Citation: *AT v Canada Employment Insurance Commission*, 2023 SST 668

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (529202) dated September 21, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	March 1, 2023
Hearing participant:	Appellant
Decision date:	March 3, 2023
File number:	GE-22-3448

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits because she was suspended from her job due to her own misconduct[1].

Overview

[3] The Appellant worked as a LINC[2] instructor at a support centre (the employer)[3]. On February 9, 2022, the employer instituted a mandatory Covid-19 vaccination policy (the policy) requiring all employees to attest to their vaccination status by February 25, 2022 and become fully vaccinated by April 26, 2022, or be subject to discipline up to and including termination[4].

[4] The Appellant was advised of the policy[5]. But she did not disclose her vaccination status by the deadline and did not want to be vaccinated with a Covid-19 vaccine[6].

[5] She told the employer she had natural immunity from a recent Covid-19 infection, and other "religious restraints" and personal medical reasons for not getting vaccinated (GD3-75). She also asked the employer to accommodate her because classes were online and because vaccine mandates were being lifted in many sectors. But the employer said she did not provide sufficient documentation to exempt her from vaccination and would be placed on unpaid leave[7]. She still declined to get vaccinated.

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[1] That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.
[2] LINC stands for Language Instruction for Newcomers to Canada.
[3] The Appellant worked for Settlement Assistance & Family Support Service, which she testified was a privately operated support centre.
[4] The employer provided the Commission with a copy of the policy (starting at GD3-37).
[5] Shortly after the policy was issued, the Appellant went on approved sick leave from February 16, 2022 to March 30, 2022. The employer wrote to the Appellant on March 22, 2022 (see GD3-38) and told her she would be required to disclose her vaccine status immediately upon returning to work or be subject to discipline.
[6] See Appellant's e-mail to the employer on April 1, 2023 (at GD3-75).
[7] See employer's e-mail to the Appellant on April 25, 2022 (at GD3-73).

[6] Since the Appellant did not provide proof that she was fully vaccinated by the policy deadline, the employer placed her on an "involuntary leave of absence due to noncompliance with the workplace Covid-19 vaccine policy as of April 26, 2022"[8].

[7] The Appellant applied for EI benefits. The Respondent (Commission) decided she was separated from her employment due to her own misconduct[9], and this meant she could not be paid any EI benefits[10].

[8] The Appellant asked the Commission to reconsider. She said she made a personal choice not to get vaccinated against Covid-19 for a number of personal reasons. She asked the employer to accommodate her by allowing her to work unvaccinated for 3 more months because she had natural immunity and because classes were online, but the employer refused. She also said she has fears about the

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[8] See Record of Employment at GD3-26.

[9] See the decision letter at GD3- 28. This letter says the Appellant is not entitled to EI benefits because she voluntarily left her employment on April 25, 2022 without just cause. But on her application for EI benefits, the Appellant said she was suspended, and her Record of Employment says she was on a leave of absence. So I don't understand why the decision letter says she voluntarily left her employment.

However, the Commission corrected this error during the reconsideration process (during which time both the Appellant and the employer confirmed she had been placed on an involuntary leave of absence for non-compliance with the policy). The reconsideration decision was changed to "Misconduct" and the Commission said it was maintaining its decision on this issue (see GD3-84).

The reconsideration decision means the Commission determined that the Appellant was suspended from her employment due to her own misconduct.

But this correction doesn't change ***the effect*** of the Commission's decision – it just means there is a different reason why the Commission says the Appellant is not entitled to EI benefits.

Where an employer chooses to place an employee on leave without pay rather than imposing a suspension or termination, the involuntary unpaid leave of absence will be treated as a suspension *if the reason for the leave is considered misconduct*. In the present case, the Commission determined that the reason for the Appellant's unpaid leave of absence (namely, her non-compliance with the employer's mandatory vaccination policy) was misconduct and, therefore her separation from employment would be treated as suspension.

[10] Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension.

safety and potential side effects of the vaccines, and she asked the Commission to override the policy because the federal government has removed its vaccine mandates.

[9] The employer told the Commission the Appellant could come back to work if she complied with the policy by getting vaccinated.

[10] The Commission maintained the disentitlement on the Appellant's claim, and she appealed that decision to the Social Security Tribunal (Tribunal).

[11] I must decide whether the Appellant was suspended from her job due to her own misconduct. To do this, I have to look at the reason for her suspension, and then determine if the conduct that caused her suspension is conduct the law considers to be "misconduct" for purposes of EI benefits.

[12] The Commission says the Appellant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with it. She knew she would be placed on an unpaid leave of absence by making this choice – and that's what happened. The Commission says these facts prove the Appellant was suspended due to her own misconduct, which means she cannot receive EI benefits[11].

[13] The Appellant disagrees. She says she should not be punished for exercising her right to bodily autonomy. She made a personal choice not to get vaccinated against Covid-19. She argues she has the right to receive EI benefits because the employer forced her to go on leave when it could easily have accommodated her, and because she has paid into the EI program for many years and needs financial assistance. She also asks the Tribunal to overturn the finding of misconduct because vaccine mandates are being lifted across all sectors and unvaccinated employees are being recalled to work.

[14] I agree with the Commission. These are my reasons.

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[11] See footnote 10 above.

Issue

[15] Was the Appellant suspended from her job because of her own misconduct?

Analysis

[16] To answer this question, I have to decide two things. First, I have to determine why the Appellant was suspended from her job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Appellant suspended from her job?

[17] The Appellant was suspended because she refused to provide proof she was fully vaccinated against Covid-19 as required by the policy, and did not have an approved exemption.

[18] The Appellant repeatedly told the Commission that the employer put her on unpaid leave because she is not vaccinated and did not comply with the policy.

[19] The employer confirmed that the Appellant was suspended from her job because she was not vaccinated and did not comply with the policy.

[20] In her Notice of Appeal, the Appellant said she was put on an unpaid leave of absence because she chose not to be vaccinated in accordance with the policy.

[21] At the hearing, the Appellant testified that:

- She had serious concerns about the safety and efficacy of the vaccines, especially after her own illness from Covid-19.
- She still does not want to get vaccinated.
- In a meeting with the employer on April 25, 2022, she explained her reasons for not getting vaccinated, and asked the employer to accommodate her by allowing her to continue teaching online. But the employer would not make an exception for her.

- She refused to get vaccinated in accordance with the policy, so the employer told her she was being put on an unpaid leave of absence.

[22] The evidence shows the Appellant was suspended from her employment (prevented from working) because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[23] **Issue 2: Is the reason for her suspension misconduct under the law?**

[24] Yes, the reason for the Appellant's suspension is misconduct for purposes of EI benefits.

[25] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[12]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[13] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[26] The Appellant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct under the law[14].

[27] There is misconduct if the Appellant knew or ***ought to have known*** her conduct could get in the way of carrying out her duties towards the employer and there was a real possibility of being suspended because of it[15].

[28] The Commission has to prove the Appellant was suspended from her job due to misconduct[16]. It relies on evidence Service Canada representatives obtain from the employer and the Claimant to do so.

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[12] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[13] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[14] See *Attorney General of Canada v. Secours*, A-352-94.
[15] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[16] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Appellant lost her job because of misconduct.

[29] The Appellant told the Commission that she didn't want to get vaccinated because of her religious beliefs and because she thinks the Covid-19 vaccines are unsafe.

[30] At the hearing, the Claimant testified that:

- She was aware of the policy and understood what was required, what the deadlines were, and what the consequences of non-compliance would be.
- She was advised of the policy on February 9, 2022. On February 11th, she got sick with Covid and was eventually admitted to hospital[17].
- At a meeting with the employer on April 25, 2022, she said she didn't want to get vaccinated by the April 26th deadline in the policy. She felt it was too soon after her Covid infection. She also believed she had natural immunity for at least 3 months after infection.
- She asked the employer if she could continue working for 3 more months, while classes were on-line. That would have given her until August or September to see if she felt well enough to get vaccinated. She wanted to work and classes were on-line, so there shouldn't have been a problem.
- But the employer refused to accommodate her[18].
- She didn't think the employer would be willing to lose a good teacher like her.
- She thought there would be some "compassion" for her situation.
- But the employer put her on unpaid leave – just like the policy said.

[17] During her reconsideration interview, the Appellant told the Commission she was on paid sick leave from March 28 to April 22, 2022 (see GD3-35).
[18] The Appellant also told the Commission that she requested a religious exemption, but it was denied on April 25, 2022 (see GD3-35).

- The employer continued to “cling” to the policy, “even though the Emergencies Act was removed” and “vaccine mandates were lifting”.

- It “hurts” her to see the word “misconduct” in the Commission’s decision because the reason she’s not working has nothing to do with how she did her work or her behaviour in the workplace.

- The employer should “remove” the policy because “everything is over” and unvaccinated employees are being recalled to work.

- But instead, she has no job and no EI benefits, which is a “double punishment” for exercising her right to make her own medical decisions. She wants to “retire with dignity”. There should be some “compassion” for her situation.

- The employer said she could come back to work if she gets vaccinated, but she still doesn’t want to get vaccinated. She continues to have valid concerns about the potential side effects of the vaccines given her medical history.

- She also doesn’t see the need to get vaccinated now that the vaccine mandates “are gone”.

- She believes the employer is “just being spiteful” and discriminating against her by continuing to “cling” to the policy.

- It’s not a fair outcome. She has suffered emotionally and financially, and it really feels like she’s being punished for making the best medical decision for herself.

[31] I acknowledge the Appellant’s disappointment at not receiving EI benefits after being suspended.

[32] However, it is not the Tribunal’s role to decide if the employer’s policy was reasonable, or whether the employer should have accommodated the Appellant by

allowing her to continue teaching on-line, or whether the penalty of being placed on an unpaid leave of absence on was too severe[19].

[33] The Tribunal must focus on the conduct that caused ***the Appellant*** to be suspended and decide if it constitutes misconduct under the EI Act.

[34] I have already found that the conduct which led to the Appellant's suspension was her failure to provide proof of vaccination in accordance with the employer's workplace policy in response to the Covid-19 pandemic.

[35] The uncontested evidence obtained from the employer and the Appellant, together with her testimony at the hearing, allows me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it.

b) her refusal to comply with the policy was deliberate and intentional. This made her refusal wilful.

c) she knew her failure to provide proof of vaccination would cause her to be suspended from her job[20].

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[19] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

[20] The Claimant testified that she didn't believe the employer would be willing to lose her and would have compassion for her instead of following the policy in her case. This is not an exculpatory argument for 2 reasons.

First, the legal test says there will be misconduct if the Claimant knew ***or ought to have known*** that non-compliance with the policy could cause her to be separated from her employment. I have no hesitation in finding that she ***ought to have known*** from the March 22, 2022 letter (see GD3-38 to 39) and the e-mails she had with the employer thereafter (see GD3-71 to 77) that the employer intended to apply the policy and she needed to comply or she would not be permitted to work after the policy deadline. She chose to disregard the message in the e-mails and assumed the employer would make an exception for her or provide accommodations. The fact that her assumption proved incorrect does not diminish the information communicated by the employer, namely that she had to get vaccinated or she would not be allowed to work.

d) her refusal to comply with the policy was the direct cause of her suspension.

[36] The employer has the right to set policies for workplace health and safety. The Appellant had the right to refuse to comply with the policy. By choosing not to be vaccinated and provide proof of vaccination, she made a personal decision that led to foreseeable consequences for her employment.

[37] This Tribunal's Appeal Division has repeatedly confirmed it doesn't matter if a claimant's personal decision is based on religious beliefs or medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 health and safety policy is considered wilful and will be misconduct for purposes of EI benefits[21].

[38] The Appeal Division decisions are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[22].

[39] I therefore find that the Appellant's wilful refusal to provide proof of vaccination in accordance with the policy – in the absence of an approved exemption – constitutes misconduct under the EI Act.

[40] The Appellant submits that a finding of "misconduct" requires her to have done something "wrong" in connection with the performance of her duties or her conduct in the workplace. But as I explained at the start of the hearing, the term "misconduct" for purposes of EI benefits does **not** necessarily mean that a claimant did something "wrong". The term misconduct does not have the same meaning for EI benefits as it does in other employment contexts, such as discipline and grievance proceedings or

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Second, it didn't make a difference to the Appellant's conduct. On April 25, 2022, when it was clear she would be suspended if she didn't comply with the policy, she still refused to get vaccinated. This meant she refused to comply with the policy requirement to provide proof of vaccination.

[21] See: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.

[22] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

labour arbitrations. It simply means that a claimant engaged in wilful (deliberate, intentional) conduct that they knew or ought to have known could cause them to be separated from their employment.

[41] The Appellant has not been terminated from her employment and could resume her duties upon being vaccinated[23]. But this doesn't diminish the fact that, at the April 25, 2022 meeting, she knew she would be suspended for failing to comply with the policy and still refused to do so.

[42] The Appellant argues that the policy is unreasonable because vaccine mandates are being lifted in many sectors and unvaccinated employees are being recalled to work. She says this means the policy is irrelevant and, therefore, her non-compliance with the policy shouldn't prevent her from receiving EI benefits.

[43] I am not empowered to make findings with respect to the reasonableness or validity of the policy or any violations of the Appellant's rights. Nor do I have authority to decide if the employer's exemption request process was proper or whether the employer could have accommodated the Appellant in some other way.

[44] The Appellant's recourse for all of her complaints about the policy and the employer's actions is to pursue these claims in court or before another tribunal that deals with such matters. She remains free to make these arguments before the appropriate adjudicative bodies and seek relief there[24].

[45] However, none of her arguments change the fact that the Commission has proven on a balance of probabilities that she was suspended because of conduct that constitutes misconduct under the EI Act.

[46] And this means she is not entitled to receive EI benefits while she is suspended.

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[23] See Supplementary Record of Claim at GD3-36.

[24] The employer told the Commission that the Appellant filed a grievance of her suspension, and provided a copy of its response (see GD3-80 to GD3-82). The Appellant did not testify about the status of the grievance, but she remains free to pursue it if it is on-going.

[47] Finally, I acknowledge that the Appellant is in need of financial support. But it's not enough to have paid into the EI program or to be in need of financial support. If a claimant is suspended from their employment due to their own misconduct, they are not entitled to EI benefits during the period of the suspension – regardless of how many years they have contributed to the program or how difficult their financial circumstances are.

Conclusion

[48] The Commission has proven the Appellant was suspended from her employment because of her own misconduct. This means she is disentitled to EI benefits during the period of the suspension.

[49] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section