Citation: *PA v Canada Employment Insurance Commission*, 2023 SST 613

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (516514) dated August 25, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	January 26, 2023
Hearing participant:	Appellant
Decision date:	February 17, 2023
File number:	GE-22-3057

Decision

[1] I am dismissing the appeal. The Tribunal disagrees with the Appellant.

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

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

[4] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his suspension and dismissal.[1]

[5] This is what the Commission decided. In other words, the Commission made the correct decision in his EI claim.

Overview

[6] His employer put him on an involuntary unpaid leave of absence starting November 6, 2021.[2] The Commission is saying the employer put him on leave because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] 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 didn't pay him EI benefits from February 13, 2022. This is the start date of the claim.

[8] The Appellant says his departure was negotiated as dismissal without cause as supported by the record of employment (ROE).[3]

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[1] 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.
[2] Section 31 of the EI Act uses "suspension." In this decision, a suspension means the same this as an unpaid leave of absence, a leave of absence without pay, and an involuntary unpaid leave of absence.
[3] See GD3 page 32.

[9] I have to decide whether the Appellant got suspended and dismissal or termination from his job for misconduct under the EI Act.

Matter I have to consider first

I will accept a document added to the file after the hearing

[10] A document was added to the file after the hearing. This document was discussed during the hearing and had in fact already been sent in prior to the hearing. There were, however, some issues with the attachments. The Appellant sent in a correction with the attachments just prior to the hearing. This was added to the file after the hearing.

[11] I agreed to accept this document as sent in prior to the hearing. The document was shared with the Commission. The Commission has not provided additional submissions following this.

Issue

[12] Was the Appellant suspended then terminated from his job because of misconduct under the EI Act?

Analysis

[13] 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.

[14] 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.

The reason the Appellant was suspended and dismissed

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

[16] The Appellant says in his appeal that the employer unilaterally put in a new condition of employment but did not give him the legally requisite notice of change. The employment contract had been altered on their part but without any consideration being given to the Appellant.

[17] His termination was clearly designated “Dismissal without cause” on the ROE. This was agreed upon by both parties in the separation settlement.

[18] I have to look at the facts of his appeal through the lens of the EI Act. Under the EI Act an involuntary unpaid leave of absence means the same thing as a “suspension.”[4]

[19] The Appellant and the Commission agree that the Appellant was first suspended effective November 6, 2021, then terminated effective January 24, 2022. The parties do not agree on the misconduct part.

[20] 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

[21] 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

[22] 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.

[4] 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.

[23] 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]

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

[25] 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]

[26] 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]

[27] 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

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[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.
[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.

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.

What the Commission and the Appellant say

[28] 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 (by October 24, 2021).[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.[16]
- He made a conscious and deliberate personal choice not to get vaccinated by the deadline.
- The employer suspended him effective November 6, 2021, because he didn't comply with its vaccination policy.

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

- The Tribunal should follow AL v CEIC, an earlier decision of this Tribunal.[17] His case is similar to that of the Appellant in that decision.

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[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See GD3 page 37.
[16] See GD3 page 36.
[17] This decision is not the one published by the Tribunal. For this reason, it doesn't have an official or neutral citation. It refers to the appellant by their name. To identify the decision without identifying the appellant, I am going to cite it as: *AL v CEIC* (SST file GE-22-1889, December 14, 2022). I am going to refer to it as: *AL v* CEIC. The appellant in *AL v CEIC* made similar arguments to the Appellant in his appeal. AL argued her employer breached the collective agreement because mandatory COVID vaccination wasn't part of her collective agreement when she was hired. She also argued she had a right to refuse to get vaccinated.

- His employer put in a new condition of employment without the required notice of change.[18] The employment contract had been altered by the employer without any consideration given to the Appellant.
- The employer issued the ROE which was clearly designated as "Dismissal Without Cause." This was agreed upon between himself and the employer with the help of the Appellant's lawyer.
- His work reviews never raised any issues regarding misconduct or other disciplinary issues.
- Everyone has the freedom of choice of what to put in their bodies. Especially when it involves medication still under trial and testing.
- His employer is not qualified to dictate what medical procedures are acceptable or required as part of his job.
- He was not a threat to anyone's health.

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

[31] 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.

[32] 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

[33] 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.

[18] See GD2 page 5.

[34] 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.[19]

[35] 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.[20] Our Tribunal does not 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.[21]

- 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.[22] 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.

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[19] 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.
[20] 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 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.
[21] 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.
[22] 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.

[36] 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*. [23] As I understand the Federal Court cases, when 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 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.

[37] 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

[38] I addressed why the Tribunal can not consider the *AL v CEIC* decision. The list at paragraph 29 included other arguments.

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

[40] I accept that the Appellant was issued an ROE which states dismissal without cause.[24] I also accept the Appellant never had any ill intent. The fact that the Appellant

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[23] 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. When we limit our role to interpreting and applying the EI Act, this allows our Tribunal to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." (This is what section 3(1)(a) of the Social Security Tribunal Regulation says our Tribunal should do). Ultimately, this benefits the people who file appeals with our Tribunal. It also avoids situations where our Tribunal decides a collective agreement says one thing, and a labour arbitrator decides it says something else.
[24] See GD3 page 21.

never had any ill intent may very well have been part of the employer`s reasoning for agreeing to issue the ROE with such a comment.

[41] However, 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 or termination. His behaviour was willful. His actions were conscious, deliberate or intentional.

[42] A negotiated settlement after the fact between an employer and a former employee does not alter the legal test required to be met. Their intent may have been to negotiate an agreement which would facilitate EI payments. However, this is now before the Tribunal to decide when looking at all the facts, the EI Act and related case law.

[43] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[25] 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.

[44] There have also been more recent court cases which support this. In a recent case called *Parmar*,[26] 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.

[45] 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:

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[25] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[26] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

> [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 …

[46] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[27] 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.

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

[48] I agree the Appellant can decline vaccination. That is his own personal decision. In his case, his reason is religious and medical. 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.

[49] 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 could suspend or terminate him if he didn't get vaccinated.

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[27] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

- He consciously, deliberately, or intentionally made a personal decision not to get vaccinated by the deadline.
- He was suspended then terminated from his job because he didn't comply with his employer's vaccination policy.

[50] 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.[28]

Dates of Disentitlement and Disqualification

[51] The employer's policy states that designated employees need to have their first dose by September 17, 2021.[29] It then says that by October 24, 2021, all designated employees will be required to provide proof of their second vaccination. Timelines for individual cases based on extenuating circumstances, approved by People & Culture Department.

[52] The Appellant provided an email that would suggest he was placed on unpaid leave as of October 18, 2021.[30] The Appellant testified he was already non-compliant with the first dose required by September 7, 2021, and that may be why he was placed on unpaid leave as of October 18, 2021.

[53] The Appellant also testified he agrees the ROE shows he was paid until November 5, 2021. The Appellant stated that the employer was initially paying out vacation pay after his last physical day at work and agrees he may have been paid as such until November 5, 2021. On the advice of his lawyer, this was stopped and was to be discussed as part of the separation agreement they reached later.

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[28] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.
[29] See GD3 page 37.
[30] The Appellant provided an email sent to him dated October 15, 2021, stating he would be placed on unpaid leave starting Monday. The Appellant agrees he was placed on leave as of October 18, 2021, which is prior to the deadline of October 24, 2021. He agrees he may have been paid until November 5, 2021.

[54] The employer issued the ROE on February 17, 2022.[31] The claim was established effective February 13, 2022.[32] This happens to occur in the same calendar week. As disqualifications start on the Sunday of the week in which a claimant is dismissed, I find that the Appellant is disqualified from February 13, 2022.[33]

[55] The earliest the disqualification can start is February 13, 2022, as this coincides with the start of this claim. Prior to this date, the Appellant would be disentitled from November 7, 2021, for the period of his unpaid leave.[34] However, the claim was established only February 13, 2022.

Conclusion

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

[57] Because of this, the Appellant is disqualified from receiving EI benefits effective February 13, 2022.

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

[59] So, I am dismissing his appeal.

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

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[31] See GD3 page 32.
[32] See GD4 page 1.
[33] Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, “a period of seven consecutive days beginning on and including Sunday, or any other prescribed period.” This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.
[34] 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.