



Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 564

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

Decision

Appellant:	S. C.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (488500) dated July 7, 2022 (issued by Service Canada)
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Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	January 19, 2023
Hearing participant:	Appellant
Decision date:	February 9, 2023
File number:	GE-22-2492

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because he lost his job due to his own misconduct¹.

Overview

[3] The Claimant worked as a Carhouse Operator for X (the employer). On September 7, 2021, the employer implemented a mandatory Covid-19 vaccination policy (the policy). The Claimant did not want to comply with the requirements in the policy because he believed the policy violated his religious and human rights, as well as his collective agreement. He also had concerns about the safety and efficacy of the Covid-19 vaccines.

[4] On November 21, 2021, the employer placed him on an unpaid leave of absence because he failed to submit proof he had received two doses of a Covid-19 vaccine by the deadline in the policy. On December 31, 2021, he was dismissed because he remained non-compliant with the policy².

[5] The Claimant applied for EI benefits. The Respondent (Commission) determined that he was suspended – and subsequently dismissed – due to his own misconduct and could not be paid any EI benefits³.

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 See the December 31, 2021 Termination letter issued by the employer (at GD3-59).

³ The decision letter is at GD3-29. 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. The Claimant’s first Record of Employment refers to a “Leave of absence” (GD3-21). The Commission determined that the reason for the Claimant’s unpaid leave (namely, his failure to comply with the employer’s mandatory vaccination policy) was misconduct. That is why he is considered to have been suspended; and why he is **disentitled** to EI benefits from November 20, 2021.

Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. Since the Commission determined that the reason the

[6] The Claimant asked the Commission to reconsider. He acknowledged he was suspended and then dismissed for non-compliance with the policy. But he made a personal decision not to be vaccinated. He argued that the employer could have accommodated him; and that he contributed to the EI program for many years and should not be denied EI benefits because of a policy that was not part of his collective agreement.

[7] The Commission maintained the misconduct decision on his claim⁴. He appealed that decision to the Social Security Tribunal (Tribunal).

[8] I must decide whether the Claimant was separated from his employment due to his own misconduct⁵. To do this, I have to look at the reason for his suspension and dismissal, and then determine if the conduct that caused his job loss is conduct the law considers to be “misconduct” for purposes of EI benefits.

[9] The Commission says the Claimant 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 the policy. He knew he could be suspended and then dismissed from his job by making this choice – and that’s what happened. The Commission says these facts prove the Claimant lost his job due to his own misconduct, which means he cannot receive EI benefits.

[10] The Claimant disagrees. He says he made a personal choice not to comply with the policy for moral and religious reasons and because he has concerns about the safety and efficacy of the vaccines. He also says the employer could have accommodated him, and that the policy violated his collective agreement and many of

Claimant was terminated from his employment on December 31, 2021 was due to his own misconduct, he is **disqualified** from EI benefits from that date.

However, since the Claimant didn’t apply for EI benefits until January 4, 2022, his benefit period only starts on January 2, 2022 (the Sunday of the week in which he applied for EI benefits). This is why the Commission says the Claimant is refused EI benefits starting from January 2, 2022.

⁴ See the July 7, 2022 decision letter at GD3-62.

⁵ 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.

his rights. He believes he should receive EI benefits because he paid into the EI program for many years and because the employer recalled him to work even though he remains unvaccinated. He says this shows the employer acted in bad faith and in a way that caused him hardship, and that the policy was not justified.

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

Issue

[12] Was the Claimant suspended and subsequently dismissed from his job at the City because of his own misconduct?

Analysis

[13] To answer this question, I must decide two things. First, I have to determine why the Claimant was suspended and subsequently dismissed from his job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Claimant suspended and subsequently dismissed from his job?

[14] The Claimant was suspended – and subsequently dismissed – from his job because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[15] The evidence about the policy is⁶:

- On September 1, 2021, all employees were informed that a mandatory Covid-19 vaccination policy would be in effect as of September 7, 2021.
- Employees had to disclose their vaccination status by October 6, 2021.
- Employees were required to become fully vaccinated by October 30, 2021.

⁶ See interview with employer at GD3-24 and the policy documents provided by the employer at GD3-31 to GD3-58.

- Any employee who was not fully vaccinated by November 21, 2021 would be put on leave without pay.
- All employees who were put on unpaid leave were sent a letter reminding them of the requirement to become fully vaccinated by the final deadline of December 31, 2021 - or be dismissed.
- Employees had to update their vaccination status as they obtained each dose.
- There was a process for making accommodation requests.
- The Claimant was terminated for non-compliance with the policy on December 31, 2021⁷.

[16] The Claimant told the Commission that⁸:

- He was dismissed for not complying with the policy.
- He tried to get a medical exemption, but his doctor would not give him one.
- He spoke to the employer about his concerns about the Covid-19 vaccines, his religious objections to getting vaccinated, and his belief that he has the right to choose what he puts in his body – but the employer was not receptive⁹.
- The employer did not offer any accommodations.
- He refused to get vaccinated and was dismissed for not complying with the policy.

⁷ A copy of the Termination letter issued by the employer is at GD3-59.

⁸ See the application for EI benefits at GD3-13, and the Claimant's interviews at GD3-25 and GD3-61.

⁹ In his Notice of Appeal, the Claimant said he "submitted an attestation letter" asking to be exempt from the policy on human rights grounds, but was denied (see GD2-5).

[17] The employer issued a Record of Employment (ROE) stating the Claimant was on a leave of absence from November 21, 2021 (GD3-21). On January 12, 2022, the employer amended the ROE to report that the Claimant was dismissed (GD3-23).

[18] The Claimant does not dispute that he was placed on unpaid leave and subsequently dismissed because he did not comply with the policy.

[19] I therefore find that the Claimant was suspended – and subsequently dismissed – from his job because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

Issue 2: Is the reason for the suspension and subsequent dismissal misconduct under the law?

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

[21] To be misconduct under the law, the conduct must be wilful. This means the conduct was conscious, deliberate, or intentional¹⁰. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful¹¹ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[22] The Claimant doesn't have to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct under the law¹².

[23] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being suspended and dismissed because of it¹³.

¹⁰ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

¹² See *Attorney General of Canada v. Secours*, A-352-94.

¹³ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[24] The Commission has to prove the Claimant was suspended and dismissed from his job due to misconduct¹⁴. It relies on evidence Service Canada representatives obtained from the employer and the Claimant to do so.

[25] The Claimant submits he made a personal choice not to be vaccinated for many reasons, including his belief that the policy violated numerous of his rights and his collective agreement.

[26] He also argues he has the right to be paid EI benefits because he has contributed to the EI program for many years.

[27] The evidence from the employer is set out under Issue 1 above.

[28] In his Notice of Appeal, the Claimant set out his concerns about the Covid-19 vaccines and the policy; and stated that he was willing to co-operate with other safety measures, such as masking and regular testing. He said that his conduct in exercising his rights does not warrant the denial of EI benefits, especially after he has paid into the EI program for “over 2 decades”¹⁵. I have reviewed and considered all of these documents.

[29] The Claimant was supported at the hearing by his daughter, who made submissions on his behalf. They said that:

- The employer recalled him and he went back to work on January 9, 2023.
- The conduct that the Commission say is misconduct, namely his refusal to get vaccinated, was not wilful because he was being “forced to take the vaccine against his will”.

¹⁴ 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 Claimant lost his job because of misconduct.

¹⁵ See GD2-5.

- There was no requirement for mandatory vaccination when he was hired. Nor is it anywhere in his current employment contract. It was introduced much later.
- His conduct was also not reckless because he was willing to mask, wear PPE, practice social distancing and do rapid tests.
- It was the employer who refused to accept his “religious exemption form” or the exercise of his “human rights”.
- He was aware that he would lose his job for not complying with the policy, but he was choosing to follow his own beliefs.
- He made a personal decision not to get vaccinated against Covid-19.
- How can this choice be wilful when his rights were being taken away?
- It was his right to say he didn’t want a new, untested vaccine “in his body”, when he had his own medical concerns that he felt did not make him a good candidate for this vaccine.
- He made a personal choice not to take the vaccine even though he knew it would cause him to be separated from his employment.
- But he had the right to make that choice. The “Charter” gives him that right. If he gets punished for making that choice and exercising his rights – then that’s not a choice. It’s “an ultimatum”. It’s saying “the Charter doesn’t matter”.
- He didn’t have a choice. He was told to follow the policy “or get out”. This is the same as saying he didn’t have any human rights. But he couldn’t go against his conscience.
- He was not a threat to colleagues or the public because he doesn’t work “in close proximity” to either.

- The employer could have accommodated him and allowed him to continue working – while also protecting his human rights and the safety of other employees.
- It was the employer who refused to provide any accommodations or options, such as regular rapid testing.
- He was not trying to “purposely do something wrong” which is the definition of misconduct.
- He’s worked for almost 25 years and there have never been any issues with misconduct at his workplace. He’s a loyal worker, always on time, and never had any complaints about his job performance.
- If refusing to get vaccinated “was so bad” and “so reckless”, why has he been healthy the whole time? He is still unvaccinated and he’s been “perfectly healthy”. The vaccine “clearly does not stop the spread of Covid”.
- And now that same employer has called him back to work. The employer is not asking him to attest to his vaccination status “because apparently that doesn’t matter anymore”.
- If he was let go for “misconduct”, why would the employer take him back? Especially if the reason he was terminated hasn’t changed (he is still unvaccinated)?
- How can his income be cut off for a whole year when he has been contributing to the EI program for 25 years? Especially when the same employer who let him go has asked him to come back to work – and he’s still unvaccinated.
- This is not a fair. He needs financial support and EI is supposed to be there “as long as you didn’t do something wrong”. That’s the case here.
- The employer handled the situation “very poorly” and “their behaviour” was reckless.

- It's "scary" that an employer can "arbitrarily" institute a policy that forces somebody out of their job because they've been put in a position of choosing between their human rights and their job. And then that same employer can "call you back to do the same job" under the very same conditions that caused the job loss. And in the interim, the person is without an income and cannot be paid EI benefits. This is incomprehensible.

[30] I acknowledge the Claimant's disappointment at not receiving EI benefits on his claim. I recognize that he is the sole provider for his family and has experienced financial difficulties since being laid off and terminated.

[31] But it's not the Tribunal's role to decide if the employer's policy was reasonable or fair, or whether the employer should have accepted the Claimant's request for an exemption or accommodation, or whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed was too severe¹⁶. The Tribunal must focus on the conduct that caused the Claimant to be suspended and terminated and decide if it constitutes misconduct under the EI Act.

[32] I have already found that the conduct which led to the Claimant's suspension and subsequent dismissal from employment was his failure to provide proof of vaccination as required by the policy – or obtain an approved exemption.

[33] The uncontested evidence obtained by the Commission, together with the Claimant's appeal materials and testimony at the hearing, allows me to make these additional findings:

- a) The Claimant was informed of the mandatory vaccination policy and given time to comply with it.

¹⁶ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

- b) His refusal to comply with the policy was deliberate and intentional. This made his refusal wilful.
- c) He knew his refusal to be vaccinated and provide proof of same, in the absence of an approved exemption, could cause him to be suspended and subsequently dismissed from his job¹⁷. This means he accepted the consequences.
- d) His refusal to comply with the policy was the direct cause of his suspension and dismissal.

[34] The employer has the right to set policies for safety in the workplace¹⁸.

[35] The Claimant always had the right to refuse to comply with the policy. But by choosing not to be vaccinated, in the absence of an approved exemption, he made a personal decision that led to foreseeable consequences for his employment.

[36] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if a claimant's decision is based on religious beliefs, privacy concerns, medical concerns or another personal reason. The act of deliberately choosing not to comply with a

¹⁷ The employer initially advised that employees who did not attest to their vaccination status by October 6, 2021 were potentially putting themselves in a position where they would be considered unavailable for work (see GD3-47). On October 15, 2021, the employer gave notice of the final opportunity to comply with the policy by obtaining 2 doses by October 30, 2021 (see GD3-49). At that time, the employer advised that effective November 21, 2021, employees who were not fully vaccinated would immediately be placed on an unpaid absence and given until December 30, 2021 to comply with the policy; and employees who remained unvaccinated at December 31, 2021 would be terminated with cause (GD3-49). Employees who did not disclose their vaccination status would be considered unvaccinated in accordance with the policy. The employer gave a further reminder of the consequences as of November 20, 2021 by E-mail on November 17, 2021 (see GD3-55). The termination letter issued to the Claimant on December 31, 2021 (at GD3-59) said the Claimant was advised "numerous times" of the requirement to submit proof of vaccination by December 30, 2021 or be terminated from employment as of December 31, 2021. The Claimant admitted to the Commission and at the hearing that he was aware that his refusal to comply with the policy would cause him to be suspended and eventually terminated from his employment.

¹⁸ The Claimant's argument that his refusal to comply with the policy was not misconduct because there was no provision for mandatory vaccination in the contract that governed his employment when he was hired 24 years ago is not a persuasive argument. There was no Covid-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as changing circumstances may require.

workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits¹⁹.

[37] These cases 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 Act²⁰.

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

[39] The Claimant submits he has the right to refuse to be vaccinated and attest to his vaccination status. He believes the employer should have accommodated him by allowing him to continue with other precautions, such as wearing PPE, social distancing and rapid testing. He also says the policy – and the consequences for non-compliance with the policy – violated his collective agreement, his constitutional rights and various other laws.

[40] But I have no authority to decide whether the employer breached the collective agreement or any of the Claimant's human or constitutional rights by putting him on a mandatory unpaid leave of absence – and subsequently dismissing him – for failing to comply with the policy²¹. Nor do I have authority to decide if the employer's exemption or accommodation request process was proper – or whether the employer could have accommodated the Claimant in some other way²².

¹⁹ 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.

²⁰ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

²¹ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

²² See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, where the Federal Court of Appeal said an employer's duty to accommodate is irrelevant in determining misconduct under the EI Act.

[41] The Charter applies to government action. It does not apply to private interactions between individuals or businesses²³. This means the Tribunal is only allowed to consider whether a provision of the EI Act or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter; and cannot consider whether an action taken by an employer violates a claimant's Charter rights. Nor is the Tribunal allowed to make rulings based on any of the provincial Human Rights laws that protect human rights and freedoms.

[42] The Claimant's recourse for all of his complaints about the policy and the employer's actions is to pursue his claims in court or before another tribunal that deals with such matters²⁴.

[43] I therefore make no findings with respect to any of these allegations, and the Claimant remains free to make these arguments before the appropriate adjudicative bodies and seek relief there.

[44] However, none of the Claimant's submissions or arguments change the fact that the Commission has proven on a balance of probabilities that he was suspended – and subsequently dismissed – because of conduct that is considered to be misconduct under the EI Act.

[45] And this means he cannot receive EI benefits on his claim.

Issue 3: Is the Claimant entitled to EI benefits because he paid in to the EI program?

[46] No, he is not.

[47] The Claimant says he should receive EI benefits because he paid into the EI program for many years. He argues this is especially the case given that the employer

²³ See section 32(1) of the *Canadian Charter of Rights and Freedoms*.

²⁴ This would include filing a grievance under his collective agreement.

called him to return to work even though he remains unvaccinated. He says this shows the policy wasn't justified.

[48] Unfortunately for the Claimant, I cannot agree. The fact that the employer called him back to work does not change the nature of the misconduct that initially led to his suspension and dismissal²⁵. I must focus on the reason he was separated from his employment in the first place to determine if he can be paid EI benefits on his claim.

[49] Finally, it is not enough to have paid into the EI program or to be in need of financial support.

[50] 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 suspension²⁶. And if a claimant is dismissed from their employment due to their own misconduct, they are disqualified from EI benefits for having done so²⁷. These outcomes are established by law, and they apply regardless of how many years a claimant has contributed to the EI program or how difficult their financial circumstances are.

Conclusion

[51] The Commission has proven the Claimant was suspended and subsequently dismissed from his employment because of his own misconduct. This means he cannot receive EI benefits.

[52] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

²⁵ See *Canada (Attorney General) v. Boulton*, 1996 FCA 1682, and *Canada (Attorney General) v. Morrow*, 1999 FCA 193.

²⁶ Section 31 of the EI Act.

²⁷ Section 30 of the EI Act.