Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 1111

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (460525) dated March 9, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	June 13, 2023
Hearing participant:	Appellant Appellant's spouse
Decision date:	June 21, 2023
File number:	GE-23-607

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). This means he is disentitled from receiving Employment Insurance (EI) benefits from April 25, 2022, to May 4, 2022

Overview

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

[4] Even though the Appellant doesn't dispute that this happened, he says going against his employer's vaccination policy isn't misconduct. He argues that requiring him to be vaccinated was a new condition of employment the employer unilaterally imposed on him. It wasn't part of his employment contract or his collective agreement. And the policy violated his human rights.

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

Matters I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party. The employer did not respond.

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

[7] As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

The Appellant's appeal was returned to the General Division

[8] The Appellant first appealed his denial of EI benefits to the Tribunal's General Division in April 2022. The General Division member summarily dismissed his appeal because she found the Appellant had no reasonable chance of success. This meant he didn't get a chance to speak at a hearing about his appeal and the Tribunal didn't fully consider his arguments about his case in its decision.

[9] The Appellant appealed the summary dismissal decision to the Appeal Division. The Appeal Division member found that the Appellant's appeal should not have been summarily dismissed. She ordered the appeal to be returned to the General Division for a hearing. This decision is a result of that hearing

I agreed to accept post-hearing submissions from the Appellant

[10] At the hearing, the Appellant and his spouse said they may not have received all of the appeal documents. The appeal file contained twenty documents that had been sent to the Appellant since April 2022. After we discussed it, we decided that I would send the Appellant all of the documents following the hearing. And if the Appellant and his spouse wanted, they could send me any further submissions in writing. I asked them to send their submissions by June 21, 2023.

[11] On June 17, 2023, the Appellant emailed the Tribunal to say that he and his spouse had nothing more to add about his appeal. So, I proceeded with the decision based on the evidence on file and the testimony and submissions I heard at the hearing.

Issue

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

Analysis

[13] 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]

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

Why was the Appellant suspended?

[15] Both parties agree that the Appellant was suspended because he didn't comply with the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for his suspension misconduct under the law?

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

[17] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law explains how to determine whether the Appellant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] 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.[6]

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[3] See sections 30 and 31 of the Act.
[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v his Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.

[19] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward the employer and that there was a real possibility of being let go from his job because of that.[7]

[20] The Commission must prove that the Appellant lost his job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost his job because of misconduct.[8]

[21] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[10] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner due to the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[23] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found that the question in misconduct cases is, "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is,

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[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

"clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[24] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[11] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[12]

[25] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[13] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[14]

[26] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[15]

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[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[13] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.

[27] 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.[16]

[28] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[17]

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

What the Commission and the Appellant say

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

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

- the employer had a vaccination policy and communicated that policy to the Appellant

[16] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

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

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

- the policy wasn't part of his employment contract or his collective agreement
- it was not a condition of employment when he was hired
- there was no legislation requiring him to be vaccinated
- the employer could have offered alternatives to the vaccination requirement
- the policy went against the law and his human rights

[33] The evidence is clear that the employer implemented a mandatory vaccination policy. The Appellant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Appellant about the requirements and the consequences of not following them.

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

[35] I find the Appellant knew that his employer instituted a mandatory vaccination policy and knew what would happen if he didn't follow it because he testified that he was aware of the policy and the consequences of not complying.

[36] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer

implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[18]

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

[38] 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,[19] that protect rights and freedoms. These laws are enforced by different courts and tribunals.

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

[40] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

[41] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[20]

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[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] The Appellant mentioned this a few times and submitted that it gave him the right to refuse unsafe work.
[20] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

[42] The Appellant may have other recourse to pursue his claims that the employer discriminated against him. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[21]

Other Tribunal decisions

[43] The Appellant and his spouse submitted three Tribunal decisions that they say are relevant to his case. I will refer to the cases as *AL v CEIC*,[22] *TC v CEIC*,[23] and *JS v CEIC*.[24]

[44] The Appellant argues I should follow these decisions because are all recent decisions that found claimants in similar circumstances as his didn't lose their job because of misconduct. I have chosen not to follow these decisions for the following reasons.

- **My reasons for not following the Tribunal's decision in AL v CEIC**

[45] In this case, AL worked in the hospital's administration. She was suspended and later dismissed by the hospital because she did not comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job for a reason the law considers misconduct.

[46] The Tribunal member found the employer changed the terms of AL's employment contract and imposed a new condition of employment without her agreement, and without amending the collective agreement.

[47] The Member reasoned that an employer could impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee" and that there was no such legislation. So, the Member found that the employer's vaccination policy wasn't an express or implied

[21] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102.
[22] This decision is identified by tribunal file number GE-22-1889.
[23] This decision is identified by tribunal file number GE-22-829.
[24] This decision is identified by tribunal file number AD-22-472.

condition of AL's employment. This meant her refusal to get vaccinated wasn't misconduct.

[48] The Member also found that claimants have a right to choose whether to accept any medical treatment. And that even if her choice contradicts her employer's policy and leads to her dismissal, exercising that "right" cannot be seen as a wrongful act or conduct sufficient to conclude it is misconduct worthy of punishment or disqualification under the EI Act.[25]

[49] I don't have to follow other decisions of our Tribunal.[26] I can rely on them to guide me where I find them persuasive and helpful. I will not adopt the reasoning in AL for the following reasons.

[50] First, the Appellant's facts in the appeal before me are substantially different than those in AL. Importantly, AL had a collective bargaining agreement that considered whether vaccinations other than COVID-19 were mandatory. The Member relied on this fact to find that AL's employer and the union (the parties to the collective agreement) had addressed the requirement of other vaccines in the collective agreement. So, the Member reasoned, to require the COVID-19 vaccine should have followed the same process.

[51] In the appeal before me the Appellant has not produced evidence that his collective agreement has a provision that considered mandatory vaccinations. So, I find his case is distinguished from the facts in AL.

[52] Second, I don't agree with the Member's choice to interpret and apply the collective agreement, which was the basis of his finding that the employer had no authority to require that employees get vaccinated against COVID-19. This goes beyond

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[25] See *AL v Canada Employment Insurance Commission*, paras 76, 79, and 80.
[26] This is based on the principle of *stare decisis*. It's a foundational principle of decision-making in our legal system. It means I have to follow Federal Court decisions that are relevant to the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. I don't have to follow Social Security Tribunal decisions because other members of the Tribunal have the same authority I have.

the scope and authority of this Tribunal.[27] The Federal Court has made it clear that I must focus on the conduct of the claimant when deciding whether a claimant's conduct was misconduct. I don't have the legal authority to interpret and apply employment law, privacy laws, human rights laws, international law, the Criminal Code, or other laws.

- **My reasons for not following the Tribunal's decision in TC v CEIC**

[53] In this decision, TC was put on leave from his job because he didn't comply with the vaccination policy at work.

[54] Importantly in this case, the employer notified TC of the vaccination policy two days before the deadline to be vaccinated. He didn't see a copy of the policy and didn't know what the consequences were for not following the policy. He also didn't have a chance to ask for an exemption to the policy. Two days later, the employer put him on leave.

[55] The Tribunal member found that the employer had the right to develop and impose policies at the workplace, but employees should be given a chance to understand the policy, to know what is required, have an opportunity to review and/or ask questions and be given enough time to comply.

[56] This appeal and TC's have the same question of law—whether they were suspended from their jobs because of misconduct. However, the important facts are different. In this appeal, the Appellant had enough time to comply with the employer's policy. He chose not to.

[57] Because of these differences, I find the case of TC is not persuasive in the question of whether the Appellant was suspended due to misconduct. The factors that the Tribunal member in TC relied on to allow his appeal are not present in this case.

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[27] The Tribunal's legal authority is limited to make a decision on the Commission's decision about a claimant's EI benefits. It doesn't include interpreting and applying a collective agreement. The courts have said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For instance, where an employee covered by a collective agreement believes their employer breached the agreement, they or their union can file a grievance under the collective agreement.

- **My reasons for not following the Tribunal's decision in JS v CEIC**

[58] This is a decision from the Tribunal's Appeal Division. In this case, JS appealed a decision from the General Division to summarily dismiss his appeal because it found he had no reasonable chance of success.

[59] The Appeal Division member found that the General Division member shouldn't have summarily dismissed JS's appeal. She ordered the appeal be returned to the General Division for a hearing by another member.

[60] I don't find this decision relevant to this decision. The Appeal Division didn't address whether JS lost his job because of misconduct. It focused on the fairness of the process and whether the General Division member applied the correct legal test.[28]

[61] For this reason, I find this decision is not persuasive in the question of whether the Appellant was suspended due to misconduct.

So, was the Appellant suspended because of misconduct?

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

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

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

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[28] The legal test to decide whether to summarily dismiss an appeal is different than the legal test to decide if a claimant lost their job because of misconduct. Even though the Commission's decision in both JS and the Appellant's cases were the same, the legal test applied by the General Division and reviewed by the Appeal Division in JS's case was different.

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

[65] The Appellant returned to work on April 15, 2022, after his employer lifted the mandatory vaccination policy. So, his disentitlement ends on that date.[29]

Conclusion

[66] The appeal is dismissed.

[67] The Commission has proven that the Appellant was suspended from his job because of misconduct. This means the Appellant is disentitled from receiving EI benefits during the period of his suspension. So, from January 3, 2022, to April 15, 2022.

Catherine Shaw
Member, General Division – Employment Insurance Section

[29] Section 31(a) of the EI Act says that a claimant who is suspended from their job because of misconduct is not entitled to receive benefits until the period of suspension expires.