the employer could unilaterally impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee." And he found that there was no such legislation in the case. This meant that the employer's mandatory vaccination policy was not an express or implied condition of AL's employment. So AL's refusal to get vaccinated was not misconduct.
- Second, AL had a "right to bodily integrity". It was her right to choose whether to accept medical treatment—in this case, the COVID-19 vaccine. If her choice went against her employer's policy and led to her dismissal, exercising that right can't be a wrongful act or undesirable conduct worthy of punishment or disqualification under the EI Act. In other words, her refusal to get vaccinated was legally justified so it can't be misconduct under the EI Act.

[41] The Commission says the *AL v CEIC* decision makes no difference in the Claimant's appeal.<sup>35</sup> It says there are many other Tribunal decisions that have decided that a

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<sup>34</sup> The Claimant in this appeal made similar arguments. His employer breached the collective agreement because mandatory COVID vaccination wasn't part of his collective agreement when he was hired. He also argued he had a right to refuse to get vaccinated.

<sup>35</sup> See GD22, the Commission's Supplementary Representations.

claimant's failure to comply with their employer's vaccination policy is misconduct under the EI Act. It says the Claimant's conduct was misconduct.

[42] 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.<sup>36</sup>

[43] I am not going to follow *AL v CEIC*. With the respect owed to my colleague who decided *AL v CEIC*, I am not persuaded by his findings and the reasoning he relied on to arrive at those findings. In my opinion, his decision goes against the rules the Federal Court has set out in its decisions about misconduct.<sup>37</sup> Our Tribunal does not have the legal authority (in law we call this "jurisdiction") to do two things the Member did in his decision:

- First, he should not have interpreted and applied the collective agreement to find the employer had no authority to mandate that employees get vaccinated against COVID-19.<sup>38</sup>
- Second, he should not have found that the claimant had a right—in the employment context—to refuse to comply with the employer's vaccination policy based on the law of informed consent to medical treatment.<sup>39</sup> In other words, he had no legal authority to add to the collective agreement an absolute right for a worker to choose to ignore

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<sup>36</sup> 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.

<sup>37</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. 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.

<sup>38</sup> Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and apply a collective agreement. The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For example, where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement.

<sup>39</sup> In other words, when deciding whether there was misconduct, he focused on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. He should have focused on the conduct of the claimant. Once again, if the claimant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

the employer's vaccination policy based on a rule imported from a distinct area of law.

[44] My reasons for not following *AL v CEIC* flow from our Tribunal's jurisdiction. My reasons aren't based on the specific facts of that appeal *versus* the Claimant's appeal. So my reasons aren't limited to the circumstances and arguments the claimant made in *AL v CEIC*.<sup>40</sup> As I understand the Federal Court cases, when I am deciding whether a claimant's conduct is misconduct I don't have the legal authority to interpret and apply an employment contract, privacy laws, human rights laws, international law, the Criminal Code, or other laws.

### ***The Claimant's other arguments***

[45] The Claimant also made other arguments:

- His employer should have accommodated him and explored alternatives to vaccination.
- His employer infringed rights under the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*.
- COVID vaccines are experimental, don't prevent infection or transmission, and have killed many people in Canada.
- His employer violated Ontario's occupational health and safety law, and other laws that deal with privacy, by requiring employees to disclose their COVID vaccination status.

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<sup>40</sup> The Federal Court decisions I have cited also make practical and institutional sense. It doesn't make sense for our Tribunal to interpret and apply long and complicated collective agreements (or other laws) to decide issues under the EI Act. Labour law (like privacy law, human rights law, and criminal law) is a specialized area of law. We don't have the expertise or the resources to interpret and apply a collective agreement, an employment contract, or other laws. When we limit our role to interpreting and applying the EI Act, this allows our Tribunal to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". (This is what section 3(1)(a) of the Social Security Tribunal Regulation says our Tribunal should do.) Ultimately, this benefits the people who file appeals with our Tribunal. It also avoids situations where our Tribunal decides a collective agreement says one thing, and a labour arbitrator decides it says something else.

- His employer is guilty of offences in the *Criminal Code*.

[46] Unfortunately for the Claimant, I can't consider these arguments. My job in misconduct cases is to consider whether the Claimant's conduct is misconduct under the EI Act. I shouldn't focus on his employer's conduct. So, I can't consider whether the policy his employer adopted or the penalty it applied to him is reasonable. And I can't consider other laws, such as employment law, labour law, or privacy law.

[47] The Claimant testified that he has filed a grievance against his employer. He can raise these arguments in that case.

[48] Finally, the Claimant says he should be able to get EI benefits because he was born in Canada and contributed to EI for 16 years, he is experiencing dire financial hardship, and the EI Act says he is entitled.<sup>41</sup>

[49] There is no question that the financial consequences of the Commission's disqualification decision are harsh for the Claimant. Unfortunately for the Claimant, I have to follow the EI Act when I make my decision.<sup>42</sup> I have no power outside the EI Act to make my decision based on principles of fairness or equity.

[50] The EI Act is an insurance plan. Like other insurance plans, someone who makes a claim for a specific benefit needs to show that they meet all the conditions required to get that benefit.<sup>43</sup> Unfortunately for Claimant, sections 30 and 31 of the EI Act say he can't get EI regular benefits.

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<sup>41</sup> The Claimant says that he meets the conditions of eligibility under section 7 of the EI Act, and that he had just cause for voluntary leaving under section 29 of the EI Act because his employer acted contrary to law. Section 29 does not apply to the Claimant since he was suspended and dismissed for misconduct under sections 30 and 31 of the EI Act.

<sup>42</sup> See *Canada (Attorney General) v Knee* 2011 FCA 301.

<sup>43</sup> See *Pannu v. Canada (Attorney General)* 2004 FCA 90.

***Summary of my finding about misconduct***

[51] After considering and weighing all of the documents and testimony, I find the Commission has shown the Claimant was suspended and then lost his job because of misconduct under the EI Act.

**Conclusion**

[52] The Commission has proven that the Claimant was suspended and then lost his job because of misconduct under the EI Act

[53] Because of this, the Claimant is disentitled and disqualified from receiving EI benefits.

[54] This means the Commission made the correct decision in his EI claim.

[55] So I am dismissing his appeal.

Glenn Betteridge  
Member, General Division – Employment Insurance Section