Citation: *DF v Canada Employment Insurance Commission*, 2023 SST 670

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: D. F.
Representative: R. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (488429) dated June 25, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: January 23, 2023

Hearing participant: Appellant
Appellant's representative

Decision date: February 21, 2023

File number: GE-22-2425

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits because he lost his employment due to his own misconduct[1].

Overview

[3] The Appellant worked as a Signalman for X. (the employer).

[4] On September 20, 2021, the employer implemented a mandatory Covid-19 vaccination policy that required all employees to become fully vaccinated by November 1, 2021 (the policy). Employees had to provide proof of vaccination (or obtain an approved exemption to vaccination) by the policy deadline or they would be subject to discipline up to and including termination.

[5] The Appellant didn't want to comply with the policy by being vaccinated. Nor did he ask to be exempt from the policy for medical or human rights reasons. He continued working until October 30, 2021 but did not submit proof of vaccination.

[6] On November 3, 2021, the employer said he was no longer permitted to attend at the job site or perform any work because he failed to provide proof of vaccination by the policy deadline. On November 5, 2021, the employer issued a Record of Employment (ROE) which said the Appellant was dismissed.

[7] The Appellant applied for EI benefits. He said he was told he was suspended from his employment for non-compliance with the policy. He was shocked to learn his ROE said he was dismissed. His union filed a grievance on his behalf.

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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.

[8] The Respondent (Commission) decided the Appellant lost his employment due to his own misconduct and could not be paid any EI benefits[2].

[9] The Appellant asked the Commission to reconsider. His representative said he should be paid EI benefits because, in the on-going grievance proceeding, the employer took the position that the Appellant was not discharged but was considered as "not

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[2] In the April 7, 2022 decision letter (at GD3-28), the Commission said the Appellant lost his employment on October 30, 2021 due to his own misconduct and imposed a disqualification on his claim.

Section 30 of the *Employment Insurance Act* (EI Act) says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct.

Section 29(b) of the EI Act says that **loss of employment** for purposes of section 30 **includes a suspension** from employment.

The Appellant says he has not been dismissed from his job, although he used the term "dismissed" to explain to the Commission why he was no longer working. At the hearing, his representative said the Appellant still has an employment relationship with the employer, but the employer is preventing him from working.

Whether the Appellant was dismissed, suspended or otherwise prevented from working after his last paid day of work on October 30, 2021 does not change the effect of the Commission's decision, which is that he cannot be paid EI benefits.

When a claimant applies for EI benefits, the Commission must look at the reason for the separation from employment – i.e., **the reason why a claimant is no longer working**. This a question on every application for EI benefits (see the Appellant's application at GD3-6).

Where an employer prevents an employee from working and unilaterally places them on leave without pay, the reason for the separation from employment (i.e. **the reason why that claimant is no longer working**) will be considered a suspension **<u>if</u>** the reason for the unpaid leave is due to misconduct.

Section 31 of the EI Act says that a claimant who is **suspended** from their employment due to misconduct is not entitled to receive EI benefits **during the period of the suspension**.

Therefore, even if the Appellant has an on-going employment relationship, the fact remains that he has not worked or been paid by the employer since October 30, 2021. He is separated from his employment (i.e. no longer working). The Commission must look at the reason for this separation from employment. The Commission determined that the Appellant was no longer working because of his failure to comply with the policy – ***and*** that his failure to comply is considered misconduct for purposes of EI benefits. This means the Commission considers the Appellant to be suspended due to misconduct. The law says that loss of employment includes a suspension. This is why the Commission said that the Appellant lost his employment due to misconduct – because loss of employment includes a suspension from employment.

So regardless of whether the Appellant was dismissed or suspended or otherwise prevented from working after his last paid day of work on October 30, 2021, the combined effect of sections 29(b), 30 and 31 of the EI Act on the Commission's determination is that he lost his employment due to misconduct and cannot be paid any EI benefits on his claim.

This is the decision he has appealed to the Tribunal.

being available for work because of the absence of vaccination"[3] and there has not been a decision yet about the legality of the policy. The Appellant also argued that the policy was not reasonable in the context of his workplace, and that his refusal to be vaccinated cannot be misconduct because it was based on his own principles and human rights.

[10] The Commission maintained the decision to deny his claim for EI benefits, and the Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[11] I must decide whether the Appellant is separated from his employment (no longer working) due to his own misconduct[4].

[12] To do this, I have to look at the reason why he is no longer working and then determine if the conduct that caused him to be separated from his employment is conduct the law considers to be "misconduct" for purposes of EI benefits.

[13] 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 the policy. He knew he could be disciplined up to and including termination by making this choice – and that's what happened. The Commission says these facts prove the Appellant stopped working due to his own misconduct, which means he cannot receive EI benefits.

[14] The Appellant disagrees. He said he made a personal choice not to be vaccinated and should not be denied EI benefits because he exercised his rights, including the right to privacy and the right not to be coerced into taking a vaccine he believes could harm him. He also says the employer could have accommodated him because he worked outdoors and did not have contact with co-workers or members of the public. He argues the lawfulness of the policy is in dispute and subject to arbitration; the policy is not reasonable; and the policy was not binding on him because

[3] See GD3-32.

[4] That is, misconduct a**s the term is used for purposes of EI benefits**. See footnote 2 above.

it was not a condition of employment in his collective agreement. For all of these reasons, he says his conduct does not meet the legal test for misconduct.

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

Issue

[16] Did the Appellant lose his employment because of his own misconduct?

Analysis

[17] To answer this question, I need to decide two things. First, I must determine why the Appellant was separated from his employment (stopped working) after his last paid day on October 30, 2021. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers the reason he stopped working to be misconduct.

Issue 1: Why was the Appellant separated from his employment?

[18] The Appellant stopped working because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[19] The employer told the Commission that[5]:

- The Covid-19 vaccination policy required employees to be vaccinated and show proof of vaccination by November 1, 2021.
- The Appellant did not provide proof of full vaccination by the policy deadline.
- On November 3, 2021, the employer sent the Appellant an e-mail advising that, because of his non-compliance with the policy, he was not "permitted to continue to attend and/or perform any work" (GD6-61).
- The employer's November 3, 2021 e-mail also said:

[5] See Supplementary Records of Claim at GD3-19 and GD3-23. See also the employer's November 3, 2021 e-mail to the Claimant (at GD6-61).

> "You will not be permitted to attend and/or perform work for the Company Nov. 1, 2021 until at least January 7, 2022, at which time your vaccination status will be reassessed. Should you not provide proof of full vaccination at that time, you may be subject to further withholding from work up and including to the point of termination of employment.
>
> While we cannot force you to obtain a vaccine, we encourage you to speak with your family physician or other qualified medical advisor about the safety and efficacy of the various Covid-19 vaccines which have been approved by Health Canada and safely used by millions of people globally.
>
> If your vaccination status changes prior to January 7, 2022, please let us know immediately to coordinate a return to work." (GD6-61)

- On November 5, 2021, the employer issued a Record of Employment stating the Claimant was dismissed.

[20] The Appellant told the Commission that[6]:

- The employer had a mandatory vaccination policy.
- On October 27, 2021, he received an e-mail stating that he had to upload proof of vaccination by November 1, 2021. If non-compliant, he would be suspended and given until January 7, 2022 to comply.
- He did not provide proof of vaccination.
- He did not comply with the policy.
- His next shift would have been November 3, 2021.
- But one of the employer's Human Resources representatives phoned him and said he was suspended and that the police would remove him if he showed up for work.

[6] See Supplementary Records of Claim at GD3-20, GD3-21, and GD3-50.

- He never received his ROE.
- He didn't know he was being dismissed until a union representative showed him how to download his ROE and he obtained a copy on November 24, 2022.
- The reason for his dismissal was non-compliance with the mandatory vaccination policy.
- The union filed a grievance on his behalf.

[21] The Appellant's union representative told the Commission that[7]:

- It was the union's understanding that the Appellant was dismissed because he refused to disclose his vaccination status.
- The employer had said workers would be put on unpaid leave, but then it put dismissal on the Appellant's ROE.

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

- He knew that the policy required him to disclose his vaccination status and provide proof of vaccination by November 1, 2021.
- He did not do so.
- He knew that, in the alternative, he could apply for a human rights or medical exemption. He told the employer of his concerns about privacy and human rights but didn't bother to apply for an exemption.
- He was aware of the policy and had enough time to comply with it.

[7] See Supplementary Record of Claim at GD3-24.

- He understood that if he didn’t comply with the policy by the November 1, 2021 deadline, he’d be “suspended”.
- He decided not to disclose his vaccination status or provide proof of vaccination based on his own research and “risk assessment”.
- On the day he was “dismissed”, he was working overtime and covering for vaccinated co-workers who were off sick with Covid.
- On October 31, 2021, he got a “hostile phone call” saying he had until January 7, 2022 to get fully vaccinated and in the meantime he’d be “suspended”. He was also “threatened” with the police if he showed up for his next shift on November 3, 2021. So, he dropped off his equipment and called his manager and his supervisor to let them know what had occurred.
- He got a letter on November 3, 2021 saying he would not be allowed to attend or perform work until at least January 7, 2022[8].
- His understanding was that he was “suspended” – not “terminated”.
- He thought his status would be “re-assessed” on January 7, 2021, and the “consequences up to termination” could follow after that.
- That’s why it took him so long to apply for EI benefits. He applied for EI benefits after he saw his ROE said “dismissed”.
- He has not returned to work.
- His grievance is on-going. The arbitrator has issued a preliminary ruling[9], but the main arbitration hearing has not finished yet.

[8] The Appellant referred me to the employer’s November 3, 2021 e-mail at GD6-61.

[9] The Appellant’s representative referred me to the January 24, 2022 Interim Award of the Arbitrator in the Appellant’s grievance (starting at GD3-35).

[23] The Appellant's representative submitted that the Appellant was not dismissed[10]. He said the Appellant uses the term "dismissed" to "communicate that he was not working anymore". The Appellant's representative argued the Appellant has a continuing employment relationship with the employer and is being prevented from working "at the employer's initiative".

[24] For purposes of EI benefits, it doesn't matter that the employer and the Appellant appear to disagree about whether the Appellant was considered dismissed or suspended when he stopped working[11]. What matters is ***why*** he stopped working.

[25] The evidence shows that the employer prevented the Appellant from working starting on November 1, 2021. In the November 3, 2021 e-mail, the employer unilaterally placed the Appellant on an unpaid leave of absence from "Nov. 1, 2021 until at least January 7, 2022", and expressly reserved "further withholding from work up and including to the point of termination" until after January 7, 2022.

[26] The employer may have wanted to dismiss the Appellant when it issued his ROE 2 days later (on November 5, 2021) as a dismissal. But I accept the Appellant's testimony and other evidence[12] that his employment was not terminated and the employer is still preventing him from working.

[27] There is no dispute about ***why*** the employer prevented the Appellant from working: because he failed to comply with the policy.

[28] I therefore find that the Appellant was suspended (prevented from working) starting from November 1, 2021 because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

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[10] In the January 24, 2022 Interim Award of the Arbitrator in the Appellant's grievance (starting at GD3-35), the Arbitrator found that the Appellant (a Grievor) had not been discharged by the employer and or disciplined under the collective agreement but was considered as "not being available for work because of the absence of vaccination" (GD3-44).
[11] See footnote 2 above.
[12] See footnote 9 above.

Issue 2: Is the reason the Appellant was suspended considered to be misconduct under the law?

[29] Yes. The reason for the Appellant's suspension is considered misconduct for purposes of EI benefits.

[30] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[13]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[14] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[31] The Appellant 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 law[15].

[32] There is misconduct if the Appellant knew or *ought to have known* his conduct could get in the way of carrying out his duties to the employer and there was a real possibility of being suspended and/or dismissed because of it[16].

[33] The Commission has to prove the Appellant was suspended from his job due to misconduct[17]. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

<u>Evidence from the Employer</u>

[34] The employer's evidence is set out in paragraph 19 above.

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

[14] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

[15] See *Attorney General of Canada v. Secours*, A-352-94.

[16] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[17] 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 his job because of misconduct.

Evidence from the Appellant

[35] The Appellant testified that:

- He is 62 years old.
- "99.9%" of his work is done outdoors, testing circuits and maintaining equipment.
- He worked alone and communicated with his co-workers by radio. When he handed over his vehicle at the end of a shift, he followed the "PPE" and cleaning protocols.
- He had no contact with members of the public while he was at work.
- He did his own "research and risk assessment" and decided not to disclose his vaccination status or provide proof of vaccination as required by the policy.
- He knew people at work who were vaccinated and still got sick with Covid. But he was always fine. He regularly "covered" for such people "on overtime", including on the day he was "dismissed".
- He had prior negative experiences with flu shots, and some other personal health issues. He decided not to get the Covid vaccine because he felt there was "more risk to taking the vaccine than to getting sick with Covid".
- He was "not going to be coerced" into getting vaccinated. Especially when he was performing his duties outdoors and was no risk to anyone else.
- The employer "threw worker safety out the window" with this policy. He could have "caused harm to himself or others" because of the "trauma of this".
- The employer was "negligent and careless".
- He understood that he would not be permitted to work if he failed to provide proof of vaccination by the first policy deadline. He thought he would then be "suspended" and his status reassessed at second deadline of January 7, 2022 –

and then the “consequences up to termination” could follow if he remained non-compliant after that.

- He has no intention of getting vaccinated against Covid-19.
- He did not ask the employer for an exemption to the mandatory vaccination requirement in the policy.

[36] The Appellant’s representative made the following submissions on his behalf:

a) The Commission has the onus of proving misconduct. To do that, they must prove the policy is legal. They cannot prove that because both the reasonableness and the lawfulness of the policy are “very much in dispute” and being challenged by the Appellant in an on-going arbitration proceeding.

b) The Appellant’s employment is governed by a collective agreement. This means that for the policy to be lawful, it must be reasonable. In the interim arbitration award, the Arbitrator noted the employer did not discipline the Appellant, there was no insubordination, and the unilateral imposition of the policy was “possibly unreasonable”.

   - The “context” of the Appellant’s employment (working outside, by himself, and having no contact with the public) undermines the reasonableness of the policy.
   - The employer’s decision to unilaterally impose a vaccine mandate without negotiating with the union or bargaining for an amendment to the collective agreement – especially in a low-risk context like the Appellant’s, undermines the lawfulness of the policy. In a unionized workplace, a unilaterally imposed policy must be reasonable in order to be binding on employees.

c) It is inappropriate for the Commission to accept the lawfulness of the policy on its face when the policy itself is being challenged in an on-going proceeding.

d) It is similarly inappropriate to conclude the Appellant was dismissed for misconduct solely because he decided not to comply with the policy when the policy itself is being challenged.

e) The Appellant made a "thoughtful" personal decision not to get vaccinated after reflecting on the matter. He based his decision on his prior negative experiences with vaccines and his assessment that he was not putting anyone at risk when he was at work.

f) For there to be misconduct, there must be a breach of an express or implied duty to the employer. There is no provision in the Appellant's collective agreement that supports a mandatory vaccination policy or obligates him to get vaccinated against Covid-19. And he never agreed – by his conduct or otherwise – to be bound by the policy. The mere existence of the policy, and the Appellant's decision not to comply with the policy, is not enough to prove that he breached a condition of his employment.

[37] The Appellant's representative also referred me to a recent decision of the Tribunal (which I will refer to as the AL decision[18]), in which a Tribunal member reversed the Commission's finding of misconduct and said the claimant (AL) was not disentitled to EI benefits. The Appellant's representative argued I should follow the AL decision.

[38] The facts AL's case are similar to the Appellant's in that AL worked in a hospital, her employment was subject to a collective agreement, and she was suspended and later dismissed for non-compliance with her employer's mandatory Covid-19 vaccination

[18] *AL v Canada Employment Insurance Commission,* 2022 SST 1428. The claimant in the AL decision made similar arguments to the Claimant in this decision, namely that the employer breached the collective agreement because mandatory COVID vaccination wasn't part of the collective agreement when she was hired. She also argued she had a right to refuse to get vaccinated.

policy. The Tribunal member found that AL did not lose her job for a reason the EI Act considers to be misconduct for two reasons:

- First, the member found the employer's mandatory Covid-19 vaccination policy was not an express or implied condition of AL's employment and, therefore, her refusal to get vaccinated was not misconduct.

- Second, the member found AL had a right to bodily integrity and exercised that right when she refused to get vaccinated. The member found that exercising a legal right can't be considered a wrongful act or conduct that should disqualify a claimant from EI benefits.

[39] I am not bound by decisions of other Tribunal members, but I can rely on them to guide me where I find them persuasive and helpful[19].

[40] I do not find the AL decision to be persuasive or helpful, and I decline to follow it.

[41] This is because the AL decision goes against binding caselaw from the Federal court about misconduct.

[42] The Tribunal does not have jurisdiction to interpret or apply a collective agreement or employment contract[20]. Nor does the Tribunal have legal authority to

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[19] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I must 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. But I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[20] 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. 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. This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. 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. This means that if a claimant (or their union) believes that workers had a right

interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act[21].

[43] Said differently, it is not the Tribunal's role to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal decide whether the penalty of being placed on an unpaid leave of absence and /or dismissed on was too severe. The Tribunal must focus on the reason ***the Appellant*** was separated from his employment and decide if the conduct that caused him to be suspended constitutes misconduct under the EI Act.

[44] I have already found that the conduct which led to the Appellant's suspension was his refusal to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[45] The uncontested evidence obtained from the employer, together with the Appellant's evidence and testimony at the hearing, allow me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it[22].

b) he knew his refusal to provide proof of vaccination in the absence of an approved exemption could cause him to be suspended from his employment.

c) his refusal to comply with the policy was deliberate and intentional.

(These 3 factors made his refusal to comply with the policy wilful.)

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to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process is the proper legal avenue to make this argument.

[21] 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 a claimant 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 Claimant isn't.

[22] At the hearing, the Appellant's representative said that the Appellant "stipulates" to this statement. This means the Appellant agrees to these facts and they can be treated as undisputed and proven.

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

[46] The employer has the right to set policies for workplace safety[23]. The Appellant had the right to refuse to comply with the policy. 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.

[47] This Tribunal's Appeal Division has repeatedly confirmed 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 workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits[24].

[48] These cases are supported by case law from the Federal Court of Appeal that says a deliberate violation of an employer's policy will be considered misconduct within the meaning of the EI Act[25] .

[49] I therefore find that the Claimant'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.

[50] The Appellant's representative also urged me to consider 3 other decisions of this Tribunal (which I will refer to as the NE case[26], the CO case[27] and the *Meunier* case[28]). The Appellant's representative submitted that:

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[23] See the "Statement" and "Purpose" recitals in the policy, at GD6-55.

[24] For example, 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.

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

[26] *NE v. Canada Employment Insurance Commission*, 2022 SST 732.
[27] CO v. *Canada Employment Insurance Commission*, 2022 SST 1066.
[28] Michel Meunier v. Canada Employment and Immigration Commission, 1996 CanLII 3983 (FCA).

a) the NE case suggests the Tribunal is required to engage in an analysis as to whether the policy is lawful;

b) the CO case suggests that each case must be decided individually, based on a detailed review of the policy; and

c) the *Meunier* case suggests the Commission can't just accept an employer's decision of misconduct. Rather, it must engage in a detailed review of the context of the employment (such as the Appellant's outdoor work and lack of contact with co-workers and the public) and other information necessary to determine if the policy was reasonable.

[51] These cases do not help the Appellant.

[52] At best, the NE case suggests the Tribunal should consider whether an employee committed misconduct if the policy was "obviously unlawful"[29]. There is no evidence that the policy adopted by the employer in the Appellant's case was "obviously unlawful" in the way envisioned by the Tribunal member who decided the NE case. That member gave guidance as to when a policy might be considered "obviously unlawful" when the member gave an example. That example was a policy requiring employees to work 24 hours consecutively without any breaks, thereby violating provincial employment standards[30]. The policy in the Appellant's case is not in the same category as the example and does not reach the threshold for "obviously unlawful".

[53] I do not find the CO case persuasive or helpful for the same reasons I have already explained for the AL case. And while the *Meunier* case is a decision of the Federal Court of Appeal, I decline to follow it because it has been updated by the more recent cases I have cited in paragraphs 42 to 48 above. These cases are binding on me.

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[29] At paragraph 37.
[30] At paragraph 38.

[54] The Appellant also argues his conduct was not misconduct because there was no provision for mandatory vaccination in the collective agreement governing his employment. This is not a persuasive argument. There was no Covid-19 pandemic at the time the collective agreement came into effect[31] and the employer is entitled to set workplace health and safety policies as changing circumstances may require. As stated above, I have no authority to decide whether the employer breached the Appellant's collective agreement or whether he was wrongfully suspended. The Appellant's recourse for his complaints against the employer is to pursue his claims in court or before another tribunal that deals with such matters.

[55] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under the collective agreement or otherwise. He is free to make these arguments before the appropriate adjudicative bodies and seek relief there[32].

[56] However, none of the Appellant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that he was suspended from his employment because of conduct that is considered misconduct under the EI Act.

[57] And this means he cannot be paid EI benefits.

Conclusion

[58] The Commission has proven the Appellant was suspended from his employment because of his own misconduct. This means he cannot receive EI benefits.

[59] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

[31] According to the Appellant's grievance, the collective agreement became effective December 1, 2019 (see GD6-63).

[32] I note that the grievance filed by the Claimant's union is continuing.