Citation: *MC v Canada Employment Insurance Commission*, 2023 SST 300

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. C.
Respondent:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (467149) dated May 13, 2022 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	Teleconference
Hearing date:	February 2, 2023
Hearing participants: [1]	Appellant Counsel for the Respondent (Dani Grandmaitre) Respondent (Josee Lachance, Senior Program Advisor, ESDC)
Decision date:	March 30, 2023
File number:	GE-22-1993

[1] The Appellant agreed to let two law articling students from the Department of Justice (Canada) observe the hearing. The students didn't participate in the hearing.

Decision

[1] I am dismissing M. C.'s appeal.

[2] The Canada Employment Insurance Commission (Commission) has proven M. C.'s employer suspended him for a reason the *Employment Insurance Act* (EI Act) counts as misconduct. In other words, he did something that caused his suspension.[2]

[3] So under the EI Act he isn't entitled to receive benefits.[3]

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

Overview

[5] At the end of October 2021 M. C. (Appellant) was suspended from his job with Air Canada (employer). He worked as a cargo customer service representative.

[6] The employer says it put him on an unpaid leave of absence because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] The Commission decided the Appellant was suspended from his job for a reason the EI Act considers to be misconduct. So the Commission didn't pay him EI regular benefits.[4]

[8] The Appellant disagrees. He says his employer's conduct caused his non-compliance with the vaccination policy. So his conduct wasn't intentional and doesn't meet the legal test for misconduct.

[9] I have to decide the reason the Appellant was suspended. And whether that reason is misconduct under the EI Act.

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[2] In this decision, suspension, leave of absence, and unpaid leave of absence all mean the same thing.
[3] Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[4] Her employer lifted its COVID vaccination mandate, and the Appellant went back to work. Under section 31(a) of the EI Act, the Appellant's period of disentitlement ended when her suspension ended. These dates are from the Commission's representations, and the Appellant confirmed them at the hearing. See the Commission's representations at GD4-2.

Matters I have to consider first

The Appellant withdrew his *Charter* challenge

[10] In his appeal notice the Appellant makes legal arguments based on the *Canadian Charter of Rights and Freedoms* (*Charter*).

[11] I held a pre-hearing conference on October 28, 2022. I reviewed the Tribunal's decision-making power and its process to hear and decide a *Charter* challenge.[5] I explained to the Appellant if he decided to drop his *Charter* challenge, he could not make *Charter* arguments in this appeal or if he appeals this decision to the Appeal Division.

[12] I gave the Appellant two weeks to consider whether he wanted to go ahead with his *Charter* challenge.[6] The Appellant told the Tribunal he would not go ahead with it.[7]

[13] So I don't have to consider the Appellant's *Charter* (or other constitutional) arguments when I decide this appeal.

Documents sent in after the hearing

[14] The Appellant and the Respondent asked to send in documents after the hearing. They referred to these documents (evidence, Tribunal decisions, and court decisions) during the hearing.

[15] At the end of the hearing we (the Appellant, the Respondent and I) agreed to a schedule for them to send documents to the Tribunal.

[16] I have reviewed and considered the documents they sent.[8]

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[5] "Jurisdiction" is the legal term often used to describe a tribunal's decision-making power, and whether it has power to decide an issue.
[6] The Tribunal sent the Appellant and Respondent a letter summarizing this and the deadline for the Appellant to tell the Tribunal. See GD23.
[7] See GD24.
[8] See GD37 and GD38.

[17] One of the documents the Appellant sent in is about types and signs of abuse.[9]

[18] I will accept all the documents sent in after the hearing. For two reasons: First, I agreed the parties could send these documents. Second, the cases the parties sent in are relevant to the legal issue I have to decide. And the Appellant's types and signs of abuse document is relevant to his argument based on the *Astolfi* case.

Issue

[19] Did the Appellant get suspended from his job for a reason the EI Act says is misconduct?

Analysis

[20] 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.[10]

[21] I have to decide two things.

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

The reason the Appellant was suspended from his job

[22] I find the Appellant's employer suspended him because he didn't follow its vaccination policy.

[23] The Appellant says in his appeal notice he was placed on a "forced unpaid leave of absence".[11]

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[9] See GD37-2 for the Appellant's argument and GD37-35 to GD37-36 for the document, which is a printout from a webpage: Types and Signs of Abuse | DSHS (wa.gov).
[10] Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[11] See his appeal documents at GD2-6.

[24] The Commission says the Appellant's leave of absence without pay counts as a suspension under section 31 of the EI Act.[12]

[25] I have to look at the facts and evidence through the lens of the EI Act. Under the EI Act a “forced unpaid leave of absence” means the same thing as a “suspension”.

[26] So I find the Appellant and the Commission agree that his employer suspended him (in the EI Act sense of that word) for not complying with its vaccination policy.

[27] I have no reason to doubt what the Appellant and his employer said. And there's no evidence that goes against what they said.

The reason is misconduct under the law

[28] The Appellant’s failure to follow his employer’s vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[29] 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 issues I have to look at when making my decision.

[30] The Commission has to prove it is more likely than not the Appellant was suspended from her job for misconduct under the EI Act, and not for another reason.[13]

[31] 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 her conduct is misconduct.[14] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[15] And misconduct also includes conduct that is so reckless that it is almost wilful.[16]

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[12] See the Commission’s submission at GD15-4 and GD15-9.
[13] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[14] See *Attorney General of Canada v Secours*, A-352-94.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *McKay-Eden v His Majesty the Queen*, A-402-96.

[32] There's misconduct if the Appellant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and knew or should have known there was a real possibility of being suspended because of that.[17]

[33] I have to focus on what the Appellant did or did not do, and whether that conduct amounts to misconduct under the EI Act.[18] I can't consider whether the employer's policy is reasonable, or whether a suspension was a reasonable penalty.[19]

[34] Finally, I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[20]

The Cecchetto case

[35] The Federal Court recently released its first EI decision about misconduct where an appellant didn't follow their employer's COVID vaccination policy.[21] In *Cecchetto* the Court confirmed the Tribunal: [22]

- has an "important, but narrow and specific role" in these cases
- has to decide two things: why the appellant was dismissed and whether that reason is "misconduct" under the EI Act

[36] *Cecchetto* also confirms the legal test for misconduct set by earlier Federal Court decisions.[23]

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[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] This is what sections 30 and 31 of the EI Act say.
[19] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[20] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms (Charter)*, 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.
[21] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 (*Cecchetto*).
[22] See *Cecchetto* at paragraphs 46 to 48.
[23] See paragraph 39 in *Cecchetto*, where the Court states the test: There will be misconduct where the appellant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.

[37] Finally, *Cecchetto* says the Tribunal doesn't have the power to rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic.[24] Appellants have other legal options to challenge vaccine mandates and employers' policies.

[38] So I won't consider the Appellant's arguments that his conduct isn't misconduct because:

- COVID vaccines aren't safe or effective and he has better protection from COVID infection and hospitalization because he had already been infected with COVID
- his employer's policy and its decision to force him on an unpaid leave of absence because he didn't follow its vaccination policy go against his collective agreement, the *Canadian Bill of Rights*, Alberta and BC occupational health and safety laws and workers' compensation laws, the *Canada Labour Code*, or the *Canadian Human Rights Act*
- his employer breached the collective agreement in the way it handled his religious exemption request, and violated its own accommodation policy
- his employer had a duty to consult the union before adopting its vaccination policy, and consult the union when it assessed and decided his religious exemption request

[39] The Appellant and his union have filed two grievances. They can raise these arguments in those grievances if they want.

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[24] See *Cecchetto* at paragraph 46, where the Federal Court writes: "… 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."

My reasons for not following the Astolfi *case*

[40] To be misconduct, the Appellant's conduct has to be wilful, meaning conscious, deliberate, or intentional.[25]

[41] The Appellant says his refusal to follow his employer's vaccination policy wasn't intentional. He says I should follow the Federal Court decision in *Astolfi*.[26] That case says the Tribunal can look at an employer's conduct when it decides whether the employee's conduct was intentional.

[42] I don't agree with the Appellant's argument. And I am not going to follow *Astolfi* for the following reasons.

[43] *Astolfi* narrows a general rule in misconduct cases. The general rule says the Tribunal should focus on the employee's conduct, not the employer's conduct.

[44] *Astolfi* says there is an important difference between an employer's conduct:

- **before** the employee's alleged misconduct, and
- **after** the employee's alleged misconduct

[45] The Tribunal should consider whether an employer's conduct **before** led to the employee's alleged misconduct.[27] If it did, the employee's conduct might not be wilful (conscious, deliberate, intentional) or reckless to the point of being wilful.

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[25] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[26] *Astolfi v Canada (Attorney General)*, 2020 FC 30 (*Astolfi*).
[27] See *Astolfi* at paragraph 33. Mr Astolfi didn't go into the office and his employer dismissed him because of that. The Commission said this was misconduct. Mr Astolfi argued he argued his conduct wasn't intentional, because it resulted from something the employer did. His employer **harassed him by** yelling and pounding on the table at a meeting. He says this made it unsafe for him to go to the office. And that's why he didn't go in. So there was no misconduct under the EI Act.

[46] The Appellant says his conduct isn't misconduct because his employer mentally mistreated and emotionally abused him.[28] He says his employer's conduct made him fear his employer and placed him in an impossible situation.[29]

[47] He framed it as a workplace health and safety issue. He was fearful of the side-effects of COVID vaccination his employer was forcing on him. And because of his religious beliefs as a Catholic he believed his metaphysical safety was in jeopardy.

[48] He says he could not follow the vaccination and reporting part of the policy because his employer didn`t fulfill its obligation to:[30]

- follow through on the religious exemption part of the policy
- provide him with any information about vaccine safety, health risks, risk/benefit analysis
- address his religious concerns
- follow health and safety legal requirements under Canadian Labour Law and Provincial Labour Codes and Laws and the employers own Corporate Safety Policy and safety training courses

[49] The facts in this appeal are totally different from the facts in *Astolfi*.

[50] I don't believe his employer harassed him, mentally mistreated him, or emotionally abused him. And I don't believe his employer put his health or safety at risk. There is no credible evidence of that. And he didn't give any evidence that he had signs of mental mistreatment or emotional abuse.

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[28] The webpage the Appellant submitted (Types and Signs of Abuse | DSHS (wa.gov)) says: **Mental mistreatment or emotional abuse** is deliberately causing mental or emotional pain. Examples include intimidation, coercion, ridiculing, harassment, treating an adult like a child, isolating an adult from family, friends, or regular activity, use of silence to control behavior, and yelling or swearing which results in mental distress. The signs of mental mistreatment / emotional abuse are: being emotionally upset or agitated; being extremely withdrawn and non communicative or non responsive; unusual behavior usually attributed to dementia (eg, sucking, biting, ricking), nervousness around certain people, and individual's report of being verbally or mentally mistreated.
[29] See GD36-9 and GD36-10
[30] See GD36-6 and GD36-10.

[51] The opposite is true. The Commission's reconsideration file shows me the Appellant was extremely active, engaged, and communicative in response to his employer's policy and decisions under it. He challenged his employer throughout the fall of 2021. And he challenged the Commission's decision to deny him EI, repeatedly and persistently, on the phone and in writing.

[52] The Appellant raised the mental mistreatment and emotional abuse argument for the first time in the submission he sent right before his hearing. That argument—and the evidence he relies on—doesn't fit with what he said before that.

[53] The employer adopted and followed is vaccination policy. It didn't cause the Appellant's misconduct—his refusal to comply with its vaccination policy.

[54] I find that Appellant intentionally, consciously, and deliberated decided not to follow his employer's vaccination policy. He disagrees with the vaccination policy. He disagrees with the process his employer followed because it didn't consult him enough. He disagrees with mandated vaccination because it was against his religious beliefs and his understanding of constitutional laws. He disagrees with the COVID vaccine because its not safe or effective. And he disagrees with his suspension.

[55] The Appellant`s argument really isn't about anything his employer did or didn't do to him. He is using *Astolfi* to challenge his employer's vaccination policy and decisions it made under it. But *Cecchetto* makes it clear the Tribunal can't consider these challenges.

[56] I appreciate the Appellant was under tremendous stress, and may have felt mental anguish, in October 2021. Given his personal and religious beliefs, he was faced with an incredibly difficult decision. But this doesn't change the fact that nothing his employer did amounted to mental mistreatment, emotional abuse, or harassment. His employer followed its vaccination policy. And the Appellant ultimately made the difficult decision not to comply with it because he believed he shouldn't have to.

The other parts of the legal test for misconduct

[57] I find the Commission has proven the Appellant knew or should have known what he had to do under his employer`s vaccination policy. And I find it has proven the Appellant knew or should have known that he could be suspended if he didn't comply with the vaccination policy.

[58] The Appellant told the Commission his employer advised him in August 2021 he would have to give his employer proof of vaccination, or his employer would place him on an unpaid leave.[31]

[59] The vaccination policy says:[32]

- it applies to all employees
- employees with medical, religious or other reasons based on prohibited ground of discrimination can apply to the employer for accommodation—to be exempted from the policy
- all employees without and approved accommodation must get "fully vaccinated" (which is defined in policy), and report their vaccination status and give proof of vaccination through the employer`s on-line reporting tool by October 30, 2022
- employees who don't get fully vaccinated, report, and give proof are in non-compliance with the policy
- employees who aren't granted an accommodation (exemption) and who are in non-compliance with the policy are prohibited from entering any of the employer`s workplaces, considered unavailable to fulfill their duties, and will be placed on an unpaid leave of absence for 6 months (to April 30), after which their continuing relationship with the employer will be reassessed

[31] See GD3-22.
[32] The policy is at GD3-30 to GD3-34.

[60] On September 8, 2021 the Appellant applied for an exemption from the vaccination policy on religious grounds. His employer denied his application and told him he was in non-compliance with its vaccination policy.[33]

[61] At the hearing, the Appellant testified he knew if he got fully vaccinated his employer would lift his suspension and he could return to work.

[62] I have no reason to doubt the authenticity of the employer`s policy. I accept what the Appellant told the Commission about what the knew and when he knew it. His employer conformed the relevant dates and deadlines in a call with the Commission. The vaccination policy is also consistent with what the Appellant told the Commission. And there is no dispute his employer refused his exemption request.

[63] So based on the facts I have accepted, I find the Appellant knew or should have known he had to be fully vaccinated, and report and give proof to his employer. And he knew or should have known if he didn`t, his employer would suspend him.

The Appellant's other arguments

AL v CEIC

[64] The Appellant argues I should follow *AL v CEIC*, a decision of this Tribunal.

[65] I don't have to follow other decisions of this Tribunal. I can rely on them to guide me where I find them persuasive and helpful.[34]

[66] I am not going to do follow *AL v CEIC*.[35] With the respect owed to my colleague who decided that appeal, I am not persuaded by his findings and the reasoning he

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[33] See the email from his employer (dated October 22, 2021), at GD3-35 and GD3-36. His employer followed up with an email (dated October 30, 2021) placing him on an unpaid leave of absence, at GD3-40 to GD3-45.

[34] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I have to follow 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. I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[35] AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in

relied on to get to those findings. His decision goes against the legal test the Federal Court has set out for misconduct.[36] Our Tribunal does not have the legal authority (in law we call this "jurisdiction") to do two things the Member did in *AL v CEIC:*

- First, he should not have interpreted and applied the collective agreement to find the employer had no authority to mandate that employees get vaccinated against COVID-19.[37]

- Second, he should not have found that the appellant had a right—in the employment context—to refuse to comply with the employer's vaccination policy based on the law of informed consent to medical treatment.[38] In other words, he had no legal authority to add to the collective agreement an absolute right for a worker to choose to ignore the employer's vaccination policy based on a rule imported from a different area of law.

[67] So the Member made two legal errors. And these errors led him to make the wrong decision in *AL v CEIC*.

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that case, the Tribunal member found that AL did not lose her job for a reason the EI Act considers misconduct, for two reasons: First, the collective agreement didn't include COVID-19 vaccination when it was signed, and the employer had not bargained with the union to include one. The Tribunal member reasoned that the employer could unilaterally 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 he found that there was no such legislation in the case. This meant that the employer's mandatory vaccination policy was not an express or implied condition of AL's employment. So AL's refusal to get vaccinated was not misconduct. Second, AL had a "right to bodily integrity". It was her right to choose whether to accept medical treatment—in this case, the COVID-19 vaccine. If her choice went against her employer's policy and led to her dismissal, exercising that right can't be a wrongful act or undesirable conduct worthy of punishment or disqualification under the EI Act. In other words, her refusal to get vaccinated was legally justified so it can't be misconduct under the EI Act.

[36] 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.

[37] Our Tribunal members' legal authority to hear and decide an appeal of the Commission's decision doesn't include interpreting and apply a collective agreement. The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. For example, where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement.

[38] In other words, when deciding whether there was misconduct, he focused on the employment law relationship, the conduct of the employer, and the penalty imposed by the employer. He should have focused on the conduct of the claimant. Once again, if the Appellant (and her union) believes that workers had a right to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

The Appellant's other arguments

[68] The Appellant sent the Tribunal three Tribunal decisions (not counting *AL v CEIC*) and three decisions from the Federal Court (not counting *Astolfi*). I have reviewed these decisions.

[69] I am not bound by earlier decisions of the Tribunal.[39] I have reviewed the decisions the Appellant sent. They don't support his argument that he didn't commit misconduct. In each of those decisions the facts are different from his appeal in legally relevant ways. So I am not going to follow the three Tribunal decisions.

[70] I have considered the Federal Court cases the Appellant sent. I find I don't have to follow their reasons because the facts are different from the Appellant's situation. Or they don't add anything to the legal test for misconduct established in the cases I reviewed above, including *Cecchetto*.[40]

[71] The Appellant also argued the EI *Digest of Benefit Entitlement Principles* (Digest) supports his argument that his refusal to follow his employer's vaccination policy isn't misconduct.[41]

[72] The Digest is the Commission's guide for its staff. It tells staff how to interpret and apply the EI Act when deciding EI claims. But it doesn't bind the Tribunal. So I don't have to follow it. And I am not going to in this case. I do have to follow the relevant Federal Court decisions, and the legal test for misconduct they have established. I have done that in this decision.

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[39] The Appellant sent the Tribunal *TW* v *Canada Employment Insurance Commission*, 2022 SST 345; *KB* v *Canada Employment Insurance Commission*, 2022 SST 673; *SA* v *Canada Employment Insurance Commission,* 2022 SST 693.
[40] The Appellant sent the Tribunal *Canada (Attorney General) v Hastings* 2007 FCA 372; *Canada (Attorney General) v Lee* 2007 FCA 406; and *Canada (Attorney General) v Doucet* 2012 FCA 105.
[41] The Digest is available online: Digest of Benefit Entitlement Principles - Canada.ca. The Appellant refers to section 7.3.2.1 in GD36, and also referred to the Digest at the hearing.

Conclusion

[73] The Commission has proven that the Appellant was suspended from his job for a reason the EI Act considers misconduct.

[74] This means he isn't entitled to receive EI regular benefits.

[75] So I am dismissing his appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section