



Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 148

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

## Decision

**Appellant:** C. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (507795) dated August 8, 2022 (issued by Service Canada)

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**Tribunal member:** Susan Stapleton

**Type of hearing:** Teleconference

**Hearing date:** February 1, 2023

**Hearing participant:** Appellant

**Decision date:** February 7, 2023

**File number:** GE-22-2877

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his employment due to his own misconduct. This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant's employer issued a policy that required him to be vaccinated against Covid-19 (Covid). He didn't get vaccinated, and was placed on unpaid leave (suspended) from his job.

[4] The Claimant doesn't dispute that this happened. However, he didn't agree with the employer's policy. It went against his religious beliefs. He says his employer discriminated against him, and should have accommodated him, based on his religious beliefs. He is healthy and doesn't need to be vaccinated against Covid. He says there was no misconduct on his part. He paid into EI for many years, and feels he is entitled to benefits.<sup>2</sup>

[5] The employer told the Commission that the Claimant was suspended because he didn't comply with its Covid vaccination policy.<sup>3</sup> His Record of Employment (ROE) indicated that it was issued because the Claimant was on a leave of absence due to "non-compliance with the vaccination practice."<sup>4</sup>

[6] The Commission found that the Claimant was disentitled from receiving benefits from February 20, 2022, because he was suspended from his job due to misconduct.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) says that Claimants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act addresses what happens when a Claimant is suspended for misconduct.

<sup>2</sup> GD2-9.

<sup>3</sup> GD3-25.

<sup>4</sup> GD3-20-21.

## Issue

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

[8] To answer this, 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 that reason to be misconduct.

## Analysis

### Why was the Claimant suspended from his job?

[9] I find that the Claimant was suspended from his job because he didn't comply with the employer's mandatory Covid vaccination policy. He stated in his Application for Benefits that he wasn't willing to reveal his vaccination status. He said that the employer had a policy that said if an employee didn't attest to being fully vaccinated, they would be suspended. He said he was told that if he didn't disclose his vaccination status by February 18, 2022, he would be suspended.<sup>5</sup> The Claimant testified that he refused to be vaccinated and didn't attest to being vaccinated.

[10] The Claimant testified that the employer gave notices to employees, beginning in November, 2021, that said employees had to call in to an automated system and attest to their vaccination status. There was also a written vaccination policy posted on the employer's website. He said that the policy applied to all employees, including him.

[11] The Claimant testified that he read the employer's policy, but he says that the policy "didn't make sense." Employees had to push a button via the automated attestation system, to say whether they were vaccinated, not vaccinated, or requesting an exemption from being vaccinated. The employer didn't require proof of vaccination. He feels that if the employer really cared whether employees were vaccinated, it would have required proof of vaccination.

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<sup>5</sup> GD3-9.

[12] The Claimant testified that it was his understanding that according to the policy, he had to attest that he was fully vaccinated by the end of November, 2021, or request an exemption from being vaccinated. If he didn't attest to being vaccinated, or have an approved exemption, he would be suspended from his job.

[13] The Claimant wrote to the employer on November 3, 2021. He said that he wasn't vaccinated, and proposed that unvaccinated employees be allowed to undergo testing instead of being vaccinated.<sup>6</sup> The employer responded to the Claimant's proposal, stating that testing instead of being vaccinated was not an acceptable option for him under its policy.<sup>7</sup>

[14] The Claimant requested a religious exemption from being vaccinated, through the employer's automated system. He submitted supporting documents. He testified that when he got to work on November 28, 2021, several other employees were given letters, and were not allowed to enter the workplace. The Claimant was allowed to continue to work, because he had requested an exemption.

[15] The employer wrote to the Claimant on February 3, 2022, denying his exemption request. It told him he must comply with its vaccination policy within the next two weeks. If not, he would be suspended from his job.<sup>8</sup>

[16] The Claimant testified that some employees whose exemption requests were denied, requested exemption again through the automated system. He says those employees got to continue to work, while the exemption request process played out again. A co-worker told him he should do this, so he could keep working. But he chose to tell the truth, and do what was right, and he didn't re-request an exemption. He also told the Commission Officer that he knew that submitting false information or a misleading attestation about his vaccination status could result in being dismissed from his job.<sup>9</sup>

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<sup>6</sup> GD3-32.

<sup>7</sup> GD3-31.

<sup>8</sup> GD3-29.

<sup>9</sup> GD3-41.

[17] The Claimant went off work on November 30, 2021, to have surgery. He received short term disability benefits while he was off. He returned to work on January 3, 2022.

[18] The Claimant testified that after he finished his delivery route on Friday, February 18, 2022, his supervisor told him that he couldn't come in to work the following Monday, unless he attested to being vaccinated. He didn't attest to being vaccinated and didn't return to work.

[19] The employer sent the Claimant a letter titled "Notice of Failure to Comply with Canada Post's Vaccination Practice." The letter said that the Claimant had yet to comply with the employer's vaccination policy and as a result, he was placed on administrative leave without pay. The letter also said that the Claimant wasn't allowed to attend work, and that he would remain suspended from his job until he complied with the vaccination policy.<sup>10</sup>

[20] The Claimant spoke to a Commission Officer on May 24, 2022. The Claimant said that he objected to being vaccinated against Covid because of his religious beliefs.<sup>11</sup>

[21] In a letter dated June 22, 2022, the Commission stated that it was unable to pay the Claimant EI benefits from February 20, 2022, because he was suspended from his job as a result of his misconduct.<sup>12</sup>

[22] The Claimant requested a reconsideration of the Commission's decision. In his Request for Reconsideration form, he argued:

- He was willing and wanting to work, but wasn't allowed to, even though he had proposed perfectly viable options to his employer.
- He didn't choose to be on leave without pay.

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<sup>10</sup> GD3-30.

<sup>11</sup> GD3-27.

<sup>12</sup> GD3-34.

- When his employer suspended him, he hadn't tested positive for Covid. There was no change in his level of risk.
- His job allowed him to easily avoid contact with others. He took other safety measures, including social distancing, wearing a mask, and washing his hands frequently. He was allowed to work under these conditions for three months, because he did rapid testing twice weekly, and therefore posed less risk to others.
- It is a health and safety issue to force people to take an experimental drug, or any drug, for an illness they don't have and are not at high risk of injury from.
- The employer didn't require proof that employees were vaccinated, only that employees attested to being vaccinated. He questioned how many people had lied, and said that he was being punished for his honesty.
- He was discriminated against and should have been given a religious exemption from being vaccinated.
- The vaccination doesn't prevent Covid.
- He has been paying into EI for many years.<sup>13</sup>

[23] The Commission maintained its decision on reconsideration.<sup>14</sup>

[24] The Claimant testified that he didn't think the employer was serious about its mandatory vaccination policy, because it didn't require employees to provide proof of vaccination. Employees "only had to press 1" on the automated system and could keep working. He was shocked when his supervisor told him he couldn't return to work because he hadn't attested to being vaccinated. He didn't think the employer would go through with suspending him.

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<sup>13</sup> GD3-37.

<sup>14</sup> GD3-43.

[25] The Claimant returned to work on July 6, 2022, when the employer's vaccination policy was suspended.

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

[26] The reason for the Claimant's suspension is misconduct under the law.

[27] The 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. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[28] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>15</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>16</sup> 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.<sup>17</sup>

[29] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer, and that there was a real possibility of being suspended from his job because of that.<sup>18</sup>

[30] The Commission has to prove that the Claimant lost 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 lost his job because of misconduct.<sup>19</sup>

[31] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements

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<sup>15</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>16</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

(accommodations) for him.<sup>20</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[32] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.<sup>21</sup> He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[33] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.<sup>22</sup>

[34] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.<sup>23</sup>

[35] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.<sup>24</sup> He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.<sup>25</sup>

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<sup>20</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>21</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

<sup>23</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>24</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>25</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.



[36] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.<sup>26</sup> He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.<sup>27</sup>

[37] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or policies and determine whether it was right to suspend the Claimant. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[38] The Commission says that there was misconduct because:

- the Claimant was aware of the employer's vaccination policy;
- he knew what was required of him under the policy, and knew what the deadlines were to comply;
- he knew that not following the policy would result in him being suspended from his job;
- he wasn't approved for an exemption from being vaccinated; and
- his refusal to follow the employer's policy was the cause of his suspension.<sup>28</sup>

[39] The Claimant says that there was no misconduct, because:

- the employer's policy was unfair, immoral and it discriminated against him;
- the employer didn't require proof that employees were vaccinated, only that employees attested to being vaccinated;

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<sup>26</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>27</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>28</sup> GD4-3.

- his job allowed him to easily avoid contact with others, and he took safety measures so that he posed less risk to others;
- he was willing to work and didn't choose to be suspended;
- his employer should have given him an exemption from being vaccinated because of his religious beliefs;
- the vaccine is experimental and isn't effective; and
- he has paid in to EI for years and feels he is entitled to benefits.

[40] I find that the Claimant made a conscious and deliberate choice not to be vaccinated, contrary to the employer's policy. He testified that he didn't get vaccinated and wasn't approved for an exemption from being vaccinated.

[41] The Claimant knew that not being vaccinated meant that he couldn't do his job. He testified that he knew that he couldn't work without being vaccinated, unless he had an exemption. His exemption request was denied by the employer, so he knew that not being vaccinated meant that he couldn't continue to work.

[42] Although the Claimant testified that he was shocked that the employer went through with suspending him, I find that he knew, or at least should have known, that not complying with the employer's vaccination policy could result in him being suspended from his job. He confirmed in his testimony that he received and read the employer's vaccination policy. He said that the policy applied to him. He knew that he had to be vaccinated, or have an approved exemption from being vaccinated, to be in compliance with the employer's policy. He testified that he knew that the consequences of not following the policy included being suspended from his job.

[43] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated, or have an approved exemption from being vaccinated;

- the employer clearly communicated its policy to the Claimant, and specified what it expected in terms of getting vaccinated;
- the Claimant knew the consequence of not following the employer's vaccination policy;
- the Claimant didn't have an exemption from being vaccinated; and
- the Claimant didn't get vaccinated and was suspended as a result.

[44] I understand that the Claimant feels he should get EI because he's paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. He has not met the requirements to be eligible for benefits.

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

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

[46] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew, or should have known, that refusing to get vaccinated, when he didn't have an approved exemption, would cause him to be suspended from his job.

### **Conclusion**

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

[48] This means that the appeal is dismissed.

Susan Stapleton  
Member, General Division – Employment Insurance Section