



Citation: *MT v Canada Employment Insurance Commission*, 2023 SST 548

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

## Decision

**Appellant:** M. T.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (510530) dated August 3, 2022 (issued by Service Canada)

---

**Tribunal member:** Jillian Evans

**Type of hearing:** Teleconference

**Hearing date:** December 5, 2022

**Hearing participants:** Appellant

**Decision date:** February 12, 2023

**File number:** GE-22-2743

## Decision

1. The appeal is dismissed. The Tribunal disagrees with the Appellant.
2. The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

3. M. T. worked for a transportation company as a driver. His employer says that he was placed on an unpaid leave of absence because he refused to comply with the company's vaccination policy: he didn't confirm that he had received approved COVID-19 vaccines by the December 20, 2021 deadline imposed in the policy.
4. When he failed to meet the requirements of the policy, his employer told the Appellant that he was ineligible to work. They placed him on unpaid leave as of December 21, 2021 and issued a Record of Employment indicating that he was on an indefinite leave of absence.
5. The Appellant applied for regular benefits on January 17, 2022.
6. The Commission initially denied the Appellant's application on two grounds:
  - a. he had chosen to voluntarily take a leave from his job without just cause; and
  - b. he had voluntarily rendered himself unable to perform his job.<sup>2</sup>
7. M. T. disputed that his separation from work was in any way voluntary. He indicated that he was ready and willing to work, but that his employer refused to allow him to return. He asked that his file be reconsidered.

---

<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are not entitled to receive benefits.

<sup>2</sup> GD3-32

8. On reconsideration, the Commission reviewed the employer's exchange of correspondence with the Appellant and agreed with the Appellant that his leave of absence had indeed been involuntary. He did not voluntarily leave his job. He had wanted to continue working there.
9. In its reconsideration decision, the Commission revised the basis for its denial. Because the Appellant was suspended for refusing to comply with his employer's vaccination policy, the Commission determined that he had been suspended from his employment for engaging in misconduct.
10. Workers who are suspended from their job for misconduct are not entitled to benefits for the duration of their suspension. The Commission denied his application for benefits.
11. The Appellant agrees that he was suspended from his job but disagrees that he engaged in misconduct. He says that the Commission was wrong to find that his decision not to share his private medical information with his employer was an act of misconduct. He says that the employer's policy is not supported by scientific evidence and that there is no proof that requiring staff to be vaccinated in any way prevents transmission of the virus.
12. He also says that by requiring him to disclose that kind of information his employer was violating his Collective Agreement.
13. The Appellant's suspension was lifted in August 2022 once he complied with his employer's vaccination requirements. He returned to work.
14. The Appellant says that he should be entitled to benefits for the period of time that his employer forced him to stay away from work without wages as it was not his fault, and he was ready and willing to work throughout that period of time.

## **Issue**

15. Was the Appellant suspended from his job because of misconduct?

## Analysis

16. The law says that you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has let you go or suspended you.<sup>3</sup>
17. To answer the question of whether M. T. was suspended because of misconduct, I have to decide two things. First, I have to determine why he was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Appellant placed on an involuntary leave of absence?**

18. The Appellant was suspended from his job because he did not comply with his employer's vaccine policy.
19. The Commission obtained a copy of the employer's policy. When it was first released, it required that:
- a. All employees be fully vaccinated by November 29, 2021 and
  - b. All employees provide proof of their fully vaccinated status by that same deadline.<sup>4</sup>
20. The policy also provided that employees who did not meet those requirements would no longer be eligible to work and would not be paid.
21. The employer later extended the deadline to December 20, 2021.
22. In a December 21, 2021 letter that the Commission obtained from the employer the Appellant was advised in writing that because he had not provided proof of his full vaccination status he could not continue to work.
23. The letter also advised the Appellant that until that requirement was met, "physical access to the workplace, network, systems and email" would cease.

---

<sup>3</sup> See sections 30 and 31 of the Act.

<sup>4</sup> GD3-30

24. The Appellant says that he was *capable* of working as of December 21, 2021. He agrees, though, that because of the policy he was not *able* to work. He chose not to meet the requirements of the policy and as a result he was not able to physically perform the duties of his job.
25. I find that the Appellant was suspended from his employment for failing to comply with his employer's policy.

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

26. The Appellant was suspended for engaging in misconduct.
27. The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's actions amount to misconduct under the Act. The Act sets out the legal test for misconduct. In some circumstances, for example, the term "misconduct" refers to the employee's violation of an employment rule.
28. Where the Commission takes the position that a claimant seeking benefits has engaged in misconduct, the Commission bears the burden of proof. It has to prove this on a balance of probabilities.
29. In M. T.'s case, this means that the Commission has to show that it is more likely than not that he was suspended from his job because of misconduct<sup>5</sup>
30. Case law says that to be misconduct, the Appellant's behaviour has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>7</sup>

---

<sup>5</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

31. The Appellant doesn't have to have wrongful intent. M. T. doesn't have to mean to do something illegal, dangerous or wrong for me to decide his conduct is misconduct.<sup>8</sup>
32. The Commission says that the Appellant was aware of the mandatory policy, was aware that it required him to provide his vaccination status to his employer and that he made a deliberate and clear choice not to comply with the requirements. The Commission says that this conduct was wilful and intentional.
33. The Appellant agrees that he was made aware of the policy by at least November 2021. He knew that he was expected to email his vaccine certificate to his employer by a certain date.
34. At the hearing he described a phone conversation with his supervisor in the days before the deadline. During that call, the Appellant advised his supervisor that he would not be providing that requested medical information and his supervisor told him that he would be ineligible to work if he did not.
35. I find that the Appellant's decision not to comply with his employer's vaccination policy was intentional.
36. The case law also says that in order for behaviour to amount to misconduct, the Appellant needs to have known or should reasonably have understood that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended or let go because of that.<sup>9</sup>
37. The Appellant says that refusing to comply with the employer's policy was not going to affect his ability to perform his job. He submitted documents to the Commission and the Tribunal that he argues show that the vaccines do not prevent transmission of COVID-19.

---

<sup>8</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

38. The Appellant argues that he could have continued to perform his job duties safely, competently and effectively without complying with the vaccine policy. He says the policy didn't have the effect that it was intended to have (to reduce transmission and protect the health and safety of the communities that they served) and so his refusal to comply with it isn't misconduct.
39. I can decide issues under the Act only. The Tribunal does not have the jurisdiction to rule on vaccine efficacy or questions of scientific proof. And it isn't for me to decide whether M. T.'s employer should have made reasonable accommodations to permit him to continue working without providing a vaccine certificate. The Federal Court has said that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's dismissal under that policy was justified or reasonable.<sup>10</sup>
40. The Tribunal must focus on the Appellant's behaviour and actions, not the employer's conduct.<sup>11</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.
41. I have found that his failure to comply with his employer's vaccination policy was misconduct.

### **Other issues**

42. The Appellant also argues that the policy contravened his Collective Agreement. Because of this, he argues, the policy itself was illegal and so refusing to follow it cannot be misconduct.
43. As discussed above, I can only decide whether there was misconduct under the EI Act. I can't interpret a collective agreement or decide whether an employer breached a collective agreement.<sup>12</sup> Our Tribunal members' legal authority doesn't

---

<sup>10</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185 at paragraph 3

<sup>11</sup> See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31

<sup>12</sup> <sup>17</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

include interpreting and applying 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 that agreement. Again, the Tribunal must focus on the Appellant's behaviour and actions, not the employer's conduct.<sup>13</sup>

## **Conclusion**

44. The Appellant knew what he had to do under the vaccination policy and knew what would happen if he didn't follow it. He decided not to follow it.
45. M. T.'s actions led to his suspension. He acted deliberately.
46. The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits while suspended.
47. This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section

---

<sup>13</sup> See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31