Citation: *WS v Canada Employment Insurance* Commission, 2023 SST 869

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	W. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (467750) dated May 5, 2022 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	In person
Hearing date:	July 7, 2023
Hearing participant:	Appellant
Decision date:	July 13, 2023
File number:	GE-23-276

Decision

[1] I am dismissing W. S.'s appeal.

[2] He didn't follow his employer's mandatory COVID-19 vaccination policy. And his employer suspended and dismissed him because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven that he was suspended then lost his job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, he did something that caused him to be suspended and to lose his job.

[4] This means he can't get Employment Insurance (EI) benefits.[1]

Overview

[5] W. S. (the Appellant) lost his job working as a distribution engineer with X (employer). His employer suspended him in October 2021 and dismissed him in January 2022.

[6] His employer said it suspended and dismissed him because he didn't comply with its mandatory COVID-19 vaccination policy (vaccination policy).

[7] The Commission accepted the employer's reason for the suspension and dismissal.[2] It decided the Appellant was suspended then lost his job for a reason that counts as misconduct under the EI Act.

[8] Because of this, the Commission didn't pay him EI regular benefits.

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[1] Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.
[2] Here is what the Commission explains at GD-4-3: "It is the Commission's position that a **disentitlement for suspension due to misconduct** be imposed from January 12 to 26, 2022, the period of the claimant's unpaid leave of absence. The Commission further recommends that **a disqualification for dismissal due to misconduct** be imposed from January 23, 2022, the week in which the claimant's employment was terminated." I have added **bold** to highlight the two decisions the Commission made.

[9] The Appellant doesn't agree he was dismissed for misconduct. He says he settled a wrongful dismissal lawsuit, and his employer changed his record of employment to Code K (other). That shows he wasn't suspended and dismissed for misconduct. He also says his employer's vaccination policy was unreasonable in the context of his job. So he didn't have to follow it. And by not following it, he wasn't acting wilfully or recklessly.

Issue

[10] I have to decide whether the Appellant was suspended and dismissed from his job for a reason the EI Act considers misconduct.

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[3]

[12] I have to decide two things.

- the reason the Appellant was suspended and lost his job
- whether the EI Act considers that reason to be misconduct

The reason the Appellant was suspended and lost his job

[13] I find the Appellant's employer suspended then dismissed him because he didn't comply with its vaccination policy.

What the law says about settlement agreements in misconduct cases

[14] The Appellant says the settlement agreement in his wrongful dismissal lawsuit proves his employer didn't dismiss him for not following its vaccination policy. He says he was dismissed for another reason (code K-other). This is what the employer marked in the new record of employment it sent in after his lawsuit settled.

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[3] See section 30 and 31 of the *Employment Insurance Act* (EI Act).

[15] I have to consider the settlement agreement.

[16] Federal Court of Appeal decisions in misconduct cases say the mere existence of a settlement agreement doesn't determine whether an employee was dismissed for misconduct.[4] The Tribunal has to assess the evidence—including what the settlement agreement says—and come to a decision.

[17] The Tribunal isn't bound by what the employer, an appellant, or another party say about the grounds used to dismiss an employee.[5]

[18] Before a settlement agreement can be used to contradict an earlier finding of misconduct, there must be some evidence about the misconduct **that would contradict the position taken by the employer** during the investigation by the Commission or at the time of the hearing.[6]

[19] I will consider the settlement agreement in the next section, where I look at the parties' evidence and arguments about the reason the Appellant was suspended lost his job.

What the Commission, the Appellant, and the settlement agreement say

[20] The Commission says the Appellant was suspended and dismissed from his employment because he refused to follow his employer's vaccination policy.[7] He told the Commission he was notified about the vaccination policy. And he knew he would be put on administrative leave, and then dismissed, if he didn't follow the policy.

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[4] See *Canada (Attorney General) v Morris*, A-291-98, leave to SCC refused, [1999] SCCA No 304; *Canada (Attorney General) v Boulton*, A-45-96 (FCA); *Canada (Attorney General) v Perusse*, A-309-81 (FCA).
[5] See *Canada (Attorney General) v Morris*, A-291-98, leave to SCC refused, [1999] SCCA No 304; *Canada (Attorney General) v Boulton*, A-45-96 (FCA); *Canada (Attorney General) v Perusse*, A-309-81 (FCA).
[6] See *Canada (Attorney General) v Morrow*, A-170-98 (FCA); *Canada (Attorney General) v Boulton*, A-45-96 (FCA).
[7] See the Commission's representations at GD3-7.

[21] The Commission reviewed the records of employment the employer sent in after it signed the settlement agreement.[8] Both records use Code K (Other) and say in the Box 18 comments, "Notice/severance was agreed upon". The Commission says its position remains unchanged because the Appellant didn't give any new information for review.[9] (This was before the Appellant sent the settlement agreement to the Tribunal, and the Tribunal sent it to the Commission.)

[22] The Appellant says the settlement agreement and new record of employment change the facts. They show he wasn't dismissed for not following his employer's vaccination policy. His employer has agreed he left his job for another (Code K-Other) reason. He placed special emphasis on the entire settlement clause in the settlement agreement.[10]

[23] I have reviewed and considered the terms of the settlement agreement. I find there is one new fact (piece of evidence) about the alleged misconduct which **might** contradict the position taken by the employer during the investigation by the Commission.[11] This is in Clause 3:

> **3. Record of Employment:** The employer shall record the "Reason for Issuing this ROE" as code "K-other." The Employer shall state that notice/severance was agreed upon.

[8] The Commission attached the two records of employment to its supplementary representations (RGD3). See the
[9] The Commission writes at RGD3-2: "The fact that the claimant and the employer have reached a settlement and the reason for separation has since been amended with compensation, does not change the Commission's position, especially since the evidence on file that shows the claimant was dismissed due to his own misconduct and there was no voluntary leaving."
[10] See clause 8 of the settlement agreement, which says: "**Entire Settlement**: These Minutes of Settlement
[11] See GD8.

The Appellant lost his job for not complying with the vaccination policy

[24] I accept the Commission's evidence that the employer suspended and dismissed the Appellant for not complying with his employer's vaccination policy. The Appellant agreed about that reason in his EI application and in his calls with the Commission.[12]

[25] I find that nothing in the settlement agreement changes the facts and evidence about the reason the employer suspended and dismissed the Appellant—at that time or after that time. The settlement agreement doesn't say the employer **didn't** suspend and dismiss the Appellant for not following its vaccination policy.

[26] The Tribunal isn't bound by what the employer and Appellant say. A record of employment is one piece of evidence I should consider. In this case there are three. I prefer the original record of employment because what it says is supported by what the employer and the Appellant told the Commission about the reason he was suspended and dismissed.[13]

[27] Clause 3 of the settlement agreement creates a legal fiction—in other words, a state of affairs accepted by the parties to the agreement—for the purposes of settling the lawsuit. It doesn't change reality after-the-fact. The employer issued the new records of employment because it agreed to do that in the settlement agreement (and to use Code K Other and "notice/severance was agreed upon"). Their agreement about those things is the only fact Clause 3 of the settlement agreement proves.

[28] The entire agreement clause in the settlement agreement doesn't bind the Tribunal to accept the facts or state of affairs agreed to (months after the Appellant was suspended then dismissed) by the parties. It binds the parties who agreed to it when they signed it to settle a civil lawsuit.

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[12] In his EI application he says he was dismissed or suspended for complying with company policy. See the Commission's notes of its calls with the Appellant at GD3-25 and GD3-35.
[13] The original record of employment, at GD3-22, used code N (leave of absence).

The reason is misconduct under the law

[29] The Appellant's refusal to follow his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[30] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal questions I have to consider when I make my decision.

[31] The Commission has to prove that it's more likely than not the Appellant lost his job because of misconduct.[14]

[32] I have to focus on what the Appellant did or didn't do, and whether his conduct amounts to misconduct under the EI Act.[15] I can't consider whether his employer adoption of the policy was reasonable or whether suspension and dismissal were reasonable penalties.[16]

[33] The Appellant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide his conduct is misconduct.[17] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[18] And misconduct also includes conduct that is so reckless that it's almost wilful.[19]

[34] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being suspended and let go because of that.[20]

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[14] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[15] This is what sections 30 and 31 of the EI Act say.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[17] See *Attorney General of Canada v Secours*, A-352-94.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[20] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[35] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[21]

[36] The Federal Court of Appeal recently made its first decision in a case where a person was refused EI benefits for misconduct where they didn't comply with their employer's COVID vaccination policy.[22] In the Cecchetto decision, the Court confirmed the "important, but narrow and specific role" of the Tribunal. The Tribunal has to decide two things: why the appellant was dismissed and whether that reason is "misconduct" under the EI Act.[23]

[37] The Federal Court of Appeal then said the Tribunal doesn't have the legal power to assess or rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic. So the Tribunal doesn't have to deal with these arguments. And the courts will not interfere with Tribunal decisions where they don't.

[38] Finally, the Federal Court pointed out that people in the Appellant's situation might have other legal options to challenge their employer's policy and conduct.[24]

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[21] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant 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 Appellant isn't.
[22] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[23] See paragraphs 46 to 48 in *Cecchetto v Canada (Attorney General)*.
[24] The Federal Court says in *Cecchetto v Canada (Attorney General)*, at paragraph 46: " … it is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It isn't unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate." Then the Federal Court pointed out (at paragraph 50) there are other types of legal cases, under laws other than the EI Act, appellants can use to challenge COVID vaccination policies and mandates.

What the Commission and the Appellant say

[39] The Commission says the Appellant was suspended and dismissed because of his own misconduct.[25] His conduct of refusing to follow his employer's vaccination policy was conscious and intentional. He told the Commission he was notified about the vaccination policy. And that he knew his employer would put him on administrative leave, and then dismissed him, if he didn't follow the vaccination policy. After learning about this, and even after being suspended, he refused to comply with the vaccination policy. And he lost his employment as a result.

[40] The Commission also says it doesn't have to prove the employer's policy was reasonable or fair, or that the employer's conduct is relevant.[26] And the Tribunal has no power to determine whether the employer acted fairly or reasonably by putting in place its vaccination policy.

[41] Finally, the Commission says the Federal Court of Appeal says an employee's refusal to comply with the employer's reasonable direction is misconduct because the refusal to comply is conscious and deliberate.[27]

[42] The Appellant says he sued his employer for wrongful dismissal. The lawsuit settled. Under the settlement agreement, his employer agreed to change his record of employment to Code K (other)—and it did. That shows he wasn't suspended or dismissed for not following his employer's vaccination policy. He and his employer agreed his services we no longer needed.

[43] The Appellant also says his employer's vaccination policy was unreasonable in the context of his job. So he didn't have to follow it. And by not following it, he wasn't acting wilfully of recklessly. It makes no sense that the Commission and Tribunal can't consider whether the employer's policy is reasonable when deciding misconduct claims.

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[25] See the Commission's representations at GD4-6.
[26] See the Commission's representations at GD4-6.
[27] See GD4-7.

To highlight this his point he said what about an employer who put in place a policy that said every employee had to give the employer a blow job at the start of each day.

The Commission has proven misconduct under the EI Act

[44] The Commission has proven the Appellant's refusal to comply with his employer's vaccination policy is misconduct under the EI Act. .

[45] I accept the Appellant's evidence about the essential facts the Commission has to prove to show his conduct was misconduct. I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his documents, and said at the hearing) about the vaccination policy, his suspension, and his dismissal. His evidence is consistent. He said the same thing to the Commission and the Tribunal. And his story about what he did, what his employer did, and what he knew at what point in time stayed essentially the same over time. And is supported by the documents his employer sent to the Commission.

[46] I don't accept the Appellant's argument that the settlement agreement changed any of the essential facts. I will write more about this below.

[47] I accept the Commission's evidence because it's consistent with the Appellant's evidence. What the employer said to the Commission, its policy, and what it wrote in its memos to the Appellant and its termination letter is consistent. It matches the Appellant's evidence about what took place. And there is no evidence that goes against the Commission's evidence.

[48] Based on the evidence I have accepted, I find that the Commission has proven:

- the employer had a vaccination policy[28]
- under that policy the Appellant had to be fully vaccinated and give proof to his employer by October 29, 2021, or he would be subject to discipline up to and including termination

[28] The employer's vaccination policy is at GD3-41 to GD3-45.

- the policy gave options and accommodations to employees with bona fide and supported medical and other applicable human rights grounds for not getting vaccinated[29]
- the Appellant knew these things and what his employer required him to do
- the Appellant didn't apply for an accommodation on medical or other human rights grounds
- the employer sent a memo to the Appellant dated October 18, 2021 reminding him of his obligations to complete and give proof of vaccination status by the deadline, and the potential for disciplinary action if he didn't comply[30]
- the Appellant didn't comply, which was a conscious and deliberate personal decision
- so his employer placed him on unpaid leave, and informed him that if he didn't provide proof of full vacation by December 31, 2021 his employment would be terminate for cause[31]
- the Appellant still didn't comply with the policy, which was a conscious and deliberate personal decision
- so his employer dismissed him for cause for not complying with its vaccination policy

[49] I don't accept the Appellant's argument that the settlement agreement shows there was no misconduct. Nothing in that agreement changes what he did or knew, what his employer did and why, or its vaccination policy.

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[29] See this section of the vaccination policy at GD3-44.
[30] See GD3-46.
[31] See the memo his employer sent him (dated October 29, 2021), at GD3-47.

[50] I also can't accept the Appellant's argument that his employer's policy was unreasonable in the context of his employment—and should not apply to him. The Appellant says the Commission's policy says it will consider the reasonableness of the employer's policy. I don't dispute that. But I don't have to follow the Commission's policy. I have to follow the Federal Court of Appeal decisions that tell me I can't consider whether the employer's policy is reasonable.

[51] In Cecchetto the Federal Court of Appeal noted that appellants who disagree with mandatory COVID vaccination policies have legal avenues to challenge them. The Appellant did just that. His wrongful dismissal lawsuit was his chance to get compensation for income he says he lost as a result of his employer's allegedly unreasonable vaccination policy and his alleged wrongful dismissal. He doesn't have a right to EI benefits—he has to meet the conditions of eligibility. Unfortunately for him, he doesn't.

[52] At the hearing the Appellant raised other "fundamental questions" about the legality of requiring employees to undergo medical procedures that haven't been shown to be safe and effective. According to the Federal Court of Appeal in Cecchetto, I don't have to consider these questions.[32]

[32] See paragraph 46 in Cecchetto, a part of which I included in footnote 24, above.

Conclusion

[53] The Commission has proven that the Appellant was suspended and lost his job because he refused to comply with his employer's vaccination policy.

[54] The Commission has also proven his refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

[55] Because of this, he can't get EI benefits.

[56] This means the Commission made the correct decision in his EI claim.

[57] So I have to dismiss his appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section