Citation: *EL v Canada Employment Insurance Commission*, 2023 SST 726

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

# Decision

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| **Appellant:** | E. L. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (539099) dated October 7, 2022 (issued by Service Canada) |

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| **Tribunal member:** | Catherine Shaw |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | March 28, 2023 |
| **Hearing participant:** | Appellant |
| **Decision date:** | March 29, 2023 |
| **File number:** | GE-22-3571 |

# Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended). This means he is disentitled from receiving Employment Insurance (EI) benefits from April 25, 2022, to May 4, 2022

# Overview

[3] The Appellant was placed on unpaid leave from his job. The employer says that he was suspended[1] for non-compliance with its vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, he says this isn't the real reason he was suspended. He argues that he was put on leave because the employer unreasonably denied his religious exemption request. And that going against his employer's vaccination policy isn't misconduct because he has religious reasons for choosing not to be vaccinated.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended due to misconduct.[2] Because of this, it decided that he is disentitled from receiving EI benefits while he was suspended, from April 25 to May 4, 2022.

# Matters I have to consider first

## The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the

[1] The Appellant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Appellant's leave, this is considered a suspension.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

appeal and wanted to be added as a party. The employer did not respond. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

## Issue

[7] Was the Appellant suspended from his job because of misconduct?

## Analysis

[8] 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.[3]

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

### Why was the Appellant suspended?

[10] I find the Appellant was suspended because he didn't comply with the employer's vaccination policy.

[11] The Appellant and the Commission don't agree on why the Appellant was suspended. The Commission says that the reason the employer gave is the real reason for the suspension.

[12] The employer issued a Record of Employment on May 8, 2022. It stated that the Appellant stopped working on April 21, 2022. It has a comment stating that the Appellant is on leave "due to non-compliance with the employer's vaccination policy."[4]

[13] The evidence on file is clear that the employer did implement a vaccination policy that required employees to be vaccinated against COVID-19 or have an approved

[3] See sections 30 and 31 of the Act.
[4] See GD03-20.

exemption. The Appellant applied for an exemption to this policy on religious grounds, but the employer denied his exemption request.

[14] The Appellant testified that he was on sick leave from work when the deadline to be vaccinated or have an approved exemption passed. He returned to work in April 2022, and said he was given one week to comply with the vaccination policy. Then he was placed on an unpaid leave of absence from his job.

[15] The Appellant says that he was only suspended because the employer denied his exemption request. He said that the employer unreasonably denied him an exemption because he has a sincerely held religious belief that prevented him from being vaccinated. He argues the employer's action in denying his exemption request violated his rights under the *Canadian Charter of Rights and Freedoms*.

[16] The parties' positions are two sides of the same coin. The Appellant essentially says that he wouldn't have been suspended if the employer had approved his exemption request. But, if the employer had approved his exemption request, then he would have been in compliance with the employer's vaccination policy.

[17] By not having an approved exemption from the policy and not being vaccinated, the Appellant was not in compliance with the policy's requirements. That the employer suspended him because he did not have an approved exemption doesn't change that. The preponderance of evidence supports that the Appellant was suspended for his non-compliance with the employer's vaccination policy

## Is the reason for his suspension misconduct under the law?

[18] The reason for the Appellant's suspension is misconduct under the law.

[19] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law explains how to determine whether the Appellant's suspension is misconduct under the 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.[5] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] The Appellant doesn't 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.[7]

[21] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward the employer and that there was a real possibility of being let go from his job because of that.[8]

[22] The Commission must prove that the Appellant lost his job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost his job because of misconduct.[9]

[23] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[24] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner due to the use of drugs, and he should have been covered under the last test he'd

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v his Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[25] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found that the question in misconduct cases is, "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is, "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[26] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[13]

[27] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[14] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[15]

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[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[28] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[16]

[29] In dismissing the case, the Federal Court wrote:

> 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…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.[17]

[30] The Court also wrote:

> The [Social Security Tribunal's General Division], 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."[18]

[31] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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[16] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.
[18] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

## What the Commission and the Appellant say

[32] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

[33] The Commission says that there was misconduct because:

- the employer had a vaccination policy and communicated that policy to the Appellant
- the employer's policy required the Appellant be vaccinated against COVID-19 or have an approved exemption.
- the Appellant knew what he had to do under the policy
- he made a choice based on his personal religious beliefs to not get vaccinated
- the employer suspended him because he did not comply with its vaccination policy

[34] The Appellant says that there was no misconduct because:

- he wasn't able to get vaccinated due to his religious beliefs
- the employer violated his Charter rights when it denied his religious exemption request

[35] The evidence is clear that the employer implemented a mandatory vaccination policy. The Appellant knew that he would be placed on unpaid leave if he was not vaccinated or had an approved exemption.

[36] The Appellant asked for an exemption to the policy on religious grounds. He answered the employer's questions about his exemption request. Shortly after that, the employer told him that his exemption request was denied.

[37] The Appellant was on sick leave when the deadline to be vaccinated passed. He returned from sick leave in April 2022. He testified that he was given one week to comply with the policy and then was placed on unpaid leave.

[38] I find the Appellant knew that his employer instituted a mandatory vaccination policy and knew what would happen if he didn't follow it because he testified that he was aware of the policy and the consequences of not complying. While exemptions were available, an exemption was never guaranteed to the Appellant.

[39] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[19]

[40] The Appellant submits that the employer's choice to deny his religious exemption request violated the law and his human rights.

[41] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45,[20] that protect rights and freedoms. These laws are enforced by different courts and tribunals.

[42] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to a claimant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating his Charter rights.

[43] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill*

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[19] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[20] The Appellant mentioned this a few times and submitted that it gave him the right to refuse unsafe work.

*of Rights*, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

[44] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[21]

[45] The Appellant may have other recourse to pursue his claims that the employer discriminated against him. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[22]

[46] I understand that the Appellant intended to comply with the employer's policy when he asked for an exemption on religious grounds. But, when his exemption was denied, he had to be vaccinated in order to meet the requirements of the vaccination policy. By not getting vaccinated, he was not in compliance with the employer's policy.

[47] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to be vaccinated or have an approved exemption
- the employer clearly told the Appellant about what it expected of its employees in terms of being vaccinated
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

## So, was the Appellant suspended because of misconduct?

[48] Based on my findings above, I find that the Appellant was suspended from his job because of misconduct.

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[21] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[22] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102.

[49] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew or ought to have known that failing to comply with the employer's policy was likely to cause him to be suspended, and he chose not to comply.

## Conclusion

[50] The appeal is dismissed.

[51] The Commission has proven that the Appellant was suspended from his job because of misconduct. This means the Appellant is disentitled from receiving EI benefits during the period of his suspension. So, from April 25 to May 4, 2022.

Catherine Shaw
Member, General Division – Employment Insurance Section