



[TRANSLATION]

Citation: *CS v Canada Employment Insurance Commission*, 2023 SST 1055

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

Decision

Appellant:	C. S.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (538397) dated September 27, 2022 (issued by Service Canada)
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Tribunal member:	Josée Langlois
Type of hearing:	Teleconference
Hearing date:	March 13, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	March 14, 2023
File number:	GE-22-3590

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant stopped working because of misconduct (in other words, because he did something that caused him to lose his job). This means that he is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant works at X. He stopped working on November 12, 2021, because he didn't provide a COVID-19 vaccination attestation as required by the employer's vaccination policy.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant was let go because of misconduct. Because of this, it could not pay him benefits.

[5] The Appellant disagrees with the Commission's decision. He admits that he didn't provide the employer with a COVID-19 vaccination attestation. But, he says that he saw a doctor who prescribed him a leave of absence from work on November 2, 2021. He says that the employer was pressuring him to get vaccinated, while he was advocating free choice. But, he argues that the employer could have waited until November 12, 2021, before sending him the termination letter, since he had until that date to provide a COVID-19 vaccination attestation.

[6] I have to decide whether the Appellant was let go because of misconduct.

¹ Section 30 of the *Employment Insurance Act* (Act) says that a claimant who is dismissed from their job because of misconduct isn't entitled to receive EI benefits.

Issues

[7] Did the Appellant provide the employer with a COVID-19 vaccination attestation as required by the vaccination directive?

[8] If so, do these acts constitute misconduct?

Analysis

[9] To decide whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to decide why the Appellant lost his job. Then, I have to decide whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

Did the Appellant provide the employer with a COVID-19 vaccination attestation as required by the vaccination policy?

[10] I find that the Appellant was let go because he didn't provide the COVID-19 vaccination attestation required by the employer.

[11] The employer indicated on the Record of Employment that the Appellant stopped working because of a suspension or dismissal.

[12] On July 7, 2022, the Appellant told a Commission employee that the employer hadn't provided a reason for his dismissal. The Commission employee then indicated that the Record of Employment and the termination letter had been sent by the employer and that the reason for the dismissal was clear. He had refused to provide a COVID-19 vaccination attestation as required by the directive. The Appellant also says that he was let go because he didn't want to make illegal transactions for the employer. Although this statement was made on July 7, 2022, at the hearing, the Appellant argues that, when he stopped working, he was confused and that his answers weren't consistent.

[13] At the hearing, the Appellant also said that his relationship with his supervisor wasn't always good. Still, he admits that he was let go because he didn't submit a

COVID-19 vaccination attestation, and that the employer was pressuring him to get vaccinated. The Appellant says that he filed a complaint with the CNESST [Quebec's labour standards commission] for prohibited practice and psychological harassment.

[14] The Commission and the Appellant agree on why he stopped working.

[15] I find that the Appellant didn't provide the vaccination attestation required by the employer and that he acted as the employer says he did.

Is the reason for the Appellant's dismissal misconduct under the Act?

[16] A worker who is dismissed because of misconduct isn't entitled to receive EI benefits.²

[17] The reason for the Appellant's dismissal is misconduct under the Act. A worker who is suspended from their job because of misconduct can't receive EI benefits.

[18] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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 Act.⁵

[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 his employer and that there was a real possibility of being let go because of that.⁶

[20] The Commission has to prove that the Appellant stopped working because of misconduct. The Commission has to prove this on a balance of probabilities. This

² Section 30 of the Act.

³ See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

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

⁵ See *Attorney General v Secours*, A-352-94.

⁶ See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant was let go because of misconduct.⁷

[21] A medical report from the CNESST says that the Appellant was off work from November 2, 2021, because of anxiety and depression. The doctor who signed this report indicated discrimination and wrongful dismissal.⁸ The Appellant filed a complaint for prohibited practice and psychological harassment with the CNESST.

[22] The Appellant said to a Commission employee that the employer was pressuring him to get vaccinated while he was advocating free choice. He says that he is entitled to EI and that labour standards have kept his file confirming that the employer committed misconduct. He says that the employer wasn't allowed to let him go while he was on sick leave.

[23] As he said at the hearing, the Appellant told a Commission employee on September 27, 2022, that he hadn't refused to be vaccinated and that he was just thinking about it; he was simply refusing to disclose his vaccination status. He says that he had until November 12, 2021, to provide a vaccination attestation, but the employer immediately let him go while he was on sick leave on November 4, 2021. The Commission employee asked the Appellant if he was vaccinated on November 12, 2021, and the Appellant replied that the question wasn't relevant anymore because he was let go and he didn't want to share personal information about himself. He also said that he doesn't remember if he was vaccinated at the time of his dismissal.

[24] The Appellant says that he is a trained microbiologist and that he has thought about COVID-19 vaccination carefully. He says that the employer is lying and he doesn't understand why his version of events isn't accepted when the employer let him go on November 4, 2021, instead of waiting until November 12, 2021. He says that the COVID-19 vaccination requirement was abusive, since on November 3, 2021, the

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

⁸ GD3-20 and GD3-21.

provincial government indicated that it no longer required health care workers to be vaccinated against COVID-19.

[25] At the hearing, the Appellant admitted that he was told about the employer's vaccination directive and the consequences of not complying. He says that the employer was putting a lot of pressure on him to get vaccinated. The Appellant knew that he would be let go on November 12, 2021, if he didn't provide a COVID-19 vaccination attestation.

[26] On July 7, 2022, the clinic's executive director told a Commission employee that the Appellant had been let go because he refused to comply with the employer's mandatory COVID-19 vaccination directive. He says that the Appellant was warned several times, that he knew he had to submit a COVID-19 vaccination attestation by November 12, 2021, and that, if he didn't, he would be let go. A registered letter was sent to him on October 14, 2021, telling him about the steps to follow.

[27] The director says that, in early November 2021, the Appellant indicated that he didn't want to be vaccinated, and he took sick leave from November 2, 2021. Given that the Appellant had indicated his intention not to be vaccinated, the employer sent a termination letter on November 4, 2021. The employer explains that this letter says the Appellant will be let go as of November 12, 2021, because he refused to submit a COVID-19 vaccination attestation as required by the directive.

[28] The Commission says that the employer is subject to the CNESST's rules to ensure the health and safety of its employees. For this reason, it argues that the employer has the right to adopt rules and directives that circumscribe the employment relationship and that refusing to obey or comply with a directive may constitute misconduct under the Act. Specifically, the Commission says that the Appellant acted deliberately and wilfully when he refused to comply with the employer's vaccination directive and that this act constitutes misconduct.

[29] The Commission also says that the Tribunal doesn't have jurisdiction to decide whether the employer acted fairly or reasonably when it adopted its mandatory vaccination policy.⁹

[30] I agree with the Commission. Because he didn't agree to comply with the employer's vaccination directive, the Appellant was let go. It isn't a matter of whether the Appellant was entitled to consent to the COVID-19 vaccine. But if he didn't, there were consequences, and the Appellant knew it.

[31] My role isn't to determine whether the dismissal was an appropriate measure. A recent decision from the Federal Court of Appeal states that the Tribunal has "an important but narrow and specific role to play in the legal system."¹⁰ This decision also says that the Tribunal doesn't have jurisdiction to rule on the legitimacy or legality of government directives and policies to address the COVID-19 pandemic and that there are other ways for a claimant to challenge these directives and policies. It also states that it is reasonable for the Tribunal not to consider these arguments and that the tribunals won't intervene in Tribunal decisions for this reason.

[32] My role is to determine whether the Appellant committed misconduct under the Act when he refused to comply with the employer's mandatory COVID-19 vaccination policy. I don't have to consider the employer's behaviour to determine whether such a policy is justified. On this point, the Federal Court of Appeal has held that the Tribunal has to focus on the claimant's conduct, not the employer's. There will be misconduct where a **claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.**¹¹

[33] Although I understand the Appellant's explanations about the choice he made or the reasons he didn't want to disclose his vaccination status to his employer, the

⁹ *Paradis v Attorney General of Canada*, 2016 FC 1282 at para 31.

¹⁰ *Cecchetto v Attorney General of Canada*, 2023 FC 102.

¹¹ *Nelson v Attorney General of Canada*, 2019 FCA 222.

employer issued a directive and required employees to provide a COVID-19 vaccination attestation by November 12, 2021. The Appellant didn't.

[34] It is true that the Appellant submitted documents to the Tribunal showing that he saw a doctor on November 2, 2022. But, the medical certificate signed by the doctor doesn't show that he was exempt from receiving the vaccine. If there was a risk to his health, the Appellant could see his doctor and ask his employer for an exemption from providing the COVID-19 attestation for medical reasons.

[35] Also, even though I understand that the Appellant challenged his dismissal before another forum and he argues that the employer should have waited until November 12, 2021, to be sure whether or not he would provide a vaccination attestation, the Appellant indicated at the hearing that he didn't contact the employer again after seeing a doctor on November 2, 2021. The facts show that the employer sent him a termination letter on November 4, 2021, and—as the employer said to the Commission—that dismissal was effective November 12, 2021.

[36] I have read *AL v Canada Employment Insurance Commission*, which the Appellant sent after the hearing.¹² In this case, the employees' collective agreement had been renegotiated to include a mandatory vaccination policy, and this particular case doesn't apply to the Appellant's. I also note that this file was challenged by the Commission before the Tribunal's Appeal Division and that permission to appeal was granted on February 9, 2023.

[37] The employer is responsible for ensuring the health and safety of its employees and may adopt directives or policies to that end. My role isn't to determine whether the dismissal was an appropriate measure or whether the employer should have proposed an alternative to dismissal.¹³ Under the Act, when an employee deliberately violates a directive from their employer, this behaviour gets in the way of carrying out their duties toward their employer.

¹² *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

¹³ *Attorney General of Canada v Marion*, 2002 FCA 185 (CanLII).

[38] It is in this sense that the Appellant breached his duties toward his employer and that he acted wilfully. Even though I am faced with conflicting versions of events, I find the employer's statement that the Appellant told it he didn't intend to get vaccinated reliable and credible when I weigh all the statements on the record. The Appellant said on more than one occasion that he didn't want to disclose his vaccination status and that he also refused to require the Clinic's employees to comply with the employer's COVID-19 vaccination directive, since this practice was, in his view, illegal.

[39] It seems more likely than not to me that the Appellant told his employer that he refused to provide the COVID-19 vaccination attestation before seeing his doctor on November 2, 2021. By not complying with the employer's COVID-19 vaccination directive, the Appellant committed misconduct under the Act. The Appellant knew that he could be let go if he didn't provide a COVID-19 vaccination attestation, and he chose not to do so. This action is wilful.

[40] Also, wrongful intent doesn't have to be proven to find misconduct under the Act. In other words, I don't have to determine whether the Appellant did something wrong.

[41] The Appellant was let go for not following the employer's rules; he refused to comply with the mandatory vaccination directive for all employees. The Appellant's refusal to follow the employer's rules was a breach of his job duties.

[42] The Appellant knew the rules and decided not to follow them. This wilful act constitutes misconduct.

So, did the Appellant lose his job because of misconduct?

[43] The Appellant can't get regular benefits if he was let go after committing misconduct. When an employee doesn't follow their employer's rules, they can assume they will be suspended or let go.

[44] Based on my findings above, I find that the Appellant acted as the employer says he did and that his refusal to comply with the employer's mandatory vaccination policy amounts to misconduct under the Act.

Conclusion

[45] The Commission has proven that the Appellant stopped working because of misconduct. Because of this, the Appellant can't receive EI benefits.

[46] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section