Citation: *TD v Canada Employment Insurance Commission*, 2023 SST 665

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. D.
Representative:	B. S.
Witness:	M. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (497170) dated August 16, 2022 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Videoconference
Hearing date:	February 21, 2023
Hearing participants:	Appellant Appellant's representative Appellant's witness
Decision date:	February 27, 2023
File number:	GE-22-3156

Decision

[1] I am dismissing the appeal. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has shown the Appellant lost her job because of misconduct (in other words, because she did something that caused her to be dismissed). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant worked in health care as a medical radiologic technologist (MRT) for a private medical clinic. The Appellant's employer says she was dismissed because she didn't comply with the employer's COVID-19 vaccination policy. She refused to disclose her vaccination status or undergo PCR and rapid COVID-19 testing.

[4] Even though the Appellant doesn't dispute this happened, she says that not agreeing to comply with the employer's policy isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. The Commission determined the Appellant was dismissed due to her misconduct. Because of this, the Commission decided the Appellant was disqualified form receiving EI benefits.

[6] The Appellant disagrees with the Commission's decision to deny her EI benefits. She appeals to the Social Security Tribunal (Tribunal) General Division.

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a

[1] See sections 30 of the *Employment Insurance Act* (EI Act).

party to this appeal. This is because there is nothing in the file that indicates this decision would impose any legal obligations on the employer.

Issues

[8] Was the Appellant dismissed because of misconduct?

Analysis

[9] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has dismissed or suspended you.[2]

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

Why was the Appellant dismissed?

[11] There is no dispute that the Appellant was dismissed because she refused to disclose whether she was vaccinated against COVID-19 or agree to participate in a PCR or rapid testing and monitoring program, as required by the October 18, 2021, policy. She admits that she didn't agree to the employer's proposal to allow monitoring by antigen testing in addition to PCR testing, as per the January 6, 2022, amendment to the policy. The Appellant testified and confirmed this was the reason why she was dismissed.

[12] I acknowledge the Appellant said the employer closed one of its clinic locations at the end of January 2022. This was only a few weeks after she was dismissed. She clarified that she worked as an MRT, at all the clinic locations. She explained that all the MRTs rotated and worked at all the clinics. Although she questions the timing of the closure of that clinic, she confirmed the reason she was dismissed was because she didn't comply with the employer's COVID-19 vaccination policy.

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[2] See sections 30 and 31 of the EI Act.

[13] So, I find the Appellant was dismissed from her job because she refused to disclose her vaccination status or agree to participate in a PCR and rapid testing and monitoring program, as required by the employer's mandatory COVID-19 vaccination policy.

Is the reason for the Appellant's dismissal misconduct under the law?

[14] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[15] To be misconduct, the conduct has to be wilful. This means the Appellant's conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4]

[16] The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the EI law.[5]

[17] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out the duties toward her employer and there was a real possibility of being dismissed or let go because of that.[6]

[18] The Commission has to prove the Appellant was dismissed because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Appellant was dismissed because of misconduct.[7]

[19] The Commission says there was misconduct for the following reasons:

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Appellant was aware of the employer's October 18, 2021, mandatory policy requiring all employees to declare whether they are vaccinated against COVID-19 or agree to participate in a PCR testing and monitoring program.

- The policy was amended, changing deadlines, and offering rapid antigen testing as part of the monitoring program.

- The Appellant knew and understood that she would be subject to termination from employment if she failed to comply.

- The employer makes it clear to the Appellant in writing that should she not comply with the rapid antigen-testing program that she would face disciplinary action up to and including termination of employment.

- On January 12, 2022, the employer discussed the Appellant's decision where she confirmed she would not undergo testing due to health risks.

[20] The Appellant's witness (the witness) says the Appellant's employer was a private clinic. So, she believes they made a "choice" to follow the provincial regulations when they instituted a COVID-19 vaccination policy.

[21] The witness says the Appellant's actions are not misconduct because her actions were not a willful obstruction. She argues the Appellant has the right to know, participate, and to refuse under provincial Occupational Health and Safety (OH&S) regulations. The Appellant engaged the OH&S regulations by requesting an investigation into the safety of the antigen testing proposed by the employer. So, the employer should not have fired her as she would be protected under the OH&S regulations.

[22] The witness asserts the employer's actions were discriminatory. This is because the Appellant had rights under OH&S regulations. The witness and representative argued the Appellant never outright refused to do the antigen testing. She wanted the employer to answer her questions and provide a better product. But the employer didn't respond to her requests and "just outright fired her."

[23] The law doesn't say I have to consider how the employer behaved.[8] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.[9]

[24] The Appellant agrees she was told in September 2021, that the employer would be instituting a mandatory COVID-19 policy. She received the policy by email on October 18, 2021.

[25] The Appellant knew the policy required all employees to disclose they were fully vaccinated against COVID-19 by November 26, 2021. Those not fully vaccinated had to provide proof of a weekly negative PCR test starting October 27, 2021. The policy states that, "Any staff member who does not comply with the covid 19 vaccination policy will face disciplinary action which may include termination of employment."[10] Despite knowing this, the Appellant refused to comply.

[26] The policy deadlines were extended a couple of times up to early January 2022. The Appellant attended a meeting with the new CEO on January 6, 2022. They discussed the employer's mandatory COVID-19 vaccination policy. The Appellant didn't agree with the vaccination policy and told the employer she would not participate with PCR testing. The CEO proposed changes to the policy, offering antigen testing. She was given 24 hours to agree with the proposal of having rapid antigen testing three times a week.

[27] The Appellant agrees she received an email from the employer, a few hours after the January 6, 2022, meeting, summarizing their discussion that day.[11] The employer documents that, during their meeting, the Appellant confirmed she didn't agree with the vaccination mandate, and she would not participate with PCR testing. They also wrote, "As communicated in the earlier memo dated October 18, 2021, any staff member who

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[8] See section 30 of the EI Act.
[9] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See the policy document at page GD3-62.
[11] See the email at page GD3-65.

does not comply with the COVID-19 policy will face disciplinary action which may include termination of employment."

[28] The Appellant says she responded to the employer within 24-hours. She didn't agree or refuse to undergo antigen testing. Instead, she requested more information about the safety of the proposed antigen testing. But the employer failed to respond to her requests.

[29] The employer told the Commission they didn't respond to the Appellant in writing about her questions and concerns about the rapid antigen testing. Instead, they told the Appellant they were not going to debate the science and were relying on the advice from the provincial health authority.

[30] On January 12, 2022, the Appellant told the employer she would not do the antigen testing. She said she would not knowingly put toxins into her body three times a week for an indefinite period. The employer dismissed her effective immediately on January 12, 2022.

[31] I acknowledge the Appellant says she paid into the EI fund for many years. But the employment insurance plan is an insurance scheme. It is not a pension fund or a needs-based program that you can withdraw anytime you want. Instead, s must meet the qualifying conditions and requirements set out in the EI Act in order to receive benefits.

[32] During the hearing, the Appellant's representative referred to two other decisions, *D.L. v CEIC* and *A.L. v CEIC.*[12] These decisions were issued by different Members of the Social Security Tribunal General Division.

[12] The representative referred to the actual SST GD appeal numbers and Appellant's names. For confidentiality reasons I have listed only the appellant's initials. See *D.L. v Canada Employment Insurance Commission (CEIC),* GE-22-510; and *A.L. v CEIC,* GE-22-1889.

[33] As explained during the hearing, I am not bound by other decisions made by this Tribunal.[13] This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[34] I don't find the *D.L. v CEIC* decision helpful or persuasive. I see no similarities between *D.L. v CEIC* and the Appellant's appeal. In *D.L. v CEIC,* the Commission conceded the issue under appeal because the facts showed *D.L.'s* employer dismissed that claimant after refusing to approve their request for religious accommodation. The employer had agreed that *D.L.* had provided proof they met the requirements for accommodation, but they could accommodate the request. The Appellant before me didn't request a religious exemption. Nor did she provide proof she requested any accommodation provided for in the employer's policy.

[35] Regarding *AL v CEIC,* the representative says the Appellant's appeal should be allowed because *AL* refused to be vaccinated because she had a medical condition. I acknowledge the Appellant says she refused to follow the vaccination policy for medical safety reasons, but she didn't present any evidence that she has a medical condition that would prevent her from receiving the COVID-19 vaccination. Nor did she request a medical accommodation.

[36] I further note that *AL* was a unionized employee whose collective agreement didn't require vaccination against COVID-19. The Appellant was not a unionized employee.

[37] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on his findings regarding the employer's unilateral actions to impose the policy and whether that claimant was legally justified in refusing to get vaccinated against COVID-19. I also wish to note that this *AL v CEIC* decision has been appealed.

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[13] I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis.*

[38] Although I am not bound by other decisions made by this Tribunal, I am bound by decisions issued by the Federal Court and Federal Court of Appeal.

[39] The Federal Court recently issued a decision in *Cecchetto v Attorney General of Canada*, where the Court dismissed an application for judicial review in a matter regarding a claimant's refusal to take the COVID-19 vaccine.[14]

[40] The claimant in *Cecchetto* worked at a hospital and was denied EI benefits because they were found to have been suspended and then dismissed from their job due to misconduct. That claimant didn't comply with the provincial directive requiring mandatory COVID-19 vaccination for hospital workers.

[41] In *Cecchetto,* the Court confirmed that it is not within the mandate or jurisdiction of the Social Security Tribunal to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy.

[42] I can't make decisions about whether the Appellant had other options under other laws or whether the employer should have made reasonable arrangements (accommodations) for the Appellant.[15] Such issues may be dealt with in other forums.[16] I can consider only one thing: whether the Appellant's action or inaction is misconduct under the EI Act.

[43] I acknowledge the Appellant may have a right to decide whether to be vaccinated or to undergo PCR or rapid antigen testing. But she knew there were consequences if she refused to follow the employer's policy, which in this case was dismissal from her employment.

[44] Based on the facts set out above, I find the Commission has proven misconduct because the Appellant's refusal to be vaccinated against COVID-19 or undergo testing (PCR or rapid antigen testing) was deliberate or intentional. There was a cause-and-

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[14] See *Cecchetto v Attorney General of Canada,* 2023 FC 102.
[15] See *Cecchetto v Attorney General of Canada,* 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General),* 2016 FC 1282.

effect relationship between her refusal to be vaccinated or tested and her dismissal. So, I find the Appellant was dismissed because of misconduct.

Conclusion

[45] The Commission has proven the Appellant was dismissed because of misconduct.

[46] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section