Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 102

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. M.
Representative:	Christopher Hall
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (555064) dated December 9, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	July 11, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	July 21, 2023
File number:	GE-23-193

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits because she lost her job due to her own misconduct[1].

Overview

[3] The Appellant worked as a hospital administrator and was employed by X (the employer).

[4] In September 2021, the employer instituted a mandatory Covid-19 vaccination policy that required all employees to be fully vaccinated by October 22, 2021 (the policy). Only those with a valid medical exemption or an exemption under the Ontario *Human Rights Code* could be accommodated with rapid testing. Those who were unvaccinated (or failed to provide proof of vaccination) and did not have an approved exemption by the deadline would face discipline up to and including termination.

[5] The Appellant did not want to comply with the policy by being vaccinated. But she did not have an approved medical or *Human Rights Code* exemption.

[6] On September 30, 2021, she wrote a letter to the employer explaining that she did not want to get vaccinated for medical and religious reasons[2]. She asked to be accommodated with remote work and/or rapid testing, social distancing, and the use of personal protective equipment (PPE) in the workplace. The employer declined her accommodation request.

[7] In October 2021, the Appellant went off work on an approved sick leave due to stress and anxiety caused by the policy[3].

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[1] That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.
[2] A copy of the Appellant's September 30, 2021 correspondence is at GD3-34 to GD3-35.
[3] See GD2-7.

[8] Her doctor cleared her to return to work on May 6, 2022, but she was unwilling to bring herself into compliance with the policy by getting vaccinated. She still did not have a medical exemption from her doctor, and the employer had already refused to accommodate her decision not to get vaccinated. On May 11, 2022, she was terminated for non-compliance with the policy[4].

[9] The Appellant applied for EI benefits. The Respondent (Commission) decided she was disqualified from EI benefits because she lost her job due to her own misconduct. The Appellant asked the Commission to reconsider. She said she had valid medical reasons for not complying with the policy and that the employer should have accommodated her. She also said she's contributed to the EI program and should be entitled to benefits.

[10] The Commission maintained the disqualification on her claim, and the Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[11] I have to decide whether the Appellant lost her job due to her own misconduct[5]. To do this, I must look at the reason for her termination, and then determine if the conduct that caused her job loss is conduct the law considers to be "misconduct" for purposes of EI benefits.

[12] The Commission says the Appellant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with the policy. She knew she could face discipline up to and including termination by making this choice – and that's what happened. The Commission says these facts prove the Appellant lost her job due to her own misconduct, which means she cannot receive EI benefits.

[13] The Appellant disagrees. She says she made a personal choice not to be vaccinated. She argues she was an exemplary employee, was wrongfully dismissed, and should not be punished with a denial of EI benefits because she exercised her right

[4] A copy of the May 11, 2022 termination letter is at GD7.
[5] That is, misconduct a**s the term is used for purposes of EI benefits**. See Issue 2 below.

to bodily autonomy and followed her religious beliefs. She also says she has paid into the EI program and should receive financial support.

[14] I agree with the Commission. These are my reasons.

Issue

[15] Did the Appellant lose her job due to her own misconduct?

Analysis

[16] To answer this question, I need to decide two things. First, I must determine why the Appellant was dismissed from her job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Appellant dismissed from her job?

[17] The Appellant was dismissed from her job because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[18] The employer's evidence, as set out in the termination letter[6], is as follows:

- The policy was revised on September 3, 2021[7].
- The policy gave employees until October 21, 2021 to provide proof they were fully vaccinated against Covid-19.
- There was a process for employees to request accommodation for a valid medical or *Human Rights Code* exemption. If an accommodation request did not meet the requirements for exemption to the policy, the employee was expected to comply with the mandatory vaccination requirement.

[6] At GD7-2 to GD7-4.
[7] A copy of the policy is at GD3-22 to GD3-25.

- Failure to comply with the policy could result in discipline up to and including termination of employment.

- The employer subsequently decided that it would terminate the employment of any employee who was not fully vaccinated by October 21, 2021, unless the employee had an approved medical or *Human Rights Code* exemption.

- The Appellant was required to comply with the policy.

- The Appellant did not provide proof of vaccination or obtain an approved exemption.

- The Appellant attended a meeting with the employer on May 11, 2022. At that meeting, she confirmed that she understood she was required to be fully vaccinated to return to work and that her employment would be terminated if she did not comply with the policy. She advised the employer that she remained unvaccinated and did not have an exemption. The employer told her it would be proceeding with termination of her employment due to non-compliance with the policy.

- The Appellant was terminated on May 12, 2022.

[19] The Appellant does not dispute any of this.

[20] In her application for EI benefits the Appellant said she was dismissed because she failed to follow the policy after her sick leave (GD3-9). She told the Commission she was dismissed from her employment after her sick leave ended because she was non-compliant with the policy (GD3-21). She also said she was aware of the policy and understood that non-compliance with the policy would result in termination. In her Request for Reconsideration, she said the employer terminated her because of the policy (GD3-27). In her reconsideration interview (GD3-30), she said that after she was cleared to return from sick leave, the employer gave her the opportunity to comply with the policy and told her that if she failed to do so her employment would be terminated.

She told the employer she would not get vaccinated, and the employer terminated her immediately.

[21] All of these statements are consistent with the Appellant's testimony at the hearing.

[22] The evidence shows the Appellant was dismissed from her employment because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

Issue 2: Is the reason for the Appellant's dismissal misconduct under the law?

[23] Yes, the reason for the Appellant's dismissal is misconduct for purposes of EI benefits.

[24] To be misconduct under the law, the conduct that led to the separation from employment has to be wilful. This means the conduct was conscious, deliberate, or intentional[8]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[9] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[25] The Appellant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct under the law[10].

[26] There is misconduct if the Appellant knew or ***ought to have known*** her conduct could get in the way of carrying out her duties towards the employer and there was a real possibility of being terminated because of it[11].

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[8] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[9] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[10] See *Attorney General of Canada v. Secours*, A-352-94.
[11] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[27] The Commission has to prove the Appellant was dismissed from her job due to misconduct[12]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

[28] The Appellant told the Commission that she did not want to get vaccinated because of medical concerns. She asked to be accommodated with an exemption to the mandatory vaccination requirement, but the employer dismissed her instead.

[29] At the hearing, the Appellant testified that:

- She had been rapid-testing and "working hybrid" (2 days remotely at home, and 3 days at the hospital with rapid testing) prior to the policy deadline for vaccination.
- This was as per her "leader's direction". She had permission to work from home full-time if necessary, as she had done successfully during the pandemic shut downs.
- She could have continued working in this hybrid way, but the employer made a decision that it would be mandatory for all employees to get vaccinated or be terminated.
- She received the policy communications from the employer.
- She has a prior medical condition that makes her uneasy about taking a Covid-19 vaccine. The vaccines were developed very quickly, they were "untested", and no one knew what the potential risks of the vaccines might be "even 10 years down the road".
- She had serious concerns about the safety of the vaccines, especially in light of her medical history.

[12] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost her job because of misconduct.

- She didn't make a "rash decision". She really thought about the risks and benefits of vaccination for herself personally, and made the decision not to get vaccinated.

- She also had religious concerns about the vaccines, and human rights objections about being forced to get vaccinated in order to continue doing her job.

- The policy said that the consequences of not getting vaccinated were discipline up to and including termination.

- She understood that if she didn't get vaccinated or have an approved exemption by the policy deadline it could lead to termination[13].

- But she hoped the employer would accommodate her medical concerns without an official exemption from a doctor because she had a proven record of performing her duties successfully from home and by rapid testing in the hybrid work model.

- She wanted to work. She was willing to work from home and do rapid testing.

- She did everything she could to "make it work" given her concerns about the Covid-19 vaccines.

- She was a loyal, dedicated worker for 14 years and should not have been forced to get vaccinated or lose her job.

- She knows of other employees who were laid off without pay. But that option wasn't "presented" to her.

- She doesn't understand why the employer was so "strict" about termination in her case, especially when she worked in an administrative role and was not a front line worker.

[13] This statement is at 29:34 of the recording of the hearing and again at 52:22.

- She had her own office and worked on her own. All of her meetings were on Zoom. The employer could have allowed her to continue working in this way without requiring her to get vaccinated.

- The loss of her job had nothing to do with her ability to do her job.

[30] The Appellant's legal representative submitted that the Appellant was an exemplary employee for over 14 years and was wrongfully terminated. He said the employer violated the Appellant's rights, did not apply the policy reasonably, and failed to provide her with appropriate accommodations. He also said the policy's implementation and enforcement were unreasonable and failed to consider individual circumstances. In the Appellant's case, her medical history gave rise to genuine concerns about the potential risks associated with the Covid-19 vaccines. She sought an exemption based on her individual human rights, her medical status and her creed, along with reasonable accommodations. In denying her accommodation requests, the employer disregarded its legal obligations under the Ontario *Human Rights Code*. She had worked remotely during the pandemic and the employer could have accommodated her request to continue doing so, or to undergo rapid testing, without incurring undue hardship.

[31] The Appellant's legal representative also submitted that Directive 6, which was the impetus for the policy, was no longer in force (as of March 2022). Nonetheless, the employer persisted with the policy despite evolving scientific evidence that the Covid-19 vaccines were not effective against the omicron variant. The policy wasn't "orchestrated" properly. It should have been there to help employees who wanted to keep working, not to force them to get vaccinated. There was nothing in the Appellant's employment agreement requiring her to get vaccinated.

[32] Finally, the Appellant's legal representative submitted that the conduct that led to the loss of her employment was not wilful because the employer "didn't open up an avenue for her to continue" working[14] - her only choices were either get vaccinated or

[14] This statement is at 18:24 of the recording of the hearing.

be terminated. But there was another route (apart from vaccination) for her to continue working: she had been working remotely without a problem and could have continued to undergo rapid testing. Everyone has the right to choose whether to be vaccinated. The Appellant had valid medical reasons for not getting vaccinated. Even though she did not have an official exemption from her doctor, her conduct should not be considered a wilful because she had valid medical reasons for not complying with the policy. If she had been allowed to rapid test or work from home (or a hybrid of these things), she would never have stopped working. The Appellant became unemployed not because of her own misconduct "but because of the misconduct of her employer"[15] and the lack of progressive discipline afforded to her.

[33] I have no doubt the Appellant was an exemplary employee.

[34] And I acknowledge her disappointment at not receiving EI benefits.

[35] The Appellant appears to think that a finding of "misconduct" requires her to have done something "wrong" in connection with the performance of her duties or her conduct in the workplace. But as I explained at the start of the hearing, the term "misconduct" for purposes of EI benefits does not necessarily mean that a claimant did something "wrong". And it does not have the same meaning for EI benefits as it does in other employment contexts, such as discipline and grievance proceedings or labour arbitrations. The term "misconduct" in the EI context simply means that a claimant engaged in wilful (deliberate, intentional) conduct that they knew or ought to have known could cause them to be separated from their employment.

[36] The Appellant's legal representative urged me to "consider" that there was no reason to terminate employment the Appellant's employment, that her refusal to comply with the policy wasn't wilful because she had valid medical and religious reasons not to be vaccinated, and that there were accommodations which would have allowed the Appellant to continue working.

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[15] This statement is at 35:05 of the recording of the hearing.

[37] But these considerations do **not** address the test for misconduct for purposes of EI benefits.

[38] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accommodated the Appellant by allowing her to work remotely or with rapid testing, or whether the penalty of being terminated was too severe[16].

[39] Nor does the Tribunal have legal authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions made under the EI Act[17].

[40] The Tribunal must focus on the conduct that caused ***the Appellant*** to be dismissed and decide if it constitutes misconduct under the EI Act.

[41] I have already found that the conduct which led to the Appellant's dismissal was her failure to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[42] The evidence from the employer and the Appellant, together with her testimony at the hearing, allows me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it.

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[16] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

[17] 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. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant 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 Claimant isn't.

b) her failure to comply with the policy was intentional – she made a deliberate personal decision not to be vaccinated. This made her failure to comply with the policy wilful.

c) she knew her failure to provide proof of vaccination could cause her to be dismissed from her job[18].

d) her failure to comply with the policy was the direct cause of her dismissal.

[43] **This** is the test for misconduct under the EI Act, and the Appellant's conduct meets the test.

[44] The employer has the right to set policies for workplace health and safety. The Appellant had the right to refuse to comply with the policy. By choosing not to be vaccinated and provide proof of vaccination, she made a personal decision that led to foreseeable consequences for her employment.

[45] This Tribunal's Appeal Division has repeatedly confirmed it doesn't matter if a claimant's personal decision is based on religious beliefs or medical concerns or another personal reason. The act of deliberately choosing not to comply with a

[18] The Appellant testified that she knew that termination was a possibility, but she hoped the employer would accommodate her decision not to get vaccinated. This is not an exculpatory argument for 2 reasons.

First, the legal test says there will be misconduct if the Appellant knew ***or ought to have known*** that non-compliance with the policy could cause her to be separated from her employment. I have no hesitation in finding that the Appellant ***ought to have known.*** The policy itself said she could be terminated. It was also apparent from the virtual meeting between the employer and the Appellant after she was cleared to return to work from sick leave that the employer intended to apply the policy and she needed to comply or she would not be permitted to return to work. She chose to stop working rather than comply with the policy. The fact that she hoped the employer would make an exception for her does not diminish the information communicated by the employer, namely that she had to get vaccinated or she would not be allowed to work.

Second, it didn't make a difference to the Appellant's conduct. At the May 11, 2022 meeting with the employer, when it was clear she would not be allowed to return to work if she didn't comply with the policy, she still refused to get vaccinated (see the Appellant's statements at GD3-30 and the termination letter at GD7-3).

workplace Covid-19 health and safety policy is considered wilful and will be misconduct for purposes of EI benefits[19].

[46] The Appeal Division decisions are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[20]. And I cannot ignore a recent decision from the Federal Court in *Cecchetto* that affirmed this principle **in the specific context of a mandatory Covid-19 vaccination policy**[21].

[47] I therefore find that the Appellant's wilful failure to provide proof of vaccination in accordance with the policy constitutes misconduct under the EI Act.

[48] The Appellant's recourse for her complaints about the policy and/or the employer's actions in connection with the cessation of her employment is to pursue these claims in court or before another tribunal that deals with such matters. She remains free to make these arguments before the appropriate adjudicative bodies and seek relief there.

[49] However, none of her arguments about what the employer did or didn't do change the fact that the Commission has proven on a balance of probabilities that she was terminated because of conduct that constitutes misconduct under the EI Act.

[50] And this means she is disqualified from receiving EI benefits.

[51] The Appellant's legal representative referred me to an arbitration decision in a labour grievance brought by employees who were terminated and recalled to work based on evidence the Covid-19 vaccines were not effective against the omicron variation[22]. He also referred me to another arbitration decision where the arbitrator

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[19] There are now many cases where the Appeal Division has confirmed this. For a small sampling of these cases, see: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.
[20] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.
[21] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.
[22] The citation is at 2022 CanLii 52913

ruled that remote work and other non-invasive measures were adequate to address the risk of Covid-19 transmission in the workplace. He says both cases support the argument that there was no reason for termination of employment when the Appellant's hybrid work practices were previously accepted and successful.

[52] These decisions are not binding on me and I do not find them to be persuasive or helpful. This is because they go against binding caselaw from the Federal court about what constitutes misconduct for purposes of the EI Act, which I have discussed above.

[53] Here, as in *Cecchetto*[23], the only issues are whether the Appellant was terminated for failing to comply with her employer's vaccination policy and, if so, whether that failure was deliberate and foreseeably likely to result in her dismissal. The answer to all these questions is yes.

[54] By making a deliberate choice not to get vaccinated as required by the policy, the Appellant was dismissed from her employment because of conduct that is considered misconduct under the EI Act.

[55] And this means she cannot be paid EI benefits on her claim.

Conclusion

[56] The Commission has proven the Appellant was terminated from her employment because of her own misconduct[24]. This means she is disqualified from EI benefits.

[57] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

[23] Cited in paragraph 46 above.
[24] That is, misconduct **as the term is used for purposes of EI benefits.**