



Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 202

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

## Decision

**Appellant:** C. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (513442) dated August 18, 2022 (issued by Service Canada)

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**Tribunal member:** Susan Stapleton

**Type of hearing:** Teleconference

**Hearing date:** February 21, 2023

**Hearing participant:** Appellant

**Decision date:** February 24, 2023

**File number:** GE-22-3044

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his employment due to his own misconduct. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant's employer introduced a policy that said he had to be vaccinated against Covid-19 (Covid). He had to attest to being vaccinated. He didn't disclose his vaccination status to the employer, and was placed on unpaid leave (suspended) from his job on March 4, 2022. His suspension ended around June 20, 2022, when the employer's vaccination policy was abolished.

[4] The Appellant doesn't dispute that this happened. However, he didn't agree with the employer's policy. His vaccination status is private medical information. He says that having to disclose his vaccination status to the employer discriminated against him, based on his ethnic background.

[5] The Commission says there was misconduct, because the Appellant knew about the vaccination policy and the deadline to comply with it. He knew the consequence of not complying with the policy. He refused to disclose his vaccination status, and was suspended from his job as a result.

## Issue

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

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act addresses what happens when an Appellant is suspended for misconduct.

[7] To answer this, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

## **Analysis**

### **Why was the Appellant suspended from his job?**

[8] I find that the Appellant was suspended from his job because he didn't comply with the employer's mandatory Covid vaccination policy: he didn't disclose his vaccination status to the employer.

[9] The Appellant testified that employees had to tell the employer whether or not they were vaccinated, by November 30, 2021. Because he was on vacation when that deadline came around, the deadline for him to attest was moved to December 20, 2021. On December 20, 2021, he declined to disclose his vaccination status, and submitted an accommodation request. He requested that he be exempt from disclosing his vaccination status, because being asked to disclose his private medical information discriminated against him based on his ethnic background.

[10] In a February 8, 2022 letter, the employer told the Appellant that his request for accommodation was denied. It said that the employer's duty to accommodate didn't apply to his request to be exempt from disclosing his vaccination status. It said that its duty to accommodate applied to employees who were unable to be vaccinated, based on a medical reason, religion, or another prohibited ground of discrimination.<sup>2</sup> In other words, the policy didn't say that the Appellant could be exempted from disclosing his vaccination status.

[11] The Appellant was given until February 22, 2022, to attest to being vaccinated. If not, he would be placed on leave without pay until he complied with the policy. He took

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<sup>2</sup> See GD3-45.

additional vacation time from February 23, 2022 to March 4, 2022, so the deadline for him to disclose his vaccination status was extended again, until the end of his vacation.

[12] The Appellant didn't disclose his vaccination status to the employer by March 4, 2022 and, as a result, he was suspended from his job.

### **Is the reason for the Appellant's suspension misconduct under the law?**

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

[14] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us 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.

[15] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> 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.<sup>5</sup>

[16] 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 suspended from his job because of that.<sup>6</sup>

[17] The Commission has to prove that the Appellant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from his job because of misconduct.<sup>7</sup>

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[18] 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. And it isn't for me to decide whether the employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.<sup>8</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[19] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because the employer wrongfully let him go.<sup>9</sup> He lost his job because of the employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[20] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.<sup>10</sup>

[21] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.<sup>11</sup>

[22] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.<sup>12</sup> He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on

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<sup>8</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>12</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

*McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.<sup>13</sup>

[23] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.<sup>14</sup> He argued that the employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.<sup>15</sup>

[24] These cases aren't about COVID-19 vaccination policies. But what they say is 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. The Appellant 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.<sup>16</sup>

[25] 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.<sup>17</sup>

[26] 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

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<sup>13</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>14</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>15</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>16</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

<sup>17</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted “misconduct.”<sup>18</sup>

[27] Case law makes it clear that my role is not to look at the employer’s behaviour or policies and determine whether it was right to suspend the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- the Appellant was aware of the employer’s vaccination policy and the deadline by which he had to comply with it;
- he applied for an exemption from disclosing his vaccination status, but his request was denied by the employer; and
- he willfully refused to disclose his vaccination status, knowing this would lead to hi being suspended.

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

- The employer’s policy violated his human rights. It discriminated against him on the basis of his ethnic background, because it required him to disclose his private medical information.
- The employer’s policy said he had to either attest to his vaccination status or request an accommodation by a specified deadline. He interpreted this to mean that employees unwilling to disclose their vaccination status could be accommodated.
- He chose to request an accommodation, instead of attesting to his vaccination status, and argues that this complied with the employer’s policy.

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<sup>18</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

- The employer didn't properly consider his request for accommodation.
- When two weeks had passed and he hadn't received an answer from the employer about his request for accommodation, he assumed that his request had been approved. It took the employer seven weeks to tell him that his request was denied.
- The employer denied his accommodation request because he hadn't disclosed his vaccination status.
- The employer incorrectly interpreted, poorly administered and mismanaged its own policy.
- The employer should have allowed him to continue to work from home instead of disclosing his vaccination status.
- Neither his collective agreement nor the terms and conditions of his employment required him to provide his private medical information to the employer.

[30] The Appellant submits that the employer's policy violated his human rights.

[31] 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, that protect rights and freedoms.

[32] These laws are enforced by different courts and tribunals.

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

[34] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates an Appellant's fundamental rights under the Charter. This is



beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, or any of the provincial laws that protect rights and freedoms.

[35] The Appellant may have other recourse to pursue his claims that the employer's policy violated his rights. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.<sup>19</sup>

[36] I find that the Appellant made a conscious and deliberate choice not to disclose his vaccination status, contrary to the employer's policy. He testified that he didn't tell the employer whether or not he was vaccinated.

[37] He argues that the employer's policy gave him a choice to either disclose his vaccination status or request an accommodation. He says that by choosing to request an accommodation, he was in compliance with the policy. I disagree. As explained by the employer in its February 8, 2022 letter, the policy said the employer would consider accommodation for employees who were unable to be vaccinated, not for employees who were unwilling to disclose their vaccination status.<sup>20</sup>

[38] I find that the Appellant knew, or should have known, that not disclosing his vaccination status meant that he could be suspended from his job. He confirmed in his testimony that he received and read the employer's vaccination policy. He said that the policy applied to him. He said he had no intention of disclosing his vaccination status to the employer.

[39] The Appellant testified that when he received the February 8, 2022 letter from the employer, denying his request for accommodation, he "didn't know what exactly the employer could decide." He hoped there was still a chance that he could continue working without having to disclose his vaccination status. But he also said that there was no process to appeal the denial of his accommodation request, that he knew of. He

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<sup>19</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102.

<sup>20</sup> See GD3-34.

said he knew he could be suspended if he didn't disclose his vaccination status by March 4, 2022.

[40] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated and attest to being vaccinated, or have an approved exemption from being vaccinated;
- the employer communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated and disclosing his vaccination status;
- the employer's policy said that employees could request accommodation if they were unable to be vaccinated, but it didn't say employees could be exempted from disclosing their vaccination status;
- the Appellant's request to be exempted from disclosing his vaccination status was denied by the employer;
- the Appellant knew the consequence of not following the employer's policy;
- the Appellant didn't disclose his vaccination status, and was suspended as a result.

[41] I understand that the Appellant feels he should get EI because he's paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. He has not met the requirements to be eligible for benefits.

### **So, was the Appellant suspended from his job because of misconduct?**

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

[43] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew, or should have known, that refusing to disclose his vaccination status to the employer would cause him to be suspended from his job.

## **Conclusion**

[44] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[45] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section