Citation: *ZH v Canada Employment Insurance Commission*, 2023 SST 1122

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (547625) dated October 28, 2022 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	May 4, 2023
Hearing participant:	Appellant
Decision date:	May 23, 2023
File number:	GE-22-3934

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose/be suspended from her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from and then lost her job. The Appellant's employer says that she was suspended and then let go because she went against its vaccination policy: she didn't have an exemption and she didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy is not misconduct. The Appellant feels that she has genuinely held religious beliefs that prevent her from being vaccinated. The employer unilaterally added a new term to her contract. She has the right to bodily autonomy. She feels her employer should have accommodated her. She feels that she should be entitled to receive EI benefits.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Matter I have to consider first

The Appellant had links in her submissions

[6] The Appellant's submissions had website links. I explained to the Appellant that I had reviewed all of her documents but that we don't follow links. I told the Appellant that

[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

she could explain anything she wanted to that was contained in the links. The Appellant said she understood.

Issue

[7] Did the Appellant lose her job because of misconduct?

Analysis

[8] 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.[2]

[9] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

[10] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[11] The Appellant worked as a nurse and was subject to an order of the Provincial Health Officer (PHO) that required those in certain health settings to be vaccinated.

[12] The Appellant says that she was first put on a leave of absence for three weeks because of this, and then let go. The Appellant said that because of her religion she didn't want to get vaccinated. The Appellant says that she followed her employer's policy and tried to get a religious exemption. The policy says that exemption requests had to be submitted to the PHO on medical grounds. The PHO denied her exemption. The Appellant feels that her employer discriminated against her by refusing to give her a religious exemption. The Appellant doesn't feel it is misconduct for not following the policy. The Appellant feels that she has the right to bodily autonomy. The employer had no right to institute a mandatory immunization policy. The Appellant feels that her employer

[2] See sections 30 and 31 of the Act.

unilaterally added a new term to her contract. The Appellant feels that her employer should have accommodated her. The Appellant feels she should be entitled to benefits.

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

[13] The reason for the Appellant's dismissal is misconduct under the law.

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

[15] Case law says that, to be misconduct, 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, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[5]

[16] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[6]

[17] The law doesn't say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[8]

[18] The Commission has to prove that the Appellant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.[9]

[19] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[11] He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[21] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[12]

[22] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[13]

[23] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[14] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

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[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[15]

[24] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[16] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.[17]

[25] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[26] There is also a very recent Federal Court decision, *Cecchetto*,[18] where the Tribunal denied benefits to the appellant because he did not follow his employer's vaccination policy. The Court found that the Tribunal's role was narrow and was to consider "misconduct" under the EI Act.

What the Commission and the Appellant say

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

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

- the employer had a vaccination policy

[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the employer sent letters to the Appellant several times to communicate what it expected
- the Appellant knew or should have known what would happen if she didn't follow the policy

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

- the employer's vaccination policy was unfair/went against the law
- her employer should have offered an accommodation
- she has the right to bodily autonomy and immunizations can't be mandatory
- the Appellant hadn't thought that she could lose her job if she didn't get vaccinated

[30] In August 2021, the employer began to communicate about a COVID-19 vaccination policy. On September 24, 2021, the employer released its policy that said the Appellant had to start getting vaccinated by October 26, 2021.[19]

[31] The employer's vaccination policy says that "all staff must comply with the requirements set out in the PHO order and outlined in this policy".[20] The Appellant doesn't dispute that the policy, and PHO order, applied to her because she is a nurse and works in a healthcare setting.

[32] The policy required that staff must have received a first dose of the vaccine by October 25, 2021. If a staff member doesn't comply with any "required preventative measures, that individual is not permitted to work. The Staff member shall be placed on

[19] See GD3-60.
[20] See GD3-47.

leave without pay and may be subject to discipline or other employment consequences, up to and including termination".[21]

[33] On October 15, 2021, the employer sent the Appellant a letter that reiterated its expectations about being vaccinated. The letter recognized that "everyone has the right to make their own, personal decisions about vaccination. However, it's important to recognize that, by choosing to remain unvaccinated or partially vaccinated, members of our workforce will experience significant impacts".[22]

[34] The Appellant says that her last day worked was October 15, 2021. She says that she went on a sick leave after that.

[35] The employer says attempts to contact the Appellant were unsuccessful. The employer says that they tried to contact the Appellant on October 28, 2021 and November 12, 2021.[23]

[36] The employer sent the Appellant a letter on October 29, 2021.[24] The letter says that because the Appellant doesn't have any COVID-19 vaccinations and therefore she has been placed on an unpaid leave of absence effective October 26, 2021. The letter advises that "if you remain unvaccinated on November 15, 2021, your employment with [employer] will be terminated for non-compliance with the PHO's Order and due to your inability to work in your position".[25]

[37] On November 17, 2021, the employer sent the Appellant another letter. This letter says that the employer's records show that the Appellant is still unvaccinated. The letter says that the Appellant's employment with the employer is terminated effective immediately.[26]

[38] The Appellant doesn't dispute receiving these letters.

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[21] See GD3-49.
[22] See GD3-45.
[23] See GD3-60.
[24] See GD3-66.
[25] See GD3-67.
[26] See GD3-68.

Medical or other exemption

[39] The Appellant was aware that her employer required that if she didn't get vaccinated, she had to get an exemption to remain employed.[27] The Appellant submitted a request for a religious-based exemption to the PHO. On October 22, 2021, the PHO refused the Appellant's exemption request.[28] The PHO said it was only accepting medical-based exemption requests.

[40] The Appellant testified about her genuinely held religious beliefs about vaccinations. I accept that the Appellant is refusing to have the COVID-19 vaccine due to her religious beliefs.

[41] The Appellant agreed that she didn't have an exemption under her employer's mandatory policy. There is no evidence to the contrary so I accept that the Appellant's testimony on these points.

Breach of contract

[42] The Appellant says that her employer violated her the employment contract by implementing a vaccination policy unilaterally. As noted above, in *McNamara*, *Paradis* and *Mishibinijima,*[29] these Court cases make it clear that the focus must be on what an appellant has or has not done.

[43] Recently, the Federal Court decided *Cecchetto*.[30] In that case, the Tribunal (both the General and Appeal division) had denied the appellant's appeal for benefits because he did not follow his employer's vaccination policy. The Federal Court found that the Tribunal has a "narrow and specific role to play in the legal system".[31] In that case it was to decide why the appellant had been dismissed and if it was "misconduct" under the EI Act.

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[27] See GD3-50.
[28] See GD3-33.
[29] See paragraphs 26 to 30 of this decision above.
[30] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[31] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraphs 46 and 47.

[44] The Federal Court also made it clear that a claimant may not be satisfied with the Employment Insurance scheme, but "there are ways in which his claims can properly be advanced under the legal system".[32]

[45] This means there are other avenues open to appellants if they do not feel that their employer was acting within their employment contract. For that reason, I don't have the authority to decide the merits, legitimacy or legality of her employer's vaccination policy. That means I am not going to decide whether the employer breached a term in the contract as that is outside of my authority.

[46] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[33] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

[47] The Appellant argues that misconduct did not arise because she performed all of the duties required of her under the terms of her employment agreement. She says that non-compliance with the vaccination policy didn't prevent her from carrying out her duties and didn't impact her ability to perform them.

[48] The Appellant entered into an employment relationship in September, 2011. It is noted that this was before the pandemic. This means that the employer wouldn't have COVID-19 pandemic policies in place.

[49] The Appellant agreed that when she was hired, she agreed to follow all employer policies, not just those she agreed with.

[50] An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[34]

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[32] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 49.
[33] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[34] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.

[51] *Cecchetto* also makes it clear than an employer may unilaterally introduce a vaccination policy without an employee's consent.[35]

Charter and Human Rights

[52] The Appellant feels that the employer's policy went against several pieces of legislation. The Appellant feels that her employer's policy is an infringement of her *Canadian Charter of Rights and Freedoms* (Charter) and Human Rights legislation. The Appellant believes that her employer's policy infringes her right to bodily autonomy.

[53] In Canada, there are a number of laws that protect an individual's rights. The Charter is one of these laws. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[54] These laws are enforced by different courts and tribunals. This Tribunal can consider whether a section of the Employment Insurance Act (or its regulations) infringes the rights that are guaranteed by the Charter.

[55] It is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter or human rights legislation. The Appellant would need to go to a different court or tribunal to address those types of issues.

Breach of collective agreement and AL v. Canada Employment Insurance Commission[36]

[56] The Appellant says her employer violated the collective agreement by implementing a policy unilaterally. She says her collective agreement doesn't have anything about a requirement to take or not take vaccines. The Appellant says she filed a grievance with her union, but as of the date of the hearing she had not heard about the result of that action.

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[35] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[36] *AL* v *Canada Employment Insurance Commission*, 2022 SST 1428.

[57] The Appellant raised a recent decision from the Social Security Tribunal where the applicant was granted benefits because the employer was not allowed to unilaterally change a work contract.[37] This is *A.L.* v. *Canada Employment Insurance Commission*.

[58] In that case, A.L. worked in a hospital's administration and was ultimately dismissed for failing to follow her employer's mandatory COVID-19 vaccination policy.

[59] The Tribunal Member found that A.L. did not lose her job because of her own misconduct. It was found that there was a collective agreement that the employer and employees were bound by. The Tribunal Member found that, absent specific legislation requiring a term, the employer was not entitled to unilaterally impose a new condition of employment as it was against the collective agreement. The reasoning was that because there was no legislation requiring mandatory vaccination that it was improper to unilaterally impose this new term.

[60] As a result, it was found that A.L. did not breach any duty owed to the employer by choosing not to be vaccinated as there was no legislation requiring a mandatory COVID-19 vaccination policy. It was noted that the collective agreement considered whether vaccinations other than the COVID-19 vaccination were mandatory. The Tribunal Member found that other vaccinations were contemplated in the collective agreement and were not mandatory. The Tribunal Member reasoned that the COVID-19 vaccinations should follow the same process as other vaccinations set out in the collective agreement.

[61] Additionally, the Tribunal Member found that A.L. had a right to choose whether or not to have a medical treatment. That choice was seen as a "right". The Tribunal Member found that even if the choice (the action) was contrary to an employer's policy it was found that it could not be considered misconduct under the EI Act.[38]

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[37] See GD6-11.
[38] See *A.L.* v. *Canada Employment Insurance Commission* at paragraphs 76, 79 and 80.

[62] I am not bound by this decision, or other Tribunal decisions.[39] I can choose to adopt their reasoning if I find them to be persuasive or helpful. I will not be adopting the reasoning in that case for the reasons that follow.

[63] In the case before me, the Appellant did not submit her collective agreement. But she testified that there aren't vaccination requirements in the agreement. This does not seem to be the same as the case the Appellant was referring to. This is one of the ways that it can be distinguished from *A.L.* v. *Canada Employment Insurance Commission*.

[64] However, my reasons for not following *A.L.* v. *Canada Employment Insurance Commission* go beyond the factual similarities or differences. One of the reasons for not following that decision is that it is contrary to other court decisions. As noted above, in *McNamara*, *Paradis, Mishibinijima and Cecchetto*[40] these Court cases make it clear that the focus must be on what an appellant has, or has not, done.

[65] The Appellant says that her employer violated the collective agreement by implementing a policy unilaterally. This is a similar argument to the Tribunal Member's finding that an employer cannot put in place any new conditions (absent legislation requiring it) unless an employee explicitly or implicitly agrees to it. Yet, as indicated above, other Courts and Tribunals have considered this very issue and have found differently.

[66] There are other avenues open to an appellant if they do not feel that the employer was acting within an agreement. For that reason, although I find that the Appellant's situation can be distinguished from the one in *A.L.* v. *Canada Employment Insurance Commission*, I am not going to decide whether the employer breached a term in the collective agreement as that is outside of my authority.[41]

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[39] It should also be noted that this case is under appeal.
[40] See paragraphs 20 to 26 of this decision above.
[41] The Federal Court of Canada in *Cecchetto v Canada (Attorney General)*, 2023 FC 102, has upheld the principle that the Tribunal must look at why an appellant has been dismissed and if it is "misconduct" under the EI Act.

[67] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[42] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

[68] The Appellant says her employer changing conditions of her employment and collective agreement is unreasonable. But I don't find this means that the employer could not create and implement a policy to address an unprecedented pandemic. Again, the Appellant can go to another court or tribunal if she thinks her employer has violated her collective agreement.

Unknown Social Security Tribunal case submitted

[69] The Appellant also submitted another Social Security Tribunal case.[43] This case is missing it's style of cause. It is therefore not possible to know if the case has been overturned or not.

[70] In this case, it is about an employee who didn't follow the PHO order. But the facts are quite different because the member in that case found that the employer didn't have a vaccination policy.[44] That isn't the case here. The employer had their own policy and the Appellant agreed that there is policy.[45]

Elements of misconduct?

[71] I find that the Commission has proven that there was misconduct for the reasons that follow.

[72] There is no dispute that the employer had a vaccination policy. The Appellant knew about the vaccination policy. I find that the Appellant made her own choice not to get vaccinated. This means that the Appellant's choice to not get vaccinated (or disclose her status) was conscious, deliberate and intentional.

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[42] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[43] See GD2.
[44] See GD6-9.
[45] See GD3-47.

[73] The Appellant didn't have an exemption. Without an exemption the Appellant's employer made it clear that an unvaccinated employee would be placed on an unpaid leave of absence and then be dismissed.[46]

[74] The employer's policy requires all employees to either have an exemption or get vaccinated. The Appellant didn't get vaccinated and had no exemption. This means that she was not in compliance with her employer's policy. That means that she could not go to work to carry out her duties owed to her employer. This is misconduct.

[75] The Appellant agreed that she was aware that by not getting vaccinated (or having an exemption) that she would be placed on an unpaid leave of absence. The Appellant also agreed that she knew if she continued to remain unvaccinated after she was on the unpaid leave of absence for three weeks that she would be dismissed. This means that the Appellant knew there was real possibility that she could be placed on an unpaid leave of absence (a suspension) and then face dismissal.

[76] By not getting vaccinated, or by not getting an exemption, the misconduct, led to the Appellant losing her employment.

[77] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Appellant knew that by not following the policy that she would not be permitted to be at work. This means that she could not carry out her duties to her employer. The Appellant was also aware that there was a real possibility that she could be let go for this reason.

Employment insurance benefits

[78] The Appellant also believes that because she has paid into employment insurance (EI) for years that she should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find

[46] See GD3-51; GD3-67 and GD3-68.

themselves unemployed and unable to find another job. I do not find that this applies in this situation.[47]

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

[79] Based on my findings above, I find that the Appellant lost her job because of misconduct.

[80] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

[81] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[82] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section

[47] See *Pannu* v *Canada (Attorney General)*, 2004 FCA 90, at paragraph 3.