Citation: *PL v Canada Employment Insurance Commission*, 2023 SST 681

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	P. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (530548) dated September 15, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Videoconference
Hearing date:	February 9, 2023
Hearing participant:	Appellant
Decision date:	February 27, 2023
File number:	GE-22-3334

Decision

[1] I am dismissing the appeal with modification. The Tribunal disagrees with the Appellant. The modification is that the disentitlement should start on February 1, 2022. This is the first day he was suspended without pay.[1]

[2] His employer suspended him because he didn't follow its mandatory vaccination policy.

[3] In this appeal the Canada Employment Insurance Commission (Commission) has proven the Appellant's employer suspended him because of misconduct. In other words, because he did something that caused him to be suspended from his job.

[4] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his suspension.[2] This is what the Commission decided. In other words, the Commission made the correct decision in his EI claim.

Overview

[5] His employer put him on an involuntary unpaid leave of absence starting February 1, 2022. The Commission is saying the employer put him on leave because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[6] The Commission decided that the Appellant was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission was unable to pay him EI benefits starting January 31, 2022.[3]

[7] I have to decide whether the Appellant was suspended from his job for misconduct under the EI Act.

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[1] See GD3 page 14. His first day without pay is consistently February 1, 2022, in all the evidence before me.
[2] Section 31 of the EI Act says that appellants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[3] See GD3 page 19. The Subsequent decision on page GD3 page 25 upheld this decision.

Matter I have to consider first

The hearing was adjourned once

[8] The hearing was initially scheduled for January 4, 2023, with another Tribunal Member. This appeal started as scheduled. The recent submission of additional documents of was discussed.[4] These documents included the Appellant's offer of employment in 2019, an exchange of emails in December 2021 and January 2022 between the Appellant and the employer. It also included a recent Tribunal decision.

[9] As the offer of employment and the exchange of information included French text, a mutual decision between the Appellant and the Tribunal was made. The decision is that the hearing would be adjourned so that a bilingual Tribunal Member can review the documents and conduct the rescheduled hearing the Appellant.

[10] The Tribunal file was assigned to a me and a new hearing was scheduled for February 9, 2023. The hearing was held as scheduled with the Appellant in attendance.

Issue

[11] Was the Appellant suspended and was it misconduct under the EI Act?

Analysis

[12] 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.

[13] I have to decide two things:

- The reason the Appellant was suspended from his job.
- Whether the EI Act considers that reason to be misconduct.

[4] See GD6 pages 1-45 received the by the Tribunal on January 1, 2022.

The reason the Appellant was suspended

[14] I find the Appellant's employer suspended him because he didn't comply with its vaccination policy.

[15] The Appellant and the Commission agree that the Appellant was suspended effective February 1, 2022. The reason was non-compliance with the new mandatory vaccine policy. The parties do not agree on the misconduct part. The Appellant says that suspension was abusive and not reasonable.

[16] I have no reason to believe any other reason why the Appellant is no longer working. There is nothing in the file or in testimony to make me doubt this finding. Based on the evidence before me, I find non-compliance with the vaccination policy is the reason the Appellant is no longer working with the employer.

The reason is misconduct under the law

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

What misconduct means under the EI Act

[18] 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 issues I have to consider when making my decision.

[19] The Commission has to prove it's more likely than not he was suspended from his job because of misconduct, and not for another reason.[5]

[20] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[6] I can't consider whether the

[5] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[6] This is what sections 30 and 31 of the EI Act say.

employer's policy is reasonable, or whether a suspension or termination was a reasonable penalty.[7]

[21] The Appellant 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.[8] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[9] And misconduct also includes conduct that is so reckless that it is almost wilful.[10]

[22] There is misconduct if the Appellant 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.[11]

[23] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[12] I can't decide whether the Appellant was constructively or wrongfully dismissed under employment law. I can't interpret an employment contract or decide whether an employer breached a collective agreement.[13] The Appellant testified he did not have a collective agreement but an employment contract. I also can't decide whether an employer discriminated against the Appellant or should have accommodated them under human rights law.[14] And I can't decide whether an employer breached the Appellant's privacy or other rights in the employment context, or otherwise.

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[7] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] 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 an appellant 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 Appellant isn't.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

What the Commission and the Appellant say

[24] The Commission says that there was misconduct under the EI Act because the evidence shows:

- The employer had a vaccination policy and communicated that policy to all staff.
- Under the vaccination policy, the Appellant had to be fully vaccinated or get an exemption from his employer or face unpaid leave effective February 1, 2022.[15]
- He knew what he had to do under the policy.
- He also knew his employer could suspend him under the policy if he didn't give proof of vaccination (or get an exemption) by the deadline.
- He made a conscious and deliberate personal choice not to get vaccinated by the deadline.
- The employer suspended him effective February 1, 2022, because he didn't comply with its vaccination policy.

[25] The Appellant says there was no misconduct under the EI Act because of the following:

- The vaccination policy was abusive and not reasonable.[16]
- Bell's policy allowed for no reasonable accommodation and amounted to constructive dismissal.[17]
- The entire team was 100% telework which means 0% risk of transmission between co-workers or clients.[18]
- His employment contract with his employer had no medical requirements. His employer ask he put something into his body.[19]

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[15] See GD3 page 17.
[16] See GD5 page 6.
[17] See GD2 page 6.
[18] See GD2 page 6.
[19] See GD2 page 6.

- The Tribunal should follow AL v CEIC, an earlier decision of this Tribunal.[20] His case is similar to that of the Appellant in that decision.
- He was willing to test as required as an alternative.
- Everyone has the freedom of choice of what to put in their bodies.

[26] The evidence in this appeal is consistent and straightforward. I believe and accept the Appellant's evidence and the Commission's evidence.

[27] I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his reconsideration request and appeal notice, and his testimony at the hearing). His evidence is consistent. And there is no evidence that contradicts what he said.

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

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

[29] The Appellant argues I should follow *AL v CEIC*, a decision of our Tribunal. AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy.

[30] 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.[21]

[31] I am not going to follow *AL v CEIC.* This decision goes against the rules the Federal Court has set out in its decisions about misconduct.[22] Our Tribunal does not

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[20] See GD6 pages 29-45. This is an earlier Tribunal which is/was circulating online. The copy the Appellant provided is the original copy given to the Appellant. It how now been translated and published on the Tribunal website. The neutral citation has been given as 2022 SST 1428.
[21] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to the 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.
[22] 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 an

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.[23]

- Second, he should not have found that the Appellant 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.[24] In other words, he had no legal authority to add to the collective agreement an absolute right for a worker to choose to ignore the employer's vaccination policy based on a rule imported from a distinct area of law.

[32] 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 Appellant's appeal. So my reasons aren't limited to the circumstances and arguments the Appellant made in *AL v CEIC*.[25] I am deciding whether an appellant's conduct is misconduct I don't have the legal authority to interpret and apply an employment contract, privacy laws, human

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appellant 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 Appellant isn't.

[23] Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and applying a collective agreement. The courts have clearly said that appellants 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.

[24] 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 Appellant. Once again, if the Appellant (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.

[25] 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.

rights laws, international law, the Criminal Code, or other laws. If any of those laws were broken, the recourse available to the Appeal is with the appropriate court or tribunal.

[33] We make an error of law if we focus on the employer's conduct and analyze it under other laws—because we don't have the legal authority (jurisdiction) to do that. Taking a broader perspective, legislatures have given other specialized decision-makers, under other laws, the authority to decide whether employers' policies, decisions, and conduct are unreasonable or against the law. Our Tribunal has expertise in the interpretation and application of the EI Act to appellants' circumstances and the Commission's decisions. So the Federal Court has said we should stick to doing that.

The Appellant's other arguments

[34] I addressed why the Tribunal can not consider the *AL v CEIC* decision. The list at paragraph 26 included other arguments.

[35] Unfortunately for the Appellant, I can't consider these arguments.

[36] The test that needs to be met is the EI Act. This legal test is what the Tribunal needs to review. The Commission has proven that the Appellant was advised of the policy, knew the consequences of non-compliance and followed through with his non-compliance knowing it could lead to his suspension. His behaviour was willful. His actions were conscious, deliberate or intentional.

[37] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[26] So, I can't consider whether his employer's policy or the penalty it applied to him is reasonable or legal under other laws. This includes considering whether COVID vaccination policies are supported by the scientific evidence about COVID vaccines.

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[26] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[38] There have also been more recent court cases which support this. In a recent case called *Parmar*,[27] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[39] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[40] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[28] The case started with the Commission then went to the Tribunal's General Division. The Appeal division then upheld the decision. The Federal Court then reviewed the decision. Paragraph 32 has the following:

> [32] 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 – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. 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.

[41] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws.

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[27] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[28] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

[42] I agree the Appellant can decline vaccination. That is his own personal decision. This is his right. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[43] The employer has a responsibility to provide a safe workplace. It was in the process of trying to bring employees back to the workplace under its plan.[29] Vaccination of the employees was part of this plan.

[44] Based on the evidence, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown that:

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

[45] I understand the Appellant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fairer for the Appellant.[30]

Conclusion

[46] The Commission has proven that the Appellant was suspended from his job for misconduct under the EI Act.

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[29] See GD3 page 21.
[30] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.

[47] Because of this, the Appellant is disentitled from receiving EI benefits effective February 1, 2022.[31]

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

[49] So, I am dismissing his appeal with one modification.

Marc St-Jules
Member, General Division – Employment Insurance Section

[31] Section 31 of the *Employment Insurance Act* (Act) states that, if a claimant is suspended due to misconduct, they are not entitled to receive EI benefits during the period of suspension. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be payable or paid.