



Citation: *GC v Canada Employment Insurance Commission*, 2023 SST 623

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

## Decision

**Appellant:** G. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (496292) dated June 29, 2022 (issued by Service Canada)

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**Tribunal member:** Susan Stapleton

**Type of hearing:** In person

**Hearing date:** January 31, 2023

**Hearing participant:** Appellant

**Decision date:** February 14, 2023

**File number:** GE-22-2801

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is not entitled to receive Employment Insurance (EI) benefits.

## Overview

[3] The Appellant lost his job. The employer says he was let go because he went against its vaccination policy: he didn't get vaccinated against Covid-19 (Covid).<sup>1</sup> The Appellant applied for EI benefits.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy is not misconduct. He says there was no requirement in his employment contract for him to be vaccinated. He feels that his employer's vaccination policy was coercive, illogical and brutish. He was in good standing with his employer right up until he was let go. He feels he was punished for trying to exercise his freedom of choice, and practice informed consent as he saw fit. He says the Covid vaccine doesn't protect against transmission of the virus, and that it has caused injury to many people. He paid in to EI for several years, and feel he is entitled to benefits.<sup>2</sup>

[5] The employer told the Commission that the Appellant was put on a leave of absence at the end of November, 2021, because he refused to be vaccinated against Covid. The Appellant was suspended, and given until mid-January, 2022, to get vaccinated. The Appellant didn't get vaccinated, and was dismissed from his job. The

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<sup>1</sup> See GD3-18.

<sup>2</sup> See GD2-5.

employer said that the Appellant was given written warnings that he would lose his job if he didn't get vaccinated.<sup>3</sup>

[6] The Commission accepted the employer's reason for the Appellant's suspension and then dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is not entitled to receive EI benefits.

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

[7] I allowed the Appellant time after the hearing to submit documents to support his testimony. These include copies of his employment contract, an evaluation letter from his employer, and a Social Security Tribunal (Tribunal) decision.<sup>4</sup> He filed the documents within the allotted time. The documents were coded GD8. The Tribunal shared the documents with the Commission. The Commission had time to review the documents and provide additional submissions. It did not provide additional submissions. I accept the additional documents into evidence, because they relate to the Appellant's testimony, and the Commission isn't prejudiced by my accepting them.

## **Issue**

[8] Did the Appellant lose his job 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 let you go or suspended you.<sup>5</sup>

[10] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

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<sup>3</sup> See GD3-18.

<sup>4</sup> See *A.L. v. Canada Employment Insurance Commission*, 2022 SST 1428.

<sup>5</sup> See sections 30 and 31 of the Act.

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.<sup>6</sup>

[11] If you are dismissed because of misconduct, then you are disqualified from receiving EI benefits.<sup>7</sup>

### **Why did the Appellant lose his job?**

[12] I find that the Appellant was first put on an unpaid leave of absence, or suspended, from his job on December 2, 2021, because he didn't follow the employer's vaccination policy. This is consistent with his testimony and what he told the Commission.

[13] I find that the Appellant was dismissed from his job on January 23, 2021. He testified that he was let go because he didn't get vaccinated and didn't submit his vaccination status to the employer. He told the Commission that he lost his job because he refused to get the Covid vaccination.<sup>8</sup>

[14] The employer told the Commission that the Appellant was dismissed because he didn't get vaccinated.<sup>9</sup>

[15] The employer's policy said that all employees had to provide proof of being fully vaccinated before November 30, 2021. If an employee didn't provide proof of being fully vaccinated by the deadline, they wouldn't be allowed to enter the employer's facilities, and would be placed on unpaid leave for 14 days. If the employee didn't provide proof of being fully vaccinated after those 14 days, the employee would be placed on an additional period of leave for 42 days. If the employee didn't provide proof of being

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<sup>6</sup> See section 31 of the *Employment Insurance Act*.

<sup>7</sup> See section 30 of the *Employment Insurance Act*.

<sup>8</sup> See GD3-43.

<sup>9</sup> See GD3-18.

vaccinated by the end of those 42 days, the employee would be dismissed from their job.<sup>10</sup>

[16] The Appellant testified that he first heard that his employer was going to have a mandatory Covid vaccination policy in September, 2021. He was not aware of there being an official policy document. But he expected that he would have to be vaccinated to be able to work, because of what was going on with the Covid pandemic.

[17] The Appellant testified that there were no meetings held to talk about the employer's vaccination policy. He said the employer knew that he was skeptical about the vaccine, but he felt that he was discouraged from talking about his position. He has educated himself on natural health alternatives to the Covid vaccine, and has a certificate in acupuncture. He studies Chinese herbalism. He has good reasons for rejecting the Covid vaccine, based on his research into alternative health solutions.

[18] He testified that the employer sent him letters, telling him that he had to get vaccinated and submit his vaccination status, or he would lose his job.

[19] He testified that he "probably" told his employer that he wasn't vaccinated. He said that he spoke to someone from Human Resources and either told them that he wasn't vaccinated or that he wasn't going to get vaccinated.

[20] He testified that he was allowed to undergo testing instead of being vaccinated, and was able to continue working, for about two months. But once the employer implemented its vaccine requirement, he knew that if he didn't get vaccinated, he would lose his job.

[21] The Appellant testified that the employer sent him a letter on December 1, 2021. The letter said that because he had not disclosed his vaccination status according to the policy requirements, he was being suspended from his job as of that date. The employer sent him another letter on January 26, 2022. That letter said that because he had not submitted proof of being vaccinated, he was dismissed from his job. He said

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<sup>10</sup> See GD3-46-48.

that he understands why his employer let him go. But he doesn't agree that his actions constituted misconduct, and disagrees with the Commission's decision not to pay him benefits.

[22] The employer's policy stated that it would consider individual exemption requests on medical grounds or other grounds protected by the province's *Human Rights Code*.<sup>11</sup>

[23] The Appellant testified that he didn't submit an exemption request to the employer. He said that he talked to his doctor about a medical exemption, but that she wouldn't support him in requesting one. He submitted a note from his doctor to the Commission, which says that he has an undiagnosed arrhythmia and mild hemophilia.<sup>12</sup> The Appellant said that his doctor told him that there were no concerns with him getting the Covid vaccine, in relation to these conditions. But he feels that there is a risk for him to take the vaccine because he has these conditions.

[24] The Commission says that the Appellant made a personal choice not to be vaccinated. It argues that he knew not following the employer's vaccination policy would result in him losing his job.

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

[25] I find that the reason for the Appellant's suspension and dismissal is misconduct under the law.

[26] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant'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.

[27] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>13</sup> Misconduct also includes

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<sup>11</sup> See GD3-28.

<sup>12</sup> See GD3-42.

<sup>13</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.<sup>14</sup> 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 law.<sup>15</sup>

[28] 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 that there was a real possibility of being let go because of that.<sup>16</sup>

[29] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.<sup>17</sup>

[30] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant 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 (accommodations) for him.<sup>18</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[31] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.<sup>19</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.

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<sup>14</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>15</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>17</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>18</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>19</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[32] In response, the FCA stated that it has consistently found 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>20</sup>

[33] 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 remedies available to them. Those remedies penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.<sup>21</sup>

[34] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.<sup>22</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>23</sup>

[35] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.<sup>24</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 is not relevant that the employer didn't accommodate them.<sup>25</sup>

[36] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. The Appellant also said that no decision maker had addressed how a person could be

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<sup>20</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>21</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>22</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>23</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>24</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>25</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.



forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.<sup>26</sup>

[37] In dismissing the case, the Federal Court wrote:

While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises...the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.<sup>27</sup>

[38] The Court also wrote:

The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."<sup>28</sup>

[39] Case law makes it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[40] The Appellant submitted a Tribunal decision (A.L. v. Canada Employment Insurance Commission), that he says is factually similar to his case. He says that the Appellant in that case made the same arguments he makes in support of his appeal.

[41] In A.L. v. Canada Employment Insurance Commission, the Tribunal found that A.L.'s failure to follow the employer's mandatory vaccine policy didn't amount to misconduct. However, I am not bound by this decision, or other Tribunal decisions. I can choose to adopt their reasoning if I find them to be persuasive or helpful. I will not be adopting the reasoning in the A.L. v. Canada Employment Insurance Commission case. This is because the Federal Court of Appeal has said that this case doesn't establish

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<sup>26</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

<sup>27</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

<sup>28</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.<sup>29</sup>

[42] The Commission says that there was misconduct because the Appellant knew what the employer's policy required and what the consequences would be if he didn't follow the policy. He chose not to be vaccinated, and didn't have an exemption from being vaccinated. He lost his job as a result.

[43] The Appellant says that there was no misconduct because he has health conditions that he believes put him at risk if he gets the Covid vaccine. He feels he was punished for trying to exercise his freedom of choice and practice informed consent as he saw fit. There was no requirement in his employment contract to be vaccinated. He was in good standing with his employer right up until he was let go.

[44] I find that the Appellant knew that the employer instituted a mandatory vaccination policy, and that he knew what would happen if he didn't follow it. The employer's policy stated that if an employee didn't provide proof of being fully vaccinated, they would be suspended and, if they continued not to comply with the policy, they would be dismissed. The employer wrote to the Appellant, repeating its vaccine policy requirements. The Appellant confirmed in his testimony that he knew if he didn't follow the policy, he would lose his job.

[45] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to be fully vaccinated against Covid, or have an approved exemption;
- the employer told the Appellant what it expected of him in terms of getting vaccinated;
- the employer wrote to the Appellant to communicate what it expected;

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<sup>29</sup> See *Cecchetto v Attorney General of Canada*, 2023 FC 102, at para 43.

- the Appellant testified that he knew about the policy and the consequences of not following it; and
- the Appellant didn't get vaccinated and was suspended, and then dismissed from his job as a result.

[46] I understand that the Appellant also feels that he should receive EI benefits because he's paid in to 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, did the Appellant lose his job because of misconduct?**

[47] Based on my findings above, I find that the Appellant lost his job because of misconduct.

[48] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated would cause him to lose his job.

### **Conclusion**

[49] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is not entitled to receive EI benefits.

[50] This means that the appeal is dismissed.

Susan Stapleton  
Member, General Division – Employment Insurance Section