Citation: *GM v Canada Employment Insurance Commission*, 2023 SST 1298

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (507688) dated August 15, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	In person
Hearing date:	May 17, 2023
Hearing participant:	Appellant
Decision date:	July 4, 2023
File number:	GE-22-4172

Decision

[1] The appeal is denied. I disagree with the Appellant. He is disentitled from receiving benefits because he was suspended from his job for misconduct.

Overview

[2] The Appellant G. M. was separated from his job in March 2022.

[3] His employer introduced a policy that required all employees to receive COVID-19 vaccinations as a condition of their employment unless the employer determined that they required an accommodation due to a medical contraindication, religious beliefs or any other prohibited ground of discrimination.

[4] The Appellant's request for an accommodation was denied, and when he failed to obtain the vaccinations required by the policy he was placed on a leave without pay.

[5] The Commission decided that G. M. had been suspended from his job for intentionally breaching one of his employer's policies. The Commission concluded that this amounted to misconduct and they decided that the Appellant was disentitled from receiving EI benefits for that reason.

[6] The Appellant disputes that he was suspended for misconduct. He says that he was locked out of his job in the course of a labour dispute, and that nothing about his behaviour meets the definition of misconduct.

[7] My job is to decide whether or not the Appellant was suspended, and if so, whether or not he was suspended for misconduct.

Matter I have to consider first

[8] G. M. asked for permission to video record his hearing. He advised that he wanted to have an accurate and complete record of how the hearing was conducted and of what was said during the proceeding.

[9] I considered his request. The Social Security Tribunal follows the open court principle. This principle is an important one in the Canadian justice system and promotes access to court, tribunal and other adjudicative proceedings for the parties, the media and the public. Members of the public and media are permitted to attend at and observe hearings at the Tribunal.

[10] All hearings before the Tribunal are audio-recorded, and that recording forms part of the appeal record.

[11] Neither the *Social Security Regulations*[1] nor the *Social Security Tribunal Rules of Procedure*[2] provide specific direction on whether or not parties, the media or members of the public are permitted to prepare their own personal recordings of a hearing. I am therefore permitted to exercise my own discretion in deciding this request.

[12] I denied G. M.'s request to video-record his hearing. This is consistent with procedures in most other Canadian courts, where recording or broadcasting proceedings is prohibited without advance requests or special permission.

[13] There is no prejudice to the Appellant in denying him his own personal recording of the hearing. He was provided with a copy of the Tribunal's audio-recording of the proceedings for the purposes of having an accurate and complete record of what was said during the proceeding. This will provide him with the desired account of what was said during the proceeding.

[1] S.O.R. 2022-255
[2] S.O.R. 2022-256

Issues

[14] The law says that you can't get EI benefits if you lose your job because of misconduct.[3] This is the case whether you are dismissed from your job or placed on a suspension.[4]

[15] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide three things:

1. First, I have to determine the reason that G. M. was separated from his job.
2. Then, I have to determine the nature of that separation: was the Appellant suspended from his job, or was he locked out by his employer?
3. If I find that the Appellant was suspended, I have to determine whether the *Employment Insurance Act* (the Act) considers that reason to be misconduct.

Analysis

Issue 1 – Why was the Appellant separated from his job?

[16] The Appellant was separated from his job because he did not comply with his employer's COVID-19 vaccination policy.

[17] The Commission and the Appellant agree about the reason for separation.

[18] The Appellant says that he was locked out of his job during a labour dispute with his employer. He says that the dispute arose when he was denied an exemption from the employer's COVID-19 vaccination policy and his employer forced him into an unpaid leave from his job.

[3] See section 30 of the *Act*.
[4] See section 31 of the *Act*.

[19] The Appellant states that the reason he was excluded from his workplace without pay is because he did not receive the vaccines required by his employer's vaccination policy.

[20] The Commission also says that the Appellant was separated from his job because he did not comply with his employer's vaccination policy. It says that the Appellant's employer adopted and communicated a mandatory vaccination policy, the Appellant's employer ultimately determined that he was not in compliance with that policy and the Appellant was prevented from working for failing to comply with that policy.

[21] The Commission states that there is a clear causal link between the Appellant's non-compliance with the policy and his employer separating him from his job.

[22] Both parties agree that G. M. was separated from his job for failing to provide proof that he had received the vaccines his employer's policy required. I see no evidence to the contrary. So I find that this was the reason that he was separated from his job.

Issue 2 – Was the Appellant locked out of his job or suspended from his job?

[23] The Appellant was suspended from his job by his employer.

[24] The Commission decided that G. M. was suspended from his job. It says that when an employee is placed on an "employer-initiated unpaid leave of absence without pay,"[5] that amounts to a suspension.

[25] G. M. denies that he was suspended from his job. He says that the evidence shows that the circumstances of his separation fit the definition of a labour dispute: he was an employee who disagreed with his employer about a condition that had been imposed on his employment.

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[5] GD4

[26] The Appellant argues that these events meet the definition of a labour dispute, and that his employer's decision to force him into an unpaid leave from his job during a labour dispute meets the definition of a lockout, not a suspension.

[27] The Act defines a "labour dispute" as "a dispute between employers and employees, or between employees and employees, that is connected with the employment or non-employment, or the terms or conditions of employment, of any persons."[6]

[28] The Act does not indicate whether a labour dispute can exist between a single employee and their employer, which is the case here.

[29] Although not binding on the Tribunal, the *Digest of Benefit Entitlement Principles* (Digests) can provide guidance.

[30] The Digests confirm that the Act's definition of a labour dispute is broad – any dispute between employers and employees that is related to the terms of employment.[7] However, the Digests also clarify that in order for a disagreement between an employee and an employer to be a labour dispute, the dispute must involve multiple employees: "The very idea of a labour dispute implies that the actions of employees are coordinated, even if only a very limited number of employees, such as those of a single grade or class of workers, are actually involved. This would not be the case for a disagreement between an employer and a single employee, unless this disagreement draws in other employees who support the position taken by the employee."[8]

[31] The Federal Court has also considered this issue, and has confirmed that a labour dispute, "by definition, involves a group"[9]

[32] I find that G. M.'s dispute with his employer about whether or not he needed to comply with the vaccination policy was not a labour dispute.

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[6] Section 2(1) of the Act.
[7] Digest of Benefit Entitlement Principles 8.2.1
[8] Digest of Benefit Entitlement Principles 8.2.3
[9] See *Caron v Canada,* 1989 1 FC 628

[33] The Appellant says that the circumstances and manner in which his employer prevented him from working is consistent with a lockout. He disputed a condition of his employment, he was in the midst of an ongoing disagreement with his employer about this workplace requirement and his employer responded by de-activating his security pass, removing his access to his work computer systems and directing him to return his computer and other employer-owned items.

[34] His employer prevented him from working as a result of the dispute between them. The Appellant says that the "work stoppage" imposed by his employer amounts to a lockout.

[35] Neither the *Act* nor the *Regulations* define the term "lockout."

[36] Once again, however, the Digests can provide some guidance. The Digests clarify that lockouts occur during labour disputes. "Strikes and lockouts are pressure tactics available to employees and employers respectively [during labour disputes]. Alone, they do not constitute a dispute; rather, they are the result of a dispute."[10]

[37] Given my finding that G. M.'s disagreement with his employer did not amount to a labour dispute, I find that the circumstances of the Appellant's separation from his work is more consistent with a suspension than a lockout.[11]

[38] He was suspended from his job.

Issue 3 - Was the Appellant suspended for misconduct?

[39] Having found that the Appellant was suspended from his job by his employer, I now need to determine if the reason for his suspension amounts to misconduct under the Act.

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[10] Digest of Benefit Entitlement Principles 8.2.2.
[11] In the event that I am wrong in my determination that the Appellant was suspended from his job, and in fact he was locked out, I note that he would still have been disentitled to benefits during the period of his alleged "lockout" pursuant to s. 36 of the *Employment Insurance Act*.

[40] I find that the Appellant's refusal to comply with his employer's COVID-19 vaccination requirements is misconduct under the EI Act.

[41] The *Employment Insurance Act* doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's actions amount to misconduct under the Act. The law sets out the legal test for misconduct. In some circumstances, for example, the term "misconduct" refers to the employee's violation of an employment rule.

[42] Where the Commission takes the position that a worker seeking benefits has engaged in misconduct, the Commission bears the burden of proof. It has to prove this on a balance of probabilities. In G. M.'s case, this means that the Commission bears the burden of showing that it is more likely than not that he was suspended because of misconduct.[12]

[43] I have to focus on what G. M. did or didn't do and whether his conduct amounts to misconduct under the EI Act. I can't make my decision based on other laws, like those that might govern the relationship between G. M. and his employer.

[44] I can't decide, for example, whether a worker was wrongfully suspended under employment law: the Federal Court has been clear that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's suspension or dismissal under that policy was justified or reasonable.[13]

[45] Similarly, I am not allowed analyze an employment contract or interpret a collective agreement.[14] I cannot decide whether the employer had a legal duty under labour law to accommodate G. M. The Federal Court has said that workers have other legal avenues to grieve an employer's conduct or to challenge the legality of what the employer did or didn't do.

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[12] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[13] See *Canada (Attorney General) v Marion,* 2002 FCA 185 at paragraph 3
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22

[46] The Tribunal's jurisdiction is limited to the *Employment Insurance Act*. Employment Insurance is an insurance plan. Like other insurance policies, workers looking to collect benefits under this plan need to meet the specified conditions of the plan.[15]

[47] The Tribunal's role is to determine whether a worker – the person seeking payment of benefits under the insurance policy – meets the required conditions. So, I must focus on G. M.'s behaviour and actions, and whether those behaviours meet or fail to meet the conditions of the policy.[16]

[48] Case law says that to be misconduct, an Appellant's behaviour has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[17]

[49] The Appellant doesn't have to have wrongful intent. G. M. doesn't have to mean to do something illegal, dangerous or wrong for me to determine that his conduct is misconduct.[18]

[50] The case law also says that there is misconduct if the Appellant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended or let go because of that.[19]

[51] The Appellant and the Commission largely agree about the chronology of the events that led up to G. M.'s separation from his job. I have reviewed the record (including the Appellant's written statements and attachments, the contents of the Commission's file and the evidence G. M. gave at his hearing) and here is what I find the evidence shows:

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[15] See *Pannu v. Canada (Attorney General)* 2004 FCA 90
[16] See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *Attorney General of Canada v Secours*, A-352-94.
[19] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

1. The employer implemented a COVID-19 policy and communicated that policy to all affected staff (including the Appellant).

2. The policy said that all employees needed to attest to having received a full series of COVID vaccines unless they were granted an accommodation due to a certified medical contraindication, religion or any other prohibited ground of discrimination.[20]

3. The policy provided that managers were responsible for making decisions about whether or not the employer had a duty to grant an employee's request for accommodation.[21]

4. The policy applied to all employees regardless of whether they worked onsite, remotely or telework.[22]

5. The policy said that employees who did not comply with the policy would be placed on administrative Leave Without Pay and have their access to the workplace restricted.[23]

6. The Appellant requested an accommodation and provided his employer with a sworn affidavit attesting to his sincerely held religious belief that prohibited him from receiving COVID-19 vaccines.[24]

7. The employer communicated to G. M. that his accommodation request had been denied.[25]

8. The Appellant disagreed with this decision by his employer but was told that the decision was final.[26]

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[20] GD3-22, GD3-26
[21] GD3-25
[22] GD3-28
[23] GD3-29
[24] GD9-66
[25] GD9-80
[26] GD9-104

9. G. M. was advised in writing that if he did not comply with the policy by March 11, 2022 he would be placed on administrative Leave Without Pay.[27]

10. March 11, 2022 was the last day that the Appellant worked.[28]

[52] The Commission says that this evidence shows that the Appellant engaged in misconduct: he knowingly refused to follow his employer's policy regarding COVID-19 vaccinations and he knew that if he did not follow the policy there was a real chance that he would be placed on leave.

[53] He chose not to comply with the policy anyway.

[54] The Commission says that this meets the definition of misconduct under the *Employment Insurance Act*.

[55] The Appellant says that the Commission has not met its burden of proof in showing that his behaviours amount to misconduct.

[56] The Appellant raised a number of concerns about what he says are inadequacies and inaccuracies in the Commission's investigation into his claim. The Appellant says that the Commission failed in its duty to fairly and impartially investigate and weigh the evidence available to it. He says that the law requires that the Commission engage in a thorough and fair fact-finding exercise before determining that a claimant seeking benefits engaged in misconduct.

[57] The Appellant gave the following evidence of the Commission's failure to fully and fairly investigate his claim:

1. He says that the Commission colluded with his employer to improperly amend his Record of Employment after the investigation into his application for benefits was already underway.[29]

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[27] GD9-80
[28] GD3-6
[29] GD3-17 and GD3-19

2. He says that the benefits officer who asked him questions about his reason for separation failed to contact the employer for clarification or context before making his determination.

3. The Appellant says that the benefits officer omitted information from his notes purporting to document conversations with G. M.

4. G. M. also says that the benefits officer refused to accept relevant documentation from him (namely a copy of his sworn affidavit and information about the grievance that he had filed).

5. The Appellant says that the benefits officer inaccurately documented his conversations with him, incorrectly noted that he refused to discuss the reasons for his non-vaccination and fabricated him having said things that he did not say about medical testing on fetuses.

[58] The Appellant says that all of these things show that the Commission did not fulfill its duty to act in good faith towards him as a claimant. He says that given this unfair process, the Commission considered his application in bad faith and cannot be said to have met its burden of proof.

[59] The Appellant also says that even on the record that was before the Commission, the evidence does not support a finding that he "knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."[30]

[60] G. M. says that the vaccination requirements in the policy did not form part of his collective agreement. He says that the policy should not be considered an implied condition of employment because it had not been negotiated as part of the collective agreement.[31]

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[30] See *Mishibinijima*, above
[31] The Appellant directed me to another decision of the Tribunal, *AL v CEIC* (SST file GE-22-1889, December 14, 2022) in support of this argument.

[61] The Appellant also argues that the employer's policy amounts to coercion and violates his right to medical consent.[32]

[62] Finally, the Appellant argues that he worked remotely and that his failure to abide by the employer's policy did not impair his ability to perform the duties of his job. He also says that he did everything he could, in good faith, to try and resolve the dispute with his employer and so he could not have expected to be separated from his job in those circumstances.

[63] He argues that his good faith behaviours cannot be characterized as misconduct.

I find that the Commission has proven misconduct.

[64] Based on the evidence, I find that the Commission has proven that G. M.'s behaviour amounted to misconduct. The evidence shows that he:

1. knew about the vaccination policy;
2. knew that he could be placed on an involuntary leave from his job if he didn't follow the policy;[33]
3. knew that if his religious accommodation request was denied he would be in breach of the policy;[34]
4. made an intentional and personal decision not to get the vaccines; and
5. was suspended from his job because he didn't comply with the vaccine policy.

[65] With respect to the Appellant's submissions that the Commission did not seek out – and therefore could not have had – all of the relevant information at the time that they made their determination, I have considered all of the Appellant's allegations of improper amendments and inaccurate records.

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[32] The Appellant directed me to the cases of *Hopp v Lepp* [1980] 2 S.C.R. 192 and *Malette v. Shulman* [1990] O.J. No. 450 in support of this position.
[33] GD3-28 and GD3-29
[34] GD9-104

[66] Even if I were to accept all of the Appellant's allegations as true, I find that the Commission has met its evidentiary burden. The Appellant knowingly engaged in behaviour that he ought reasonably to have known would cause him to be separated from his job.

[67] As I explained above, I do not have the jurisdiction to decide if the employer's policy was fair or reasonable. I do not have the authority to make determinations under the *Canada Labour Code* or to assess whether the employer ought to have accommodated the employee. I am limited to interpreting and applying the *Employment Insurance Act*. I can't make my decision based on other laws.

[68] The courts have said that employees who believe that they have been wrongfully suspended from their job or discriminated against by their employer have other options available to them and can pursue actions against their employer in other forums. Unionized employees have the right to file grievances. Workers can file complaints with the provincial or federal Human Rights Commissions or bring civil actions for wrongful dismissal.

[69] These solutions penalize the employer's behaviour rather than having taxpayers pay for the employer's actions through the Employment Insurance regime.[35]

[70] I also find that the cases of *Hopp v Lepp* and *Malette v. Shulman* have no application to this situation. Both of these decisions involve patients who were subjected to medical procedures without sufficient – or any - informed consent. The courts found that they were subjected to medical battery.

[71] G. M. was not forcibly subjected to any medical procedure. He was given the choice whether or not to undergo a medical procedure (COVID-19 vaccination) and made an informed decision not to receive the vaccines. His medical autonomy was not violated.

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[35] See *Canada (Attorney General) v. McNamara*, 2007 FCA 107

[72] I am also not persuaded by the Tribunal's decision in *AL v. CEIC*. I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them helpful but am not required to adopt their reasoning or findings.

[73] I disagree with my colleague's analysis and application of the law in *AL v. CEIC.* When the Appellant's employer implemented its COVID-19 vaccination policy as a requirement for all of its employees, this policy became an express condition of G. M.'s employment. And the law is clear that a deliberate violation of an employer's policy can be considered misconduct within the meaning of the law.[36]

[74] In *Cecchetto v. Canada*, the Federal Court recently confirmed that the Tribunal is not permitted to assess the legitimacy or scientific validity of an employer's policy or to determine whether the sanction imposed by the employer under that policy was appropriate.[37] It is limited to determining whether or not the policy was violated, and if the circumstances of that violation amount to misconduct.

[75] In *Cecchetto*, a worker appealing his EI denial before the Federal Court raised a number of similar arguments to G. M. He too had been separated from his employment for refusing to receive COVID-19 vaccines.

[76] Like G. M., he argued that the policy at his workplace violated his right to bodily integrity, discriminated against workers who held certain beliefs and was not proven to be scientifically safe or effective.

[77] His application for benefits had been denied by the Commission and that denial was upheld by the Tribunal. He sought a judicial review of the Tribunal's decision at the Federal Court.

[78] The Federal Court confirmed that the Tribunal was only permitted to consider and apply the *Employment Insurance Act*.

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[36] *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460

[37] *Cecchetto v. Canada (Attorney General)* 2023 FC 102 at paragraph 48

> [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 [Tribunal] 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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> [47] The SST-GD, 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." That is exactly what they did, and the Applicant has not put forward any legal or factual argument that persuades me that the Appeal Division's decision is unreasonable.[38]

[79] I have applied the EI Act and case law to the employee's actions to determine if he meets the required conditions for a claim under this insurance regime, as I am required to do.

[80] In this context, I find that the Appellant's conscious decision not to comply with his employer's clear vaccination policy meets the definition of misconduct.

Conclusion

[81] The appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section

[38] See *Cecchetto v. Canada (Attorney General)* 2023 FC 102