Citation: *DA v Canada Employment Insurance Commission*, 2023 SST 1093

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. A.
Appellant's Support person:	M. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (466400) dated April 27, 2022 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	May 16, 2023
Hearing participants:	Appellant Appellant's Support Person
Decision date:	June 8, 2023
File number:	GE-23-740

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 job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant worked for a courier firm. He was suspended from his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy is not misconduct. The Appellant feels that the policy was unlawful because it went against the collective agreement; that all of his grievances have not been addressed; and that the employer changed and violated their own policies so he didn't commit any misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

Matters I have to consider first

This case was returned to the General Division

[6] This case was previously dealt with by summary dismissal at the General Division (GD) of this Tribunal.[2] The Appellant then appealed the GD decision to the Appeal Division (AD) of this Tribunal.[3]

[7] The AD held a hearing and agreed with the parties that an error happened at the GD level.[4] The AD decided that the case had to be returned to the GD, to a new member, for reconsideration.

[8] At the new GD hearing, the Appellant understood that, while I had reviewed all previous material, this was a brand-new hearing.

Links in the Appellant's documents

[9] The Appellant sent in documents that contained website links. I told the Appellant that I can't follow links and to tell me the information where necessary.

Additional documentation and more time to file

[10] On March 14, 2023, the Tribunal notified the Appellant that if he had additional documents that they should be submitted by March 31, 2023.[5] On March 30, 2023, the Appellant asked for an additional 7 to 14 days to file his materials.[6]

[11] On March 31, 2023, the Tribunal notified the Appellant that his hearing had been set for May 16, 2023 and that he may have until April 21, 2023 to submit additional documents.

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[2] See GD decision dated November 4, 2022 at AD1A-1 to AD1A-5.
[3] See request for leave to appeal at AD1-3 to AD1-29.
[4] See AD decision dated February 16, 2023. The AD said that the GD made an error because they didn't follow a fair process.
[5] See RGD2-1.
[6] See RGD3-1.

[12] On April 21, 2023, the Appellant submitted documents these were coded as RGD7. The Appellant said that he had just found some additional relevant information and asked to submit an updated version before April 24, 2023.

[13] On April 23, 2023, the Appellant submitted his updated documents which were coded as RGD8.

The commission made a clerical error

[14] The Commission wrote in their representations that they made a clerical error in their notice of decision to the Appellant.[7] The Commission wrote that the Appellant had lost his employment. This wasn't the case. The Appellant agrees that he was on an unpaid leave of absence and wasn't let go. For the reasons that follow, I do not find that this error was material and was clerical in nature.

Issue

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

Analysis

[16] The law says that you can't get EI benefits if you are suspended from your job because of misconduct. This applies when the employer has let you go or suspended you.[8]

[17] To answer the question of whether the Appellant suspended from his job because of misconduct, 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.

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[7] See GD3-35 where the Notice of Decision says that the Appellant lost his employment. See GD4-2 where the Commission notes that they made a clerical error and the decision should have said suspended from his employment rather than lost his employment.
[8] See sections 30 and 31 of the Act.

Was the Appellant suspended from his job?

[18] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[19] The Appellant agreed that he didn't choose to be on any type of leave of absence. There is nothing in the file to suggest otherwise. Therefore, I find that the Appellant didn't have the choice to stay or leave his employment.[9]

[20] The Appellant says that he was put on a leave of absence because of the employer's vaccination policy. The Appellant doesn't feel it is misconduct for not following the policy. The Appellant feels the employer's policy violated his collective agreement and went against other laws. The Appellant feels he should be entitled to benefits.

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

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

[22] The Appellant's Record of Employment (ROE)[10] also indicates that the reason for issuing the ROE is due to "dismissal or suspension". I am not bound by how the employer and employee characterize their separation.[11] Section 31 refers to a "suspension" from employment due to misconduct.[12] In other words, when it was the employer's decision to place an employee on an unpaid leave of absence, due to misconduct, it is typically the same, as a suspension for the purposes of the *Employment Insurance Act* (Act). I will be referring to the Appellant's unpaid leave of absence as a suspension because that is the word used by the Act.

[23] 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

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[9] Note: this is as of January 10, 2022. On May 13, 2022, the Appellant says that he retired from his employment in order to access funds. The Commission noted that they didn't make any kind of decision about the time period from May 13, 2022 onwards (see GD4-1).
[10] See GD3-19.
[11] See, for example, *Canada (Attorney General)* v. *Morris*, 1999 CanLII 7853 (FCA).
[12] See section 31 of the Act.

misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[24] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[13] Misconduct also includes conduct that is so reckless that it is almost wilful.[14] 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.[15]

[25] 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 his employer and that there was a real possibility of being suspended, or let go, because of that.[16]

[26] The law doesn't say I have to consider how the employer behaved.[17] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[18]

[27] 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.[19]

[28] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.[20] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

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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] See section 30 of the Act.
[18] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[19] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[20] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[29] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[21] He lost his job because of his 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.

[30] 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.[22]

[31] 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.[23]

[32] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[24] 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 *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[25]

[33] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[26] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the

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[21] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[22] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[23] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[24] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[25] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[26] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

employee did or failed to do; it is not relevant that the employer didn't accommodate them.[27]

[34] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[35] There is also a very recent Federal Court decision, *Cecchetto*,[28] where the Tribunal denied benefits to the appellant because he didn't follow his employer's vaccination policy. The Court found that the Tribunal's role was narrow and was to consider "misconduct" under the EI Act.

What the Commission and the Appellant say

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

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated or telling it whether he had been vaccinated
- the employer sent letters to the Appellant several times to communicate what it expected
- the Appellant knew or should have known what would happen if he didn't follow the policy

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

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[27] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[28] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- the employer's vaccination policy went against many laws
- the employer's vaccination policy went against the collective bargaining agreement
- the Appellant hadn't thought that he could be suspended if he didn't say whether he had been vaccinated

[39] The employer's vaccination policy was first released on September 15, 2021. It says that it "applies to all [employer] unionized and non-unionized employees, students, contractors that attend on site, temporary agency staff, and owner operators and their relief drivers".[29]

[40] I find that this means that the policy applies to the Appellant.

[41] The Appellant agrees that the policy was first released around September 15, 2021 and that he was aware of the policy.

[42] The policy also says it "will require employees to attest to their vaccination status in accordance with the established process by no later than September 20, 2021".[30]

[43] On October 7, 2021, an updated policy was created and it says that it was issued on October 13, 2021. This policy changes the attestation date to October 15, 2021.[31]

[44] The October 7, 2021 policy also says, "effective November 2, 2021 and until December 31, 2021, eligible individuals who are not fully vaccinated or provide a negative attestation will be required to provide a negative result to a rapid antigen test administered at least twice per week in order to be permitted to enter an [employer] facility".[32]

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[29] See GD2-11. The policy was updated on October 7, 2021 and still says the same thing about its application. See GD8-36.
[30] See GD2-11.
[31] See RGD8-37.
[32] See RGD8-37.

[45] The policy also says, “similarly, anyone refusing to complete an attestation form will be in contravention of this policy and will be subject to discipline, and be unable to attend work”.[33]

[46] Finally, the policy says, “the company reserves the right to amend these dates or the terms of this policy at any time in accordance with Public health, legislation, or business requirements”.[34]

[47] On November 1, 2021, the Appellant received a letter from his employer about attestation and getting vaccinated.[35]

[48] On November 8, 2021, the Appellant was given another letter about attestation. This letter says “our records indicate that you have not completed your COVID-19 vaccination attestation. The deadline to submit this information was October 15, 2021”.[36] The letter goes on to say, “failure to complete this attestation immediately may result in you being prevented from accessing the workplace and being placed on an unpaid leave of absence until we can determine your vaccination status”.[37]

[49] On December 14, 2021, the employer wrote to the Appellant again. This letter reminds the Appellant about the requirement to be vaccinated under the employer’s policy. It says, “this will be our final reminder to you of our policy requirement. On January 10, 2022, you will be found in violation of our policy requirement, and you will be placed on an unpaid leave of absence until you meet the requirement”.[38]

[50] The employer also sent out an employee information bulletin on January 4, 2022 that reminds employees to make sure that their attestation status has been submitted before 10AM ET on January 7, 2022.[39]

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[33] See RGD8-37.
[34] See RGD8-38.
[35] See RGD8-41. The Appellant says that this was not the actual copy of the letter he received but was a co-worker’s. He said that he submitted this copy only because it was more legible. He confirmed that the letter he received was the same.
[36] See RGD8-43.
[37] See RGD8-43.
[38] See RGD8-44.
[39] See RGD8-45.

[51] The Appellant says there were medical and religious exemptions but he didn't apply for these. He says he heard the employer was just denying these anyway. The Appellant agreed that he did not have an exemption under his employer's mandatory policy. There is no evidence to the contrary so I accept that the Appellant's testimony on these points.

[52] The Appellant argues that the collective bargaining agreement (CBA) prohibits the employer from implementing a mandatory vaccination policy. The Appellant also points to a note from an executive with his employer who wrote on Facebook "Folks absolutely zero intent to make vaccines mandatory. We would never do that and couldn't even if we wanted to!".[40] The Appellant says when this was posted, he relaxed. A few days later the employer released its vaccination policy.[41]

[53] The Appellant also says he feels the employer was not consistent with things as they kept changing compliance dates. He feels the employer kept changing their policy and feels it was inconsistent. He feels this means it was hard to follow the policy.

[54] The Appellant says his employer made vaccination a condition of employment, but says that there was never a vote on this.[42] He says this makes the condition invalid.

[55] The Appellant agrees that he never attested to whether he had been vaccinated. He also says that he was never disciplined. He feels that his employer went against the CBA. His employer didn't follow the discipline procedure in the CBA.

[56] The Appellant says that his medical records are private and he shouldn't have to disclose this information to his employer.

[57] On January 7, 2022, he had a meeting with his manager and union steward. The manager told him that they wouldn't stop him from coming to work on Monday, January

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[40] See RGD8-19. The Appellant says that this was posted in September 2021.
[41] This was the first release of the vaccination policy on September 15, 2021.
[42] See RGD8-48. The Appellant retired (May 13, 2022) by the time this was released on November 7, 2022, but received it from a co-worker.

10, 2022. The Appellant says he felt confident that this meant he could continue working.

[58] On January 10, 2022, he went to work. He says his swipe card wouldn't work and he couldn't get in the building. He says there were several other employees in the same position. The union steward came out and told them that he was sorry and didn't know what happened but the employer is sticking to their December 14, 2021 letter. That letter said, "[o]n January 10, 2022, you will be found in violation of our policy requirement, and you will be placed on an unpaid leave of absence until you meet the requirement".[43]

[59] The Appellant says he filed several grievances about the different actions that his employer took.[44] The Appellant says not all of his grievances have been addressed.

[60] The Appellant argues that because the vaccination policy goes against the CBA that makes the vaccination policy a nullity.

[61] The Appellant also argues that the CBA prohibits the employer from putting an employee on an unpaid leave of absence. He says this is a breach of contract and violates the Labour Relations Act.

[62] The Appellant argues that it can't be misconduct within the meaning of the Act because the employer violated their own policies.

[63] The Appellant feels that his employer's actions, and their vaccination policy, infringe many different laws. For example: the Occupational Health and Safety Act, *Health Protection and Promotion Act*, *Health Care Consent Act*, *Freedom of Information and Protection of Privacy Act*, and the *Ontario Labour Relations Act*. The Appellant also feels that the employer's actions and the vaccination policy infringe the Criminal Code of Canada, the Canada Labour Code and the Canadian Bill of Rights.

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[43] See RGD8-44.
[44] See, for example, RGD8-66 and RGD8-67.

Charter, Human Rights and Canadian Bill of Rights

[64] The Appellant feels the employer's policy went against several pieces of legislation. The Appellant feels his employer's policy is an infringement of his *Canadian Charter of Rights and Freedoms* (Charter) and Human Rights legislation. The Appellant also feels that his employer discriminated against him based on his vaccine status.[45]

[65] In Canada, there are a number of laws that protect an individual's rights. The Charter is one of these laws. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[66] As explained to the Appellant during the hearing, these laws are enforced by different courts and tribunals. This Tribunal can consider whether a section of the Employment Insurance Act (or its regulations) infringes the rights that are guaranteed by the Charter. The Appellant stated at the hearing that he was not challenging any part of the *Employment Insurance Act*, rather he feels that his employer's policy infringed the Charter, human rights or the Canadian Bill of Rights.

[67] The Appellant also argued that his employer was basing its policy on federal direction. He believes that this refers to a policy issued by the Treasury Board of Canada. He says that any policy made by the Treasury Board of Canada must comply with the Canadian Bill of Rights.[46]

[68] It was explained to the Appellant that it is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter, human rights legislation or the Canadian Bill of Rights. It was also explained to the Appellant that he would need to go to a different court or tribunal to address those types of issues. The Appellant said that he understood and wished to proceed.

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[45] See RGD8-364.
[46] See, for example, RGD8-8.

Breach of contract

[69] The Appellant says his employer violated the employment contract by implementing a vaccination policy unilaterally.

[70] The Appellant also says that he was unilaterally put on an unpaid leave of absence. The Appellant argues that because there is no provision in the Collective Bargaining Agreement (CBA) for an employer-initiated unpaid leave. The Appellant argues that misconduct is not possible because he was following all relevant legislation and ignoring policies deemed null and void.[47]

[71] As noted above, in *McNamara*, *Paradis* and *Mishibinijima,*[48] these Court cases make it clear that the focus must be on what an appellant has or has not done.

[72] Recently, the Federal Court decided *Cecchetto*.[49] In that case, the Tribunal (both the General and Appeal division) had denied the appellant's appeal for benefits because he did not follow his employer's vaccination policy. The Federal Court found that the Tribunal has a "narrow and specific role to play in the legal system".[50] In that case it was to decide why the appellant had been dismissed and if it was "misconduct" under the EI Act.

[73] The Federal Court also made it clear that a claimant may not be satisfied with the Employment Insurance scheme, but "there are ways in which his claims can properly be advanced under the legal system".[51]

[74] This means there are other avenues open to appellants if they do not feel that their employer was acting within their employment contract. For that reason, I don't have the authority to decide the merits, legitimacy or legality of his employer's vaccination policy. That means I am not going to decide whether the employer breached a term in the contract as that is outside of my authority.

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[47] See RGD8-5.
[48] See paragraphs 29 to 35 of this decision above.
[49] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[50] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraphs 46 and 47.
[51] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 49.

[75] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[52] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

[76] The Appellant argues that misconduct did not arise because he performed all of the duties required of him under the terms of his employment agreement. He says that non-compliance with the vaccination policy didn't prevent him from carrying out his duties and didn't impact his ability to perform them. Yet, the employer clearly stated, multiple times, that a failure to attest would mean that the employee would not be allowed to attend work.

[77] The Appellant entered into an employment relationship in 1989. It is noted that this was before the pandemic. This means that the employer would not have pandemic policies in place. The Appellant agreed that when he was hired there were no vaccine practices (requirements) in effect.[53]

[78] The Appellant agreed when he was hired to follow all employer policies, not just those he agreed with.

[79] An 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.[54]

[80] The employer, in several communications, explained that their vaccination policy was created "in response to government and public health recommendations to help keep each and every one of our employees safe during the COVID-19 pandemic".[55]

[81] I find that the employer was enacting a policy to ensure the safety of its employees. A recent Social Security Tribunal Appeal Division case notes "duties owed

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[52] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[53] See GD2-25.
[54] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[55] See RGD8-25 and RGD8-36 the employer's policy statement for the COVID-19 Safer Workplaces Policy where it says that the employer is "committed to ensuring a safe and healthy workplace".

to employers go beyond just performing work tasks. They include following safety policies".[56]

[82] *Cecchetto* also makes it clear than an employer may unilaterally introduce a vaccination policy without an employee's consent.[57]

Breach of collective agreement and NE v. Canada Employment Insurance Commission[58]

[83] The Appellant says that his employer violated the CBA by implementing a policy unilaterally. He says the CBA does not have anything about a requirement to take or not take vaccines.

[84] The Appellant says any policy that violates applicable laws will be "null and void".[59]

[85] The Appellant raised a recent decision from the Social Security Tribunal's Appeal Division.[60] This decision related to a case that had been summarily dismissed by the General Division. The Appeal Division took issue with the General Division not deciding if the employer's policy was obviously unlawful.[61] It gave the example of an employer requiring an employee to work 24 hours without a break.[62]

[86] I am not bound by this decision, or other Tribunal decisions.[63] I can choose to adopt their reasoning if I find them to be persuasive or helpful. I will not be adopting the reasoning in that case for the reasons that follow.

[87] In the case before me, I am not dealing with a summary dismissal. The Appellant had a full hearing in which to make his arguments. This isn't the same as the case the

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[56] See *MW* v *Canada Employment Insurance Commission*, 2023 SST 128, where the Member refers to, for example, CUB 80774 and CUB 71744.
[57] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[58] *NE* v *Canada Employment Insurance Commission*, 2022 SST 732.
[59] See RGD8-5.
[60] *NE* v *Canada Employment Insurance Commission*, 2022 SST 732.
[61] See *NE* v *Canada Employment Insurance Commission*, 2022 SST 732 XX paragraph 37.
[62] See *NE* v *Canada Employment Insurance Commission*, 2022 SST 732 paragraph 38.
[63] It should also be noted that this case is under appeal.

Appellant was referring to. This is one of the ways that it can be distinguished from *NE* v. *Canada Employment Insurance Commission*.

[88] However, my reasons for not following *NE* v. *Canada Employment Insurance Commission* go beyond the factual similarities or differences. One of the reasons for not following that decision is that it is contrary to other court decisions. As noted above, in *McNamara*, *Paradis, Mishibinijima and Cecchetto*[64] these Court cases make it clear that the focus must be on what an appellant has, or has not, done.[65]

[89] The Appellant says that his employer violated the collective agreement by implementing an unfair policy unilaterally. Yet, as indicated above, other Courts and Tribunals have considered this very issue and have found differently.

[90] There are other avenues open to an appellant if they do not feel that the employer was acting within an agreement. For that reason, although I find that the Appellant's situation can be distinguished from the one in *NE* v. *Canada Employment Insurance Commission*, I am not going to decide whether the employer breached a term in the collective agreement as that is outside of my authority.[66]

[91] Further, in this case, although the Appellant has argued that the policy is unlawful on its face, I don't find that is the case. The Appellant argues that the policy goes against other pieces of legislation, and goes against his CBA. I find that these things are outside of my authority and the Federal Court has made it clear, on a similar case, that the focus is on the Appellant.[67]

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[64] See paragraphs 29 to 35 of this decision above.
[65] The Federal Court of Canada released its decision of *Cecchetto v Canada (Attorney General)*, 2023 FC 102, after the Appeal Division made its decision in *NE* v *Canada Employment Insurance Commission*, 2022 SST 732.
[66] The Federal Court of Canada in *Cecchetto v Canada (Attorney General)*, 2023 FC 102, has upheld the principle that the Tribunal must look at why an appellant has been dismissed and if it is "misconduct" under the EI Act.
[67] *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[92] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[68] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

[93] The Appellant says his employer changing conditions of his employment and collective agreement is illegal. He says that he is not claiming that the policy was unreasonable.[69]

[94] The policy isn't creating something that, on its face, is illegal. For example, requiring an employee to work 24 hours straight with no breaks. Yet, I don't find this means that the employer can't create and implement a policy to address an unprecedented pandemic. Again, the Appellant can go to another court or tribunal if he thinks his employer has violated his collective agreement or other laws.

[95] The Appellant says that all of his grievances haven't been dealt with. That is something that he will have to pursue through other courts or tribunals.

Privacy Laws/Health Laws/Criminal Code/Other case law

[96] As mentioned above, the Appellant feels that his employer had no right to access his private health information.[70] He feels his employer was forcing continuous medical testing, forcing an experimental medical treatment, changing the employment contract and were threatening suspension, coercion and intimidation.[71] He also feels that government mandates about the COVID-19 vaccine amount to torture and extortion.[72]

[97] The Appellant also points to other articles/cases where the employer was found to be wrong for their COVID-19 vaccination policies.[73] It is noted that these articles aren't referring to EI cases.

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[68] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[69] See AD1-11.
[70] See GD2-18 and RGD8-5.
[71] See RGD8-56.
[72] See RGD8-363.
[73] See GD2-1 to GD2-3.

[98] The Appellant referred to numerous cases[74] and maintains that he has a right to determine his own medical treatment and the right to bodily autonomy.

[99] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[75] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

Vaccine efficacy/reasonableness of policy/other legal infringements

[100] The Appellant's other arguments[76] about various other pieces of legislation and how the employer's policy infringed them, including consent to treatment and medical privacy are not for me to decide.

[101] The Appellant says there is no evidence that COVID-19 vaccines prevent infection or transmission of the virus.[77] It is not for me to decide the issues of vaccine efficacy or the reasonableness of the employer's policy, which applied to all staff.

[102] Many of the court cases that the Appellant referred to are not specific to the EI Act and its interpretation.

[103] The Appellant may have options to pursue his claims. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.[78]

Digest of benefit entitlement[79]

[104] The Appellant says broadly that he should be entitled to benefits based on Employment Insurance Digest of Benefit Entitlement Principles (Digest). He says that

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[74] There were numerous cases referred to including, but not limited to, on GD2-17, GD2-18, GD2-20, RGD8-13, RGD8-363 and RGD8-378.
[75] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[76] See paragraphs 52 to 63; 83 to 85 and 94 to 96 above.
[77] See, for example, GD2-20, RGD8-53 and RGD8-350.
[78] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102.
[79] These are found at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html

he didn’t commit misconduct within the meaning of the act as per chapter 7 of the Digest.

[105] These digests are the Commission’s internal policies. They are tools used by the Commission’s staff for interpreting and applying the Act to decide EI claims. That means that they aren’t law. I don’t find that the Commission’s general internal policies are instructive in this case.

[106] The Appellant also referred to section 6.5.10 of the digest. It says an employee can expect their employer to respect the terms of the contract negotiated at the time they were hired.

[107] The Appellant agreed he didn’t voluntarily leave his employment. In other words, it wasn’t the Appellant’s choice to be put on a leave of absence (suspended). The section of the digest that the Appellant referred to, section 6.5.10, is about voluntary leaving and if a claimant had just cause of leaving, under the EI Act. That means that this section of the Digest doesn’t apply to misconduct cases. Voluntary leaving is a separate part of the Act with different rules than misconduct.

[108] This means section 6.5.10 of the Digest doesn’t apply to the decision the Appellant is appealing. So, I also don’t find it helpful or instructive.

Elements of misconduct?

[109] I find that the Commission has proven that there was misconduct for the reasons that follow.

[110] There is no dispute that the employer had a vaccination policy. The Appellant knew about the vaccination policy. I find that the Appellant made his own choice not to attest about whether he had been vaccinated. This means that the Appellant’s choice to not disclose his status was conscious, deliberate and intentional.

[111] The Appellant didn’t have an exemption from the policy.

[112] The Appellant's employer made it clear that an employee that didn't attest would be placed on an unpaid leave of absence.[80]

[113] The employer's policy requires all employees to disclose their vaccination status and to either have an exemption or get vaccinated. The Appellant didn't disclose his vaccination status and had no exemption. This means that he wasn't in compliance with his employer's policy. That means that he couldn't go to work to carry out his duties owed to his employer.[81] This is misconduct.

[114] The Appellant argued that the employer kept changing its policy. Yet, the policy allows for review and updates.[82] The policy says, "the company reserves the right to amend these dates or the terms of this policy at any time in accordance with Public health, legislation, or business requirements".[83]

[115] The Appellant agreed that he received the December 14, 2021 letter. This letter warned him that as of January 10, 2022, if the Appellant didn't attest, he would be placed on an unpaid leave of absence. The Appellant didn't believe that the employer would do that because they had extended other dates.[84] Yet, the date extensions occurred early on in the COVID-19 implementation. There were several warnings from the employer that they required the Appellant to attest.[85] The Appellant agrees he received all of the warnings. This means that the Appellant knew, or should have known, there was real possibility that he could be placed on an unpaid leave of absence (a suspension).

[116] By not disclosing his vaccination status, or by not getting an exemption, the misconduct, led to the Appellant getting suspended.

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[80] See RGD8-37; RGD8-43 and RGD8-44.
[81] See RGD8-37 section 5.3 non-compliance; RGD8-43 and RGD8-44.
[82] See RGD8-26 where the policy says, "the policy will be reviewed at least once a quarter, and as required with changing Public Health recommendations". The same provision is found in the October 15, 2021 policy at RGD8-37.
[83] See RGD8-38.
[84] See RGD8-26 and RGD8-37 section 5.2 which changed the date from September 20, 2021 to October 15, 2021.
[85] See RGD8-41 letter dated November 1, 2021; RGD8-43 hand-delivered letter dated November 8, 2021; and RGD8-44 final warning letter dated December 14, 2021.

[117] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Appellant knew that by not following the policy that he wouldn't be permitted to be at work. This means that he couldn't carry out his duties to his employer. The Appellant was aware, or should have been aware, that there was a real possibility that he could be suspended for this reason.

Employment insurance benefits

[118] The Appellant also believes that because he has paid into employment insurance (EI) for years that he should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find themselves unemployed and unable to find another job. I do not find that this applies in this situation.[86]

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

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

[120] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew, or should have known, that refusing to say whether he had been vaccinated was likely to cause him to be suspended.

[86] See *Pannu* v *Canada (Attorney General)*, 2004 FCA 90, at paragraph 3.

Conclusion

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

[122] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section