



Citation: *AC v Canada Employment Insurance Commission*, 2023 SST 3

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

Decision

Appellant: A. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (495525) dated September 1, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: December 28, 2022

Hearing participant: A. C.
Appellant

Decision date: January 9, 2023

File number: GE-22-3048

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused his to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as an aircraft maintenance engineer for his employer. The employer put the Claimant on an unpaid leave of absence on November 15, 2021 because he did not comply with the COVID-19 vaccination policy at work. The Claimant then applied for Employment Insurance (EI) regular benefits.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy is not misconduct. The Claimant feels that the employer made an unfair policy and that it went against the collective agreement that was in place.

[5] The Canada Employment Insurance Commission (Commission) accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant was disentitled from receiving EI benefits.

Matter I have to consider first

Documents submitted after the hearing

[6] At the hearing, the Claimant read from a Social Security decision that he submitted minutes before the hearing but had not yet been received. This decision was received after the hearing and coded as GD10.

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Issue

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

Analysis

[8] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.² This does not result in a disqualification, but a disentitlement from benefits.³

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

Why did the Claimant get suspended from his job?

[10] I find that the Claimant was suspended from his job because he did not follow his employer's mandatory vaccination policy. The Claimant says that he was not suspended but rather put on an unpaid leave of absence because he made a personal choice not to get vaccinated. The Claimant does not feel it is misconduct for not following the policy. The Claimant feels that the employer's policy was an unfair and should have given more options for compliance like testing. The Claimant feels he should be entitled to benefits.

Was the reason for disqualification voluntarily leaving or misconduct?

[11] The Commission originally found that the Claimant was not entitled to benefits because he had voluntarily left his employment.⁴ The Claimant requested a reconsideration⁵ of that decision and the Commission changed its decision from voluntarily leaving to misconduct.⁶ Despite the Commission's current position that the Claimant is not entitled to benefits due to misconduct the Claimant still wants the

² See sections 30 and 31 of the Act.

³ See section 31 of the Act.

⁴ See GD3-24.

⁵ See GD3-25.

⁶ See GD3-32.

Tribunal to consider a section of the Act that applies when an employee voluntarily leaves and whether they had just cause for doing so.⁷

[12] There is one section of the *Employment Insurance Act* that sets out two reasons why someone can be disqualified from being paid EI benefits: (1) voluntarily leaving a job without just cause and (2) being dismissed because of misconduct.⁸ Sometimes it is not clear whether a person quit or voluntarily left work. The law says that, in these situations, I am not bound by how the Commission decided it.⁹ The disqualification can be based on either of the two reasons, as long as it is supported by the evidence.¹⁰

[13] In other words, while the Commission decided that the Claimant was dismissed for misconduct, I am able to look at evidence and decide whether it may in fact be a case of voluntary leaving.

[14] While the issue (whether the Claimant is disentitled) is the same, the questions of who has to prove what are different, depending on whether it is a case of voluntarily leaving without just cause or misconduct. So, I will first decide which kind of case it is.

Did the Claimant voluntarily leave his job or was the Claimant suspended/dismissed?

[15] If the Claimant had a choice to stay or leave his job, then he voluntarily left.¹¹ There is no dispute on this issue. The Claimant agrees that he did not have the choice to stay. The Claimant agrees that his employer put him on an unwanted unpaid leave of absence. I find that the Claimant did not voluntarily leave his job.

[16] Therefore, I will not be considering the test for just cause under voluntarily leaving and will instead focus on misconduct.

⁷ See section 29(c) of the EI Act.

⁸ Section 30 of the *Employment Insurance Act*.

⁹ *Canada (Attorney General) v Desson*, 2004 FCA 303.

¹⁰ *Canada (Attorney General) v Desson*, 2004 FCA 303.

¹¹ *Canada (Attorney General) v Peace*, 2004 FCA 56.

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

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

[18] The Claimant says that he was not suspended but rather put on an unpaid leave of absence for not being vaccinated. The Claimant's Record of Employment (ROE)¹² also indicates that the reason for issuing the ROE is due to "leave of absence". I am not bound by how the employer and employee characterize their separation.¹³ Section 31 refers to a "suspension" from employment due to misconduct.¹⁴ In other words, when it was the employer's decision to place an employee on an unpaid leave of absence, due to misconduct, it is typically the same, as a suspension for the purposes of the *Employment Insurance Act* (Act). I will be referring to the Claimant's unpaid leave of absence as a suspension because that is the word used by the Act.

[19] 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.

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

¹² See GD3-18.

¹³ See, for example, *Canada (Attorney General) v. Morris*, 1999 CanLII 7853 (FCA).

¹⁴ See section 31 of the Act.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

¹⁷ See *Attorney General of Canada v Secours*, A-352-94.

[21] 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 let go because of that.¹⁸

[22] The law doesn't say I have to consider how the employer behaved.¹⁹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.²⁰

[23] I only have the power to decide questions under the Act. I cannot make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.²¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[24] 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.²²

[25] 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.²³ 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.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁹ See section 30 of the Act.

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²² See *Minister of Employment and Immigration v Bartone*, A-369-88.

²³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[26] 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.²⁴

[27] 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.²⁵

[28] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.²⁶ 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.²⁷

[29] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.²⁸ 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.²⁹

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

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

²⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

²⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

- the employer had a vaccination policy;³⁰
- the employer clearly communicated with the Claimant about its expectations about vaccination;³¹
- the Claimant knew or ought to have known the consequences of not complying with the policy, including a requirement to disclose vaccination status;³² and
- the Claimant was aware of the policy and there was misconduct because the Claimant knew the vaccination policy was mandatory and he made the choice not to get vaccinated.

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

- the employer's vaccination policy was unfair and went against his religious beliefs;
- he could have performed his duties if the employer allowed him to be at work;
- his employer went against his human rights by refusing a religious exemption; and
- his employer's policy was unreasonable and he thinks it went against his collective agreement.³³

[33] The Claimant does not dispute that his employer had a vaccination policy and that he was aware of it.

[34] The Claimant testified that he first had an awareness that his employer would be making a policy about COVID-19 in April 2021. Employees were sent an email asking for the number of staff that had received vaccinations.³⁴ There was no obligation, at that

³⁰ See GD2-12 employer's vaccination policy.

³¹ See GD2-11 email from employer dated November 15, 2021 email to Claimant from employer.

³² See GD2-12 where it requires that an employee must show proof of vaccination by November 1, 2021.

³³ See GD2-17 to GD2-51.

³⁴ See GD2-3.

time, to disclose one's vaccination status. The Claimant says he was concerned about the email. At that time, he wrote to his union about his concern but they said since there was no mandatory vaccination policy there was no issue.

[35] On October 20, 2021, the Claimant's employer released its COVID-19 vaccination policy.³⁵ The Claimant felt that this policy was a radical departure from what he had been informed about back in April 2021. The Claimant testified that he felt that the policy violated his religious beliefs, his rights under the Canadian Charter of Rights and Freedoms, and Canadian Human Rights legislation. The Claimant says that there was nothing in the collective agreement that permitted the employer to make this kind of policy.

Medical or other exemption

[36] The Claimant provided testimony about his genuinely held religious belief about vaccinations. I accept that the Claimant is refusing to have the COVID-19 vaccine due to his religious beliefs.

[37] The Claimant was aware that his employer required the disclosure of vaccination status as of November 1, 2021.³⁶ The policy also says that if the employee's record shows that they have only received their first dose of the vaccine by November 1, 2021 then the employee would also be required to show proof of the second dose of vaccine on or before December 1, 2021.³⁷

[38] The policy also required that if an employee was seeking accommodation based on a medical or human rights ground that Human Resources (HR) had to be contacted by November 1, 2021.³⁸

[39] The Claimant was aware that if he did not get vaccinated he had to get an exemption to remain employed.³⁹ The Claimant sent an email to his employer on

³⁵ See GD2-12.

³⁶ See GD2-12.

³⁷ See GD2-12.

³⁸ See GD2-12.

³⁹ See GD2-12.

October 29, 2021 stating his religious beliefs and refusing to disclose his vaccine status.⁴⁰ On November 1, 2021, the employer responded to the Claimant and said that HR would be in touch regarding exemption forms.⁴¹

[40] On November 2, 2021, HR sent the Claimant accommodation forms and requested that they be returned by November 15, 2021.⁴²

[41] On November 9, 2021,⁴³ the Claimant sent an email to HR that included his objection email that he had sent to his employer on October 29, 2021. The Claimant explains in his email to HR that “this issue is one of authority. [Employer] has chosen to implement a policy with respect to its employees that it does not have the authority to do. Since my body is under the authority of God and not [employer], I will continue to exercise my right of medical privacy in the midst of a policy that discriminates against people who believe as I do.”⁴⁴

[42] On November 12, 2021, HR reminded the Claimant of the requirement to fill out the exemption forms by November 15, 2021. On November 12, 2021, the Claimant’s supervisor also wrote to all employees asking employees to update their vaccination status.

[43] The Claimant’s supervisor also wrote the Claimant personally on November 12, 2021 to ask for a vaccine status update.

[44] The Claimant testified that he refused to complete the forms sent to him by HR. He says that he does not have to justify his religion to anyone else. He also says that he felt that he would not be successful in obtaining a religious exemption.

[45] On November 15, 2021, while the Claimant was at work his site manager asked the Claimant if he had disclosed his vaccination status. The Claimant replied that he

⁴⁰ See GD2-5.

⁴¹ See GD2-4.

⁴² See GD2-9.

⁴³ See GD2-8.

⁴⁴ See GD2-8.

had not. The Claimant indicated in an email that he would be “retaining [his] medical privacy”.⁴⁵

[46] The Supervisor responded to the Claimant and said that because he was not in compliance with the employer’s vaccination policy he could not be at the workplace.⁴⁶

[47] The Claimant agreed that he did not disclose his vaccination status to his employer. The Claimant agreed that he did not have an exemption under his employer’s mandatory policy. There is no evidence to the contrary so I accept that the Claimant’s testimony on these points.

Charter and Human Rights

[48] The Claimant feels that the employer’s policy went against several pieces of legislation. The Claimant feels that her employer’s policy is an infringement of his *Canadian Charter of Rights and Freedoms* (Charter) and Human Rights legislation. The Claimant feels that by being put on an unpaid leave of absence that it was equivalent to being constructively dismissed by his employer.

[49] In Canada, there are a number of laws that protect an individual’s rights. The Charter is one of these laws. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[50] As explained to the Claimant during the hearing, these laws are enforced by different courts and tribunals. This Tribunal can consider whether a section of the Employment Insurance Act (or its regulations) infringes the rights that are guaranteed by the Charter. The Claimant stated at the hearing that he was not challenging any part of the *Employment Insurance Act*, rather he feels that his employer’s policy infringed the Charter or human rights.

[51] It was explained to the Claimant that it is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter or human rights

⁴⁵ See GD2-11.

⁴⁶ See GD2-11.

legislation. It was also explained to the Claimant that he would need to go to a different court or tribunal to address those types of issues. The Claimant said that he understood and wished to proceed.

A.L. v. Canada Employment Insurance Commission⁴⁷

[52] The Claimant submitted a Tribunal decision that he says is relevant to his case.⁴⁸ The Claimant submitted it just prior to hearing but was given opportunity to put forward his arguments about that decision during the hearing. The copy of the decision was not redacted and contained that claimant's full name. I will refer to the case as *A.L. v. Canada Employment Insurance Commission*.

[53] In that case, A.L. worked in a hospital's administration and was ultimately dismissed for failing to follow her employer's mandatory COVID-19 vaccination policy.

[54] The Tribunal Member found that A.L. did not lose her job because of her own misconduct. It was found that there was a collective agreement that the employer and employees were bound by. The Tribunal Member found that, absent specific legislation requiring a term, the employer was not entitled to unilaterally impose a new condition of employment as it was against the collective agreement. The reasoning was that because there was no legislation requiring mandatory vaccination that it was improper to unilaterally impose this new term.

[55] As a result, it was found that A.L. did not breach any duty owed to the employer by choosing not to be vaccinated as there was no legislation requiring a mandatory COVID-19 vaccination policy. It was noted that the collective agreement considered whether vaccinations other than the COVID-19 vaccination were mandatory. The Tribunal Member found that other vaccinations were contemplated in the collective agreement and were not mandatory. The Tribunal Member reasoned that the COVID-19

⁴⁷ This decision of the Tribunal's General Division, Employment Insurance division was released on December 14, 2022. It does not have a neutral citation as it had not been published yet.

⁴⁸ See GD10.

vaccinations should follow the same process as other vaccinations set out in the collective agreement.

[56] Additionally, the Tribunal Member found that A.L. had a right to choose whether or not to have a medical treatment. That choice was seen as a “right”. The Tribunal Member found that even if the choice (the action) was contrary to an employer’s policy it was found that it could not be considered misconduct under the EI Act.⁴⁹

[57] 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 that case for the reasons that follow.

[58] In the case before me, the Claimant’s collective agreement is silent on vaccinations. This is one of the ways that it can be distinguished from *A.L. v. Canada Employment Insurance Commission*.

[59] However, my reasons for not following *A.L. v. Canada Employment Insurance Commission* go beyond the factual similarities or differences. One of the reasons for not following that decision is that it is contrary to other court decisions. As noted above, in *McNamara, Paradis* and *Mishibinijima*⁵⁰ these Court cases make it clear that the focus must be on what a claimant has or has not done.

[60] The Claimant says that his employer violated the collective agreement by implementing a policy unilaterally. Further, the Claimant argued that his employer was required to negotiate a “memorandum of understanding” if there was something new. He testified that it was negotiated that employees would continue working during the pandemic.⁵¹ This is a similar argument to the Tribunal Member’s finding that an employer cannot put in place any new conditions (absent legislation requiring it) unless an employee explicitly or implicitly agrees to it. Yet, as indicated above, other Courts and Tribunals have considered this very issue and have found differently.

⁴⁹ See *A.L. v. Canada Employment Insurance Commission* at paragraphs 76, 79 and 80.

⁵⁰ See paragraphs 26 to 30 of this decision above.

⁵¹ See GD2-2.

[61] There are other avenues open to a claimant if they do not feel that the employer was acting within an agreement. For that reason, although I find that the Claimant's collective agreement can be distinguished from the one in *A.L. v. Canada Employment Insurance Commission*, I am not going to make a determination as to whether the employer breached a term in the collective agreement as that is outside of my authority.

[62] Again, I have to focus on the Act only. I cannot make any decisions about whether the Claimant has other options under other laws.⁵² I can only consider whether what the Claimant did, or failed to do, is misconduct under the Act.

Elements of misconduct?

[63] I find that the Commission has proven that there was misconduct for the reasons that follow.

[64] There is no dispute that the employer had a vaccination policy. The claimant knew about the vaccination policy. I find that the Claimant made his own choice not to get vaccinated. The Claimant also made his own choice not to disclose his vaccination status to his employer. This means that the Claimant's choice to not get vaccinated (or disclose his status) was conscious, deliberate and intentional.

[65] The Claimant did not have an accommodation exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee would be placed on an unpaid leave of absence.⁵³

[66] The employer's policy requires all employees to disclose their vaccination status and to either have an exemption or get vaccinated. The Claimant did not disclose his vaccination status, did not get vaccinated and had no exemption. This means that he was not in compliance with his employer's policy. That means that he could not go to work to carry out his duties owed to his employer. This is misconduct.

⁵² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁵³ See GD3-23.

[67] The Claimant agreed that he was aware that by not disclosing his vaccination status, or by getting vaccinated (or having an exemption) that he would be placed on an unpaid leave of absence. This means that the Claimant knew there was real possibility that he could be placed on an unpaid leave of absence (a suspension).

[68] By not disclosing his vaccination status, or getting vaccinated or by not getting an exemption, the misconduct, led to the Claimant losing his employment.

[69] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Claimant knew that by not following the policy that he would not be permitted to be at work. This means that he could not carry out his duties to his employer. The Claimant was also aware that there was a real possibility that he could be suspended for this reason.

Employment insurance benefits

[70] The Claimant also believes that because he has paid into employment insurance (EI) for years that he should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find themselves unemployed and unable to find another job. I do not find that this applies in this situation.⁵⁴

So, did the Claimant lose his job because of misconduct?

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

[72] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated or say whether he had been vaccinated was likely to cause him to be suspended from his job.

⁵⁴ See *Pannu v Canada (Attorney General)*, 2004 FCA 90, at paragraph 3.

Conclusion

[73] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[74] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section