Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 856

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (567159) dated January 30, 2023 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	April 24, 2023
Hearing participant:	Appellant
Decision date:	May 5, 2023
File number:	GE-23-429

Decision

[1] I am dismissing the appeal with one modification. The Tribunal disagrees with the Appellant.[1] The change is that the Appellant is disentitled from December 6, 2021, until June 30, 2022. Previously the disentitlement did not have an end date.

[2] In this appeal the Canada Employment Insurance Commission (Commission) has proven that the Appellant's employer suspended him because of misconduct. In other words, because he did something that caused him to be suspended from his job.

[3] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his suspension. This is what the Commission decided. In other words, the Commission made the correct decision in his EI claim.

Overview

[4] The employer put the Appellant on an involuntary unpaid leave of absence starting November 2, 2021. The Appellant returned to work on July 1, 2022. He returned to work after the employer suspended its vaccination policy. The Commission is saying the employer put him on leave of absence because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[5] The Commission decided that the Appellant was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission was unable to pay him EI benefits from December 6, 2021.[2]

[6] The Appellant disagrees. He complied with the Transport Canada policy. He argues his employer should be bound by this rather than have their own more stringent policy.

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[1] In my decision, I use "Appellant," rather than the "Claimant." I am doing this because the Appellant is the person who requested the appeal. The Commission uses "Claimant" because the Employment Insurance Act (EI Act) uses the word "claimant," meaning a person who has made a claim for EI benefits.
[2] The suspension from work occurred in November 2021. The disentitlement starts December 6, 2021 as this is the week the Appellant applied for benefits. This determined the start date of the claim as December 5, 2021. Disentitlements are for weekdays only. For this reason, the disentitlement starts on December 6, 2021.

[7] I have to decide whether the Appellant was suspended from his job for misconduct under the EI Act.

Matters I have to consider first

A Case Conference was held

[8] A few outstanding questions needed to be answered prior to the hearing. More specifically, the hearing type and the reason for the late appeal. The Tribunal`s jurisdiction also needed to be discussed. For this reason, a Case Conference was decided as the best method to address these questions. The Case Conference occurred on April 13, 2023, with the Appellant in attendance.

Type of hearing

[9] The Appellant originally requested a hearing by phone.[3] The Appellant then requested on February 13, 2023, to change to an appeal In-Writing. This was discussed during the Case Conference. After providing information on the different types of appeals, the Appellant communicated that a teleconference hearing was his preference.

[10] The Appellant wanted an answer in writing and after being advised that all types involve a written decision, he decided that a teleconference would be his preference. I agreed that this method is preferrable in the Appellant`s case. He has no issues with the technology and this method allows for a more interactive discussion. It also does not remove the Appellant`s right to submit documents similar to an In-Writing hearing.

The Appellant was given more time to file his appeal

[11] In accordance with paragraph 52(1)(a) of the *Department of Employment and Social Development Act* (DESD Act), an Appellant has 30 days to file an appeal. The thirty days is from the time the Commission communicated their decision to the claimant. The Appellant was advised verbally on June 6, 2022, that the decision was maintained. The letter confirming this verbal decision is dated June 8, 2022.

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[3] See GD02 page 3.

[12] The Appellant submitted his request for appeal on February 8, 2023. This is past the 30-day limit. The Appellant had not provided any reason why the appeal was late. This is one reason why the Case Conference was scheduled.

[13] The Appellant stated he was discouraged with the Commission ignoring his arguments. He also recalls being told by the Commission that if new information became available, he may be able to return to the Commission for a new decision.

[14] In December 2022, the Appellant found a new Tribunal decision which he felt closely matched his scenario. It is at this time that he submitted a new request for reconsideration with the Commission.[4] It is following their refusal to reconsider this new information that he filed his appeal with the Tribunal.[5]

[15] I agreed to provide more time to the Appellant. This decision is in the appeal file.[6]

The two Appeal files with the Tribunal were joined into one

[16] The Appellant filed two reconsideration requests with the Commission. Each of these were decided separately. One decision was in June 2022. This was a decision to maintain their original decision. The second decision was a decision not to reconsider their decision as the Appellant had already requested a reconsideration. The Commission denied this request in January 2023 under section 111 of the EI Act.

[17] The Appellant provided both decisions to the Tribunal when requesting his appeal. In response to this, the Tribunal created two appeal files. The reason for two files is that the first one has the employer as a potential party to the appeal.[7] The employer is not a potential added party to the second decision. The fact that the

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[4] See GD03 page 112.
[5] See GD03 page 115. It is a decision dated January 31, 2023. The Commission advised the Appellant that a reconsideration under section 112 had already been completed and it would not reconsider this decision another time.
[6] See GD08.
[7] The employer can be added as an interested party in cases of voluntary leaving or misconduct. An employer can be added if they prove they are an interested party. The first decision is one of those cases.

For the second letter, the employer could not be added as it is a decision not to review. The employer would not be able to be added as an interested party to this second decision.

employer can be a potential added party to only one the two letters necessitated two appeals.

[18] I have decided to join the Appellant`s appeals. This means that I will issue only one decision.

[19] I find that there was no injustice with joining these appeals together. There is one issue at hand. The Appellant was denied benefits following the employer`s mandatory vaccine policy.

[20] The Appellant wants another decision made by the Tribunal to be considered when making its decision. The Tribunal can accept this new Tribunal decision as part of the Appellant`s arguments and it did.[8]

Issue

[21] Was the Appellant`s suspension misconduct under the EI Act?

Analysis

[22] 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.

[23] I have to decide two things. I have to decide why was the Appellant suspended from his job. I then need to decide if this is considered misconduct under the EI Act.

[24] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule.

The reason the Appellant was suspended

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

[8] Section 52 of the *Social Security Tribunal Rules of Procedure* sets out this rule.

[26] The Appellant and the Commission agree that the Appellant was suspended effective November 1, 2021. The reason was non-compliance with the new mandatory vaccine policy. The parties do not agree on the misconduct part. The Appellant argues that he followed the policy issued by Transport Canada. He argues he did not have to follow the X policy. He argues the Transport Canada policy supersedes the policy issued by his employer.

[27] I have no reason to believe any other reason why the Appellant was suspended from his job. There is nothing in the file or in testimony to make me doubt this finding. I acknowledge the Appellant`s disagreement with his employer`s policy. However, this section is to determine the reason the Appellant was no longer employed.

[28] Based on the evidence before me, I find non-compliance with the vaccination policy is the reason the Appellant was placed on unpaid leave.

The reason is misconduct under the law

[29] The Appellant's failure to comply with 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 issues I have to consider when making my decision.

[31] The Commission has to prove it's more likely than not he was suspended from his job because of misconduct, and not for another reason.[9]

[32] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[10] I can't consider whether the

[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] This is what sections 30 and 31 of the EI Act say.

employer's policy is reasonable, or whether a suspension or termination was a reasonable penalty.[11]

[33] The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.[12] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[13] And misconduct also includes conduct that is so reckless that it is almost wilful.[14]

[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 let go because of that.[15]

[35] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[16] I can't decide whether the Appellant was constructively or wrongfully dismissed under employment law. The same goes for a suspension without pay. I can't interpret an employment contract or decide whether an employer breached a collective agreement.[17] I also can't decide whether an employer discriminated against the Appellant or should have accommodated them under human rights law.[18] And I can't decide whether an employer breached the Appellant's privacy or other rights in the employment context, or otherwise.

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[11] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[14] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] 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.
[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[18] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[36] It is important to keep in mind that “misconduct” has a specific meaning for EI purposes that doesn`t necessarily correspond to the word`s everyday usage. It is the legal test which must be met.

What the Commission and the Appellant say

[37] The Commission says that there was misconduct under the EI Act because the evidence shows:

- The employer had a vaccination policy and communicated that policy to all staff.
- Under the vaccination policy, all employees needed to disclose their vaccination status or face leave without pay.
- The Appellant knew what he had to do under the policy.
- He made a conscious and deliberate personal choice not to comply with the policy.

[38] The Appellant says there was no misconduct under the EI Act because of the following:

- The employer should have followed the vaccine policy set out by Transport Canada.
- The Appellant met the exemption requirements under the rules set out by Transport Canada.[19]
- *AL v CEIC* which is a Tribunal decision dated December 14, 2022, should be followed. The Appellant referred to this decision as the GE-22-1889.[20]
- There is no requirement in the collective agreement to become vaccinated. This is a new condition of employment. It was a unilateral change.
- X`s policy violates privacy rights. This is also supported by arbitration decisions.

[19] The Appellant argues that for the Transport Canada policy, a medical certificate is the only requirement. Nothing else.
[20] This decision has since been published. It is available on the Tribunal`s website. The neutral citation there is 2022 SST 1428.

[39] The Appellant testified that he agreed the employer`s policy was distributed to him. He did read it at the time, and he was aware of the consequences for non-compliance.

[40] He testified that he did not submit a medical exemption request via his employer prior to the initiation of the unpaid leave. He says that the reason he did not submit is that it specifically mentioned that incomplete requests would not be considered. The reason this was an issue for the Appellant is that the form included a consent to release private medical information.

[41] The Appellant did submit his medical note after his leave had started. He did so without the form required. The reason being is that this satisfied Transport Canada`s requirement. His employer should have accepted this.

[42] I believe and accept the Appellant’s evidence and the Commission’s evidence. I have no reason to doubt the Appellant’s evidence (what he said to the Commission, wrote in his reconsideration request and appeal notice, and his testimony at the hearing). His evidence is consistent. And there is no evidence that contradicts what he said.

[43] In this case, there is no dispute in the evidence. As a Tribunal member, I must rule on the balance of probabilities. The evidence is clear in this case. The parties agree on the facts. The problem is that that Appellant wants other laws to have been considered but the Tribunal has no jurisdiction on those laws. The other problem is that the Appellant wants the Tribunal to use Transport Canada`s policy rather than his employer`s.

[44] The Appellant argues I should follow *AL v CEIC*. AL worked in a hospital. The hospital suspended then dismissed her because she didn’t comply with its mandatory COVID-19 vaccination policy.

[45] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.[21]

[46] I am not going to follow *AL v CEIC.* This decision goes against the rules the Federal Court has set out in its decisions about misconduct.[22] Our Tribunal does not have the jurisdiction to do so. The Tribunal can not interpret and apply a collective agreement to determine the employer`s rights to implement a mandatory vaccine policy. The recourse available to the Appellant would be a grievance.

[47] Similarly, I don't have the legal authority to interpret and apply an employment contract, privacy laws, human rights laws, international law, the Criminal Code, or other laws. If any of those laws were broken, the recourse available to the Appeal is with the appropriate court or tribunal.

[48] The test that needs to be met is the EI Act. This legal test is what the Tribunal needs to review. The Commission has proven that the Appellant was advised of the policy, knew the consequences of non-compliance and followed through with his non-compliance knowing it could lead to his suspension. His behaviour was wilful. His actions were conscious, deliberate or intentional.

[49] I find the Appellant had no wrongful intent. Nothing in the evidence suggests this. As mentioned above, for there to be misconduct, the test that needs to be met was wilfulness. There is no need to prove wrongful intent.

[50] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[23] So, I can't consider whether his employer's policy or the penalty it applied to him is reasonable or legal under other laws. This includes considering if the COVID vaccination policy is in violation of other laws.

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[21] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. I am bound by Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act.
[22] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[23] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[51] There have also been more recent court cases which support mandatory vaccination policies. In a recent case called *Parmar*,[24] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[52] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[53] Jurisprudence has confirmed the Tribunal's limited jurisdiction as mentioned above. Another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[25] The case started with the Commission then went to the Tribunal's General Division. The Appeal division then upheld the decision. The Federal Court then reviewed the decision. Paragraph 32 has the following:

> [32] 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 – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. 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.

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[24] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[25] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

[54] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws. I have no authority to rule that the employer should have followed Transport Canada`s policy instead of their own.

[55] I agree the Appellant can decline vaccination. In the Appellant`s case, the Appellant testified he did not get vaccinated because of a medical reason. This is his right. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace. The employer has a responsibility to provide a safe workplace.

[56] Based on the evidence, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown that:

- He knew about the vaccination policy, and he knew about his duty to comply with the policy.
- He knew that his employer would suspend him if he didn't comply with the policy.
- He consciously, deliberately, or intentionally made a personal decision not to comply by the deadline.

[57] I understand the Appellant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fairer for the Appellant.[26]

[26] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.

Conclusion

[58] The Commission has proven that the Appellant was suspended from his job for misconduct under the EI Act.

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

[60] So, I am dismissing his appeal with one modification. The disentitlement is now from December 6, 2021, until June 30, 2022. These dates coincide with the Appellant`s unpaid leave.

Marc St-Jules
Member, General Division – Employment Insurance Section