



Citation: *GC v Canada Employment Insurance Commission*, 2023 SST 464

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

Decision

Appellant: G. C.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (515035) dated August 17, 2022 (issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Videoconference
Hearing date: February 16, 2023
Hearing participant: Appellant
Decision date: February 23, 2023
File number: GE-22-3078

Decision

[1] I am dismissing the appeal.

[2] The Canada Employment Insurance Commission (Commission) has shown the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to be put on leave without pay). This means the Appellant is disentitled from receiving Employment Insurance (EI) benefits from March 7, 2022, until June 17, 2022.¹

Overview

[3] The Appellant was put on unpaid leave (suspended) from his job. The Appellant's employer says he was suspended because he didn't comply with the employer's mandatory COVID-19 vaccination policy. He refused to be vaccinated.

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

[5] The Commission accepted the employer's reason for the suspension. It initially decided the Appellant lost his job due to misconduct. The Commission changed its decision at the reconsideration stage finding that the Appellant was suspended due to his misconduct. Because of this, the Commission decided the Appellant wasn't entitled to receive EI benefits from March 7, 2022, to June 17, 2022.

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

Matters I have to consider first

Potential added party

[7] 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

¹ See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

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 this decision would impose any legal obligations on the employer.

Issues

[8] Was the Appellant suspended because of misconduct?

Analysis

[9] 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.²

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

Why was the Appellant suspended?

[11] There is no dispute that the Appellant was put on an involuntary leave without pay (suspended), because he refused to be vaccinated against COVID-19 by the deadline(s) set out by the employer's mandatory COVID-19 vaccination policy.

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

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

[13] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

² See sections 30 and 31 of the EI Act.

[14] To be misconduct, the conduct has to be wilful. This means the Appellant's conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴

[15] 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 EI law.⁵

[16] 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 suspended or let go because of that.⁶

[17] The Commission has to prove the Appellant was suspended 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 because of misconduct.⁷

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

- The Appellant was aware of the employer's October 6, 2021, mandatory policy requiring all employees to be vaccinated against COVID-19 unless they were granted accommodation.
- The Appellant requested a religious accommodation. On December 15, 2021, the employer denied his request.
- The Appellant knew if he wasn't vaccinated by January 12, 2022, he would be placed on an administrative leave without pay (suspended).

[19] The Appellant says that to his knowledge there is no record of misconduct on his employment file. He argued he did everything within his power to keep working prior to

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

being suspended. He requested a religious accommodation, but it was denied. He completed the required COVID-19 training and vaccination declaration, saying he wasn't vaccinated. He filed a grievance through his union, and he followed all safety protocol. He says he jumped through every hoop to protect his bodily autonomy and to stay working. He filed a "right to refuse unsafe work" complaint which should have prevented him from being suspended until after an investigation. But his employer still suspended him, effective January 13, 2022.

[20] The Appellant testified that his employer suspended its mandatory vaccination policy in June 2022. He was allowed to return to work on June 20, 2022. He questioned how the employer had the authority to treat him so unfairly. The employer prevented him from working and earning an income for six months, only to allow him to return to a backlog of work.

[21] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.⁹

[22] The Appellant confirmed he had discussions with his employer about the mandatory policy during his efforts to stay working. He agrees he was aware of the policy deadlines. He was aware of the January 12, 2022, deadline set out in the employer's December 15, 2021, letter. He was aware the employer would put him on leave without pay (suspend him) if he didn't comply. But he says he just couldn't take this COVID-19 vaccination because of his deeply held religious beliefs.

[23] I acknowledge the Appellant says he paid into the EI fund, but the employment insurance plan is an insurance scheme. It is not a pension fund or a needs-based program that you can withdraw anytime you want. Instead, claimants must meet the qualifying conditions and requirements set out in the Act to receive benefits.

⁸ See section 30 of the EI Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[24] During the hearing, the Appellant referred to other decisions that were published by the CBC where other people were successful with their appeals for EI benefits. He says he didn't know the specifics about those decisions. So he wanted his appeal to stand on its merits.

[25] As explained, I am not bound by other decisions made by this Tribunal.¹⁰ This means I don't have to follow those decisions. I am however, bound by decisions issued by the Federal Court and Federal Court of Appeal.

[26] The Federal Court recently issued a decision in *Cecchetto v Attorney General of Canada*, where the Court dismissed an application for judicial review in a matter regarding a claimant's refusal to take the COVID-19 vaccine.¹¹

[27] 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. That claimant didn't comply with the provincial directive requiring mandatory COVID-19 vaccination for hospital workers.

[28] 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. 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) for the Appellant.¹² Such issues may be dealt with in other forums.¹³ I can consider only one thing: whether the Appellant's action or inaction is misconduct under the EI Act.

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

¹² See *Cecchetto v Attorney General of Canada*, 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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

[30] Based on the facts set out above, I find the Commission has proven misconduct because the Appellant's refusal to be vaccinated against COVID-19 was deliberate or intentional. There was a cause-and-effect relationship between his refusal to be vaccinated and his suspension. So, I find the Appellant was suspended because of misconduct.

Period of disentitlement

[31] I agree with the Commission that the Appellant is disentitled from receiving EI benefits from March 7, 2022, to June 17, 2022. Here is what I considered.

[32] The law says you are disentitled from receiving EI benefits if you are suspended from your job due to misconduct. A disentitlement is imposed on workdays (Monday through Friday) during the period of suspension falling within the benefit period.¹⁴

[33] In this case, the Appellant's benefit period starts on Sunday, March 6, 2022. He was suspended due to misconduct from January 13, 2022, until he returned to work on June 20, 2022. This means he is disentitled from receiving EI benefits from Monday March 7, 2022, to Friday June 17, 2022.

Conclusion

[34] The Commission has proven the Appellant was suspended because of misconduct.

[35] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

¹⁴ This is set out in Section 31 of the EI Act.