



Citation: *TE v Canada Employment Insurance Commission*, 2023 SST 542

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

## **Decision**

**Appellant:** T. E.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (489380) dated August 22, 2022 (issued by Service Canada)

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**Tribunal member:** Solange Losier

**Type of hearing:** Videoconference

**Hearing date:** January 12, 2023

**Hearing participants:** Appellant  
Appellant's Witness

**Decision date:** February 9, 2023

**File number:** GE-22-2951

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from working because of misconduct (in other words, because he did something that caused this). This means that the Claimant is disentitled from receiving Employment Insurance (EI) regular benefits.<sup>1</sup>

## Overview

[3] T.E. is the Claimant in this case. He worked as a Manager for a national courier company for around 16 years. The employer put the Claimant on an unpaid leave of absence because he did not comply with the covid19 policy at work. The Claimant then applied for EI regular benefits.<sup>2</sup>

[4] The Commission decided that the Claimant was not entitled to receive EI regular benefits because he was suspended and lost his employment due to his own misconduct.<sup>3</sup>

[5] The Claimant disagrees with the Commission's decision and the employer's policy.<sup>4</sup> He was not dismissed from his job. He argues that his conduct was not misconduct and that the employer breached several laws when they imposed the policy.

[6] The Claimant agrees that he did not comply with the policy but he has serious health concerns and other reasons. Also, he was willing to do covid19 antigen testing, but that option was no longer available.

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<sup>1</sup> See section 31 of the *Employment Insurance Act* (EI Act) says that Claimants who are suspended from work are disentitled from receiving EI benefits, until they meet certain criteria.

<sup>2</sup> See application for EI regular benefits at GD3-3 to GD3-13.

<sup>3</sup> See initial decision at GD3-25 to GD3-26 and reconsideration decision at GD3-46.

<sup>4</sup> See Commission's representations at GD4-1 to GD4-7.

## **Matters I have to consider first**

### **A case conference was held**

[7] This case was first scheduled to be heard by teleconference.<sup>5</sup> However, the Claimant wrote to the Tribunal and asked for his case to be heard in-person.<sup>6</sup> I arranged for a case conference to discuss possible hearing dates near his area of residence.<sup>7</sup> The Claimant and Commission attended the case conference.<sup>8</sup>

[8] At the case conference, I told the Claimant and the Commission that the original teleconference hearing date would need to be rescheduled to another date for an in-person hearing. The Claimant explained that he did not want to wait for an in-person hearing date. He asked to keep his original hearing date, but to convert it to a videoconference instead.<sup>9</sup> The Commission agreed to a videoconference as well.

[9] So, the hearing was held on the original hearing date, but by videoconference instead.<sup>10</sup>

### ***Canadian Charter of Rights and Freedoms (Charter)***

[10] The Tribunal has a different process for Charter appeals.<sup>11</sup> At the hearing, the Claimant confirmed that he was not raising any Charter arguments, even though some of them were included as part of his written arguments.<sup>12</sup> Since the Claimant is not raising any Charter arguments, the hearing proceeded as a regular hearing.

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<sup>5</sup> See notice of hearing at GD1-1 to GD1-3.

<sup>6</sup> See Claimant's request for an in-person hearing on GD8-1.

<sup>7</sup> See notice of case conference at GD9-1 to GD9-3 and case conference summary at GD12-1 to GD12-3.

<sup>8</sup> The case conference was held by teleconference on December 9, 2022.

<sup>9</sup> The new notice of hearing was sent to both parties and is found at GD14-1 to GD14-2.

<sup>10</sup> See notice of hearing (videoconference) at GD14-1 to GD14-2.

<sup>11</sup> See section 1(1) of the *Social Security Tribunal Regulations* and *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>12</sup> See GD2-1; GD3-33; GD15-9 to GD15-14.

### **The Claimant submitted documents after the hearing**

[11] At the hearing, the Claimant said he received two letters from his employer, one in November 2021 and another in January 2022. Since these letters were not part of the file, I asked the Claimant to submit them after the hearing because they might be relevant to his case.

[12] The Claimant submitted the November 2021 letter and wrote that he could not find the other letter.<sup>13</sup> Shortly after back to the Tribunal to say that he found the January 2022. I reviewed the letters he submitted. They were added to the file and sent to the Commission.<sup>14</sup> No reply submissions from the Commission were received as of the date of this decision.

### **Issue**

[13] Was the Claimant suspended and dismissed from his job due to misconduct?

### **Analysis**

[14] The law says that you can't get EI regular benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.<sup>15</sup>

[15] I have to decide two things. I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Claimant stop working?**

[16] I find that the Claimant was put on an unpaid leave of absence (suspended from working) effective January 10, 2022 because he did not comply with the employer's

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<sup>13</sup> See letter dated November 7, 2022 at GD17-1 to GD17-2 and email dated January 13, 2023 at GD18-1 to GD18-2.

<sup>14</sup> See letter dated January 6, 2022 at GD19-1 to GD19-2; The letters were sent to the Commission on January 17, 2023 and February 2, 2023.

<sup>15</sup> See sections 30 and 31 of the EI Act.

policy. Specifically, he was not fully vaccinated for covid19 by the deadline on December 31, 2021.

[17] The Claimant testified that his last day of work was January 7, 2022. The unpaid leave was imposed by the employer, so he did not have a choice. He could not continue working, even though he wanted to. On his last day of work, he cleaned out his office, took his belongings and said goodbye to his colleagues.

[18] I do not find that the Claimant was dismissed from his job. I accept the Claimant's testimony as credible when he said he was never dismissed from his job. The record of employment in the file shows "dismissal or suspension" and last day paid was January 7, 2022.<sup>16</sup> A letter from his employer dated March 14, 2022 says that the Claimant remains on an unpaid leave of absence.<sup>17</sup>

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

[19] The *Employment Insurance Act* (EI Act) does not 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 EI 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.<sup>18</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>19</sup>

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<sup>16</sup> See record of employment at GD3-14 to GD3-15.

<sup>17</sup> See letter dated March 14, 2022 at GD3-30 to GD3-31.

<sup>18</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>19</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[21] The Claimant does not 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>20</sup>

[22] 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.<sup>21</sup>

[23] The law does not say I have to consider how the employer behaved.<sup>22</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>23</sup>

[24] I have to focus on the EI Act only. I can't 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.<sup>24</sup>

[25] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[26] The Commission has to prove that the Claimant was suspended 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 was suspended because of misconduct.<sup>25</sup>

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<sup>20</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>21</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>22</sup> See section 30 of the Act.

<sup>23</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>24</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>25</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

## **The “covid19 safer workplaces policy” (policy)**

### **The Claimant told me about the policy**

[27] I asked the Claimant to tell me about the policy at work and what was expected.

[28] The Claimant said that the employer communicated the policy to employees sometime around September 2021. Employees were required to attest to their vaccination status. He had some concerns about this, but he complied by attesting that he was unvaccinated for covid19.

[29] The Claimant explained that employees at the Montreal location were also required to do bi-weekly antigen testing (testing) for covid19 starting from November 8, 2021. However, the policy changed and employees now had to be fully vaccinated for covid19 by December 31, 2021. He was disappointed that the option for testing was no longer available as of November 29, 2021.

[30] The Claimant knew that the policy had exemptions for medical and religious grounds. He applied for a medical exemption, but that was denied by the employer.<sup>26</sup>

[31] The Claimant is a born again Christian and active at his church. He says that he asked his employer for an exemption on the basis of creed, but the employer never responded and handled his request like a “memo” instead of an “official letter”.<sup>27</sup> He submitted information to the Tribunal from the Liberty Coalition in Canada that identifies various religious verses.<sup>28</sup>

### **The original and revised policy in the file**

[32] I reviewed the policy in the file. The initial policy was issued on September 15, 2021.<sup>29</sup> The policy was then revised and issued by the employer on October 13, 2021.<sup>30</sup>

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<sup>26</sup> See Claimant’s exemption letter at GD3-33 and follow up letter dated December 17, 2021 at GD3-34 and the employer’s denial letter dated January 6, 2022 at GD19-2.

<sup>27</sup> See Claimant’s exemption letter at GD3-33.

<sup>28</sup> See Liberty Coalition document at GD11-3 to GD11-5.

<sup>29</sup> See policy dated September 15, 2021 at GD3-19 to GD3-24.

<sup>30</sup> See revised policy dated October 13, 2021 at GD3-35 to GD3-38.

[33] I summarized the parts of the revised policy that I found relevant (the emphasis added is mine). I note that pages 2 and 6 of the revised policy were missing.

- a) The employer is committed to ensuring a safe and healthy workplace as part of their legal obligations under the *Canada Labour Code*.<sup>31</sup> Because of this, they want to deter the transmission of the covid19 virus and prevent harmful outcomes within the workplace and the broader community.<sup>32</sup>
- b) The employer noted that based on current medical guidance and the Federal Government's direction, they are implementing the policy **requiring all individuals covered by the policy to be vaccinated for covid19**.
- c) **After December 31, 2021**, if an employee is not vaccinated and does not have an approved exemption for medical or religious grounds will be in contravention of the policy. They will be **placed on an unpaid leave**.<sup>33</sup>
- d) Employees can submit a request for an exemption and accommodation if they are not able to have a covid19 vaccine because of a disability, religion or other ground recognized under the *Canadian Human Rights Act* (CHRA).<sup>34</sup>
- e) All accommodation requests will be considered on a case-by-case basis and must include enough information for the accommodation need, as well the "Accommodation Request Form".

[34] I looked at the previous version of the policy as well.<sup>35</sup> It required employees to attest to the vaccination status by September 20, 2021 and be fully vaccinated by October 1, 2021.<sup>36</sup> It provided for exemptions based on the CHRA. It also required employees to do testing for covid19 during the transition period. It states that non-

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<sup>31</sup> See *Canada Labour Code*, R.S.C., 1985, c. L-2.

<sup>32</sup> See GD3-35.

<sup>33</sup> See GD3-36.

<sup>34</sup> See *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

<sup>35</sup> See policy dated September 15, 2021 at GD3-19 to GD3-24.

<sup>36</sup> See GD3-20; GD3-22.



compliance would lead to an unpaid leave of absence.<sup>37</sup> The Claimant also submitted some additional information about the testing requirements.<sup>38</sup>

## **The Claimant's Witness**

[35] The Claimant brought a Witness to the hearing to support his case. The Witness said that he works as a pharmacist. He talked about covid19 vaccination and pandemic generally, the employer's policy and how the Claimant could not comply with the policy for medical reasons.

[36] The Witness also noted that only under rare circumstances would a physician have been able to provide a medical exemption letter.<sup>39</sup> He explained that the Claimant wanted to safeguard the workplace, but not at the expense of his own health. He noted that the Claimant was always willing to comply with testing as an alternative option to vaccination.

## **The Claimant's conduct was misconduct based on the EI Act**

[37] The Commission has proven that there was misconduct for the following reasons.

### **The policy was communicated to the Claimant**

[38] I find that the policy was communicated as early as September 2021 to the Claimant and that he had enough time to comply with it. The deadline to be fully vaccinated (unless exempt) was December 31, 2021.

[39] I accept that the Claimant complied with parts of the original policy (September 15, 2021). Specifically, the Claimant attested to his vaccination status by the deadline and tested for covid19 as required during the transition period. This is not disputed between the parties.

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<sup>37</sup> See GD3-23.

<sup>38</sup> See GD15-16 to GD15-27.

<sup>39</sup> See covid19 Frequently Asked Questions for physicians at GD15-31 to GD15-37.

**The Claimant did not comply with the requirement to be fully vaccinated**

[40] I find that the Claimant did not comply with the requirement to be fully vaccinated for covid19 by the extended deadline of December 31, 2021. This is what led to his unpaid leave of absence on January 10, 2022.

**The Claimant's conduct was misconduct based on the EI Act**

[41] I find that the Claimant wilfully and consciously chose not to comply with the policy for his own personal reasons. The Claimant thought about whether to comply or not comply. He made a conscious choice to not comply and that was wilful.

[42] The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.<sup>40</sup>

**The Claimant was not exempt from the policy**

[43] The policy provided for exemptions on the basis disability, religion or other ground recognized under the *CHRA*.<sup>41</sup>

[44] The Claimant told me about his medical history. He spoke about the serious medical challenges he has faced and how hard things have been. He was very worried about getting the covid19 vaccination, given his health concerns.

[45] The Claimant tried to get a medical exemption letter from his surgeon and oncologist but was not able to obtain one. He provided the Tribunal with some medical documents to prove that his health concerns were serious.<sup>42</sup>

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<sup>40</sup> See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

<sup>42</sup> See medical documents at GD3-39 to GD3-41.

[46] The Claimant asked his employer for a **medical exemption**.<sup>43</sup> However, the employer denied his medical exemption request on January 6, 2022, which was shortly before he was put on an unpaid leave of absence on January 10, 2022.<sup>44</sup>

[47] I acknowledge that the employer's exemption denial could have been timelier because once the Claimant was notified that his medical exemption request was denied, he was placed on an unpaid leave of absence a few days later. In my view, this did not give him much time to comply with the policy after he was informed of the denial.

[48] Even so, I find that if the Claimant had intended to comply with the policy, he could have asked the employer for an extension before being put on an unpaid leave of absence. There was no evidence to suggest that the Claimant intended to comply with the policy because his medical concerns were the main reason for not complying. For example, his non-compliance was not due to a lack of time to comply after he was informed of the exemption denial.

[49] I note that the employer sent him a letter in March 2022 that says he can provide proof of vaccination by March 28, 2022.<sup>45</sup> This shows that he was given additional time, even after the unpaid leave started to comply. As well, the Claimant has not been dismissed from his employment to-date, so it's possible that he could still notify his employer of his intention to comply, should he choose to do so.

[50] I acknowledge that the Claimant said he submitted an **exemption request on the basis of creed** and that he received no response from the employer.

[51] The file shows an undated letter that he submitted to his employer asking for "reasonable accommodation" because of his medical concerns.<sup>46</sup> It also says that he believes the "mandate to be vaccinated to be discriminatory based on my creed" and

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<sup>43</sup> See Claimant's request to expedite his accommodation/exemption letter dated December 17, 2021 at GD3-34.

<sup>44</sup> See exemption denial letter at GD19-2.

<sup>45</sup> See letter dated March 14, 2022 at GD3-30.

<sup>46</sup> See Claimant's exemption letter at GD3-33.

that he “should not receive different treatment or be discriminated against if I choose not to accept the vaccine at this time”.

[52] First, the policy says that accommodation requests must include enough information for the accommodation need, as well the “Accommodation Request Form”. I don’t know whether the Claimant completed the form required or if he provided enough information in order for the employer to respond. The initial request he made simply said that he felt he was being discriminated against on the basis of creed.<sup>47</sup>

[53] Second, the Claimant’s follow up letter about his medical exemption request makes no mention about his intention to request an exemption on the basis of creed.<sup>48</sup> He restates the medical reasons why he cannot comply with the policy and asks his employer to expedite their decision.

[54] Given the above, I was not persuaded that the Claimant made a proper request for an exemption on the basis of creed. While he alleges discrimination on the basis of creed, that is not the same as making a request for accommodation on the basis of creed. Even if he had intended to do so, there was no evidence to suggest that he followed up with his employer to see whether they had made a decision.

[55] Therefore, I find that the Claimant has not proven that he was exempt from the policy for medical reasons or on the basis of creed. The Claimant was obligated to comply with the policy or risk the consequences – an unpaid leave of absence.

### **The Claimant knew the consequences of non-compliance**

[56] I find that the Claimant knew or ought to have known that non-compliance by the deadline of December 31, 2021 would lead to an unpaid leave of absence. At the hearing, the Claimant agreed that he knew the consequences. He said there was a threat of termination, but it has not happened yet.

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<sup>47</sup> See Claimant’s exemption letter at GD3-33.

<sup>48</sup> See Claimant’s request to expedite his accommodation/exemption letter dated December 17, 2021 at GD3-34

[57] The Claimant received a written warning from his employer on December 10, 2021 that if he did not comply, he would be placed on an unpaid leave of absence on January 10, 2022.<sup>49</sup>

## **What about the Claimant's other arguments?**

[58] The Claimant presented other arguments at the hearing, including some of the following.

### **Another Social Security Tribunal (SST) case**

[59] The Claimant referred to a recent *SST* decision where another claimant lost his job and was granted EI benefits after the employer introduced a covid19 vaccine policy.<sup>50</sup>

[60] I reviewed the case, but I do not find it applicable to this case because the facts are completely different.

[61] For example, that person was only given a few days verbal notice of the policy before he was fired. There was no chance he could have complied with the policy and he didn't even have a chance to find out if there were any exemptions from the policy or know the consequences of non-compliance.

[62] However, the facts in this case show that the Claimant was informed of the policy well in advance and had a lot of time to comply. He also knew the consequences of non-compliance.

### **A recent Federal Court case**

[63] Recently, the Federal Court made a decision about a similar case involving a vaccine policy, misconduct, and EI benefits.<sup>51</sup> The applicant made similar arguments to

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<sup>49</sup> See letter dated December 10, 2021 at GD3-32.

<sup>50</sup> See *TC v Canada Employment Insurance Commission*, 2022 SST 891.

<sup>51</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102. Decision dated January 23, 2023.

this case, but they were dismissed by the Federal court (i.e., the application for judicial review was dismissed).

[64] In the *Cecchetto* decision, the Federal Court said:

para. 46: “As noted earlier, it is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.

para. 47: The SST-GD, 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.”

[65] The *Cecchetto* decision confirms that the SST’s scope is limited. So, even though the Claimant is asking the SST to make the “right and ethical decision” and to consider the safety and efficacy of the covid19 vaccine, bodily integrity and vaccine liability, they are not for me to decide. The Claimant is free to pursue those particular claims and remedies he is seeking at other Tribunals or the courts where these matters can be dealt with.

[66] I acknowledge that the Claimant is also asking me to decide whether the policy was reasonable, given his particular circumstances and medical history.<sup>52</sup> I understand that he expected his employer to approve his exemption. However, the Federal Court has already decided that I do not have the authority to determine whether the policy was reasonable, or if the Claimant should have been accommodated by the employer, or whether the penalty imposed by the employer should have been different.<sup>53</sup>

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<sup>52</sup> See weblinks that discuss adverse effects submitted by the Claimant at GD16-2 and other related documents at GD15-9 to GD15-14.

<sup>53</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185; *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107.

[67] I am bound by decisions issued by the Federal Court. Wilful misconduct includes conduct that was conscious, deliberate, or intentional.<sup>54</sup> So, 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 suspended or let go because of that, then it is misconduct based on the EI Act.<sup>55</sup> This is the legal test I have to apply.

[68] I accept that the Claimant did not have wrongful intent in this case. It is clear that he had serious medical reasons for not wanting to be vaccinated for covid19. However, it was still misconduct because he did not have an approved exemption and consciously chose not to comply with the policy for his own personal reasons.<sup>56</sup>

### **So, was the Claimant suspended because of misconduct?**

[69] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct. This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to stop working.

### **Conclusion**

[70] The Commission has proven that the Claimant was suspended because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.<sup>57</sup>

[71] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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<sup>54</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>55</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>56</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>57</sup> See section 31 of the EI Act.