Citation: *SL v Canada Employment Insurance Commission*, 2023 SST 1167

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (536123) dated October 17, 2022 (issued by Service Canada)

Tribunal member:	Jean Yves Bastien
Type of hearing:	Teleconference
Hearing date:	May 4, 2023
Hearing participant:	Appellant
Decision date:	May 24, 2023
File number:	GE-22-3836

Decision

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

[2] The Canada Employment Insurance Commission (the Commission) has proven that the Appellant was suspended because of misconduct (in other words, because he did something that caused him to lose his job). [1] This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits from April 25, 2022, to July 18, 2022.[2]

Overview

[3] The Appellant was suspended from his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.[3]

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the unpaid leave of absence. The Commission decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits for the period April 25, 2022, to July 18, 2022.

[6] The Appellant disputes that he was suspended. He says that he was put on a mandatory, unpaid, leave of absence.

[7] The Appellant argues that there was no misconduct because as his collective agreement did not require vaccination against COVID-19.

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[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See page GD3-31.
[3] In this decision, a suspension means the same thing as a leave of absence without pay.

Issue

[8] Was the Appellant suspended from work because of misconduct?

Analysis

[9] 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.[4]

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

Why did the Appellant lose his job?

[11] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[12] The Appellant says that he had been complying with all of his employer's COVID policies such as wearing a mask, reducing contact with clients, and doing rapid COVID tests twice a week instead of attesting to his vaccination status. But the employer`s policy changed in early 2022, and employees were required to provide proof that they were fully vaccinated.

[13] The Appellant found this change in policy to be coercive. He deliberately refused to disclose his vaccination status. He said was unwilling to do this because he believes that his personal medical information is private.[5]

[14] The Appellant's employer issued a record of employment (ROE) saying the reason for issuing it was a leave of absence. The Commission notified the Appellant that it couldn't pay him EI benefits because he was suspended from his job because of his misconduct.

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[4] See sections 30 and 31 of the Act.
[5] See page GD4-1.

[15] Section 31 of the *Employment Insurance Act* (EI Act) deals with suspension for misconduct. The Appellant says that he was never suspended by his employer, he was only put on a mandatory, unpaid, leave of absence. The Appellant makes a good observation, but it is not relevant. The Appellant had no choice over being put on the leave of absence. He wasn't asked, or paid, and he didn't go to work. The Appellant suffered an involuntary, temporary period where he was not able to go to work. The employer and the Appellant describe what took place as a leave of absence, which is fine. But the EI Act uses the word "suspension" to describe this situation. I will also use suspension to refer to the Appellant's situation, to be in line with the EI Act.

[16] The Commission says that the Appellant was suspended effective February 1, 2022, for refusing to comply with his employer's mandatory COVID-19 policy.

[17] As discussed above, the Appellant doesn't dispute that he refused to disclose his vaccination status and, as a result, suffered an involuntary, temporary period where he was not able to go to work. He characterizes this as a "leave of absence", but the EI Act defines it as a suspension.

[18] I agree with the Commission. I find that the Appellant was suspended because he deliberately chose not to reveal his vaccination status to his employer, contrary to the employer's COVID-19 policy.

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

[19] The reason for the Appellant's suspension is misconduct under the law. The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's suspension 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.

[20] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[8]

[21] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended because of that.[9]

[22] The Commission has to prove that the Appellant was suspended because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from his job because of misconduct.[10]

[23] The Appellant testified that he was "put on leave for not getting a medical procedure that was not a condition of his employment nor was it a requirement under the Canada Labour Code."

[24] The Appellant refers to his collective agreement. The Appellant testified that he does not have any type of disciplinary action on his record. He testified that he asked his employer and his union for proof of any "misconduct" on his company record, and none could be provided. The Appellant says, "Therefore since the company has not disciplined me for any misconduct, I was forcefully [sic] put on leave without cause which means I should be entitled to EI benefits as I was wrongly put on leave."[11]

[25] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully suspended or whether the employer should have

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[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[11] See page GD2-4.

made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[12] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[26] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[13] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[27] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[28] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[14] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal

[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[14] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[15]

[29] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[16] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[17]

[30] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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

- The employer had a vaccination policy.
- The employer clearly notified the Appellant about its expectations about telling them whether he had been vaccinated.
- The employer sent emails to the Appellant several times to communicate what it expected.
- The Appellant knew or should have known what would happen if he didn't follow the policy.

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

[32] The Appellant says that there was no misconduct because:[18]

- He was forced on leave without cause by his employer. He says that his employer forcefully put him on leave for not getting a medical procedure that was not a condition of his employment.
- The employer's vaccination policy went against his collective agreement and was not a requirement of the Canada Labour Code.
- He had no record of misconduct in his company personnel record. He was not disciplined by his employer for misconduct. Therefore, he was put on leave of absence without cause "which means I should be entitled to EI benefits as I was wrongfully put on leave."

[33] I understand that the Appellant feels wronged by his employer. However, as discussed above, the Tribunal does not have the power to consider the employer's actions and policies. If the Appellant wants to pursue these issues, as noted above that is "a matter for another venue".[19]

[34] The employer's vaccination policy said that by February 1, 2022, all employees had to be vaccinated and boosted (2 separate inoculations).

[35] The Appellant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The Appellant says that, on the following dates, the employer told him about the requirements and the consequences of not following them:[20]

- In September 2021, the company sent out a notification by email saying that if employees were not vaccinated before the end of January 2022 that they could be put on a leave of absence, terminated, or placed on some other sort of administrative leave.

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[18] See page GD2-4, Notice of Appeal.
[19] A.L. v Canada Employment Insurance Commission 2022 SST 1428
[20] See pages GD3-20, GD3-26

- The employer said then that failure to comply would result in disciplinary action.

- There were a number of subsequent notifications sent out during the fall of 2021.

- In October 2021 the employer said that employees who were not vaccinated could take rapid COVID tests a couple of times a week instead.

- There were consequences for employees who were not vaccinated and who didn't want to do the rapid COVID tests. The Appellant testified that he was aware of a few workers who were "terminated" because of their refusal to do these tests.

- A final notification was sent out by email about a month before the end-January 2022, deadline.

- The Appellant confirmed that the new policy required him have both vaccines (COVID-19 plus a booster) by February 1, 2022.

- The Appellant said that he had to abide by the new (COVID) policy by February 1, 2022. He stated that if he did not abide by the policy, he would be put on administrative leave until May 1, 2022, and then terminated.

[36] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said all employees had to be vaccinated with both the COVID-19 vaccine and a booster ("double" or "fully vaccinated") by February 1, 2022. The Appellant told the Commission the details of the employer's policy and doesn't dispute that there was a policy. Therefore, I find that the employer had a COVID-19 policy.

- The employer clearly told the Appellant about what it expected of its employees in terms of telling it whether they had been vaccinated. The Appellant testified to this and explained how the employer's policy changed

as COVID-19 measures and policy developed. The Appellant doesn't dispute this. He was well aware of the employer's policy, especially as it changed over time. Therefore, I find that the employer clearly notified its employees of its expectations.

- The employer sent emails to the Appellant several times to communicate what it expected. The Appellant doesn't dispute this. He provided the details and dates of these emails. Therefore, I find that the employer clearly continued to communicate with all of its employees, including the Appellant.

- The Appellant knew the consequence of not following the employer's vaccination policy. He testified that he was made aware of the consequences of not complying a number of times. The Appellant testified that he was aware of people who lost their jobs at the company earlier because they would not do the bi-weekly COVID-19 rapid tests. Therefore, I find that the Appellant was aware of the consequences of going against his employer's vaccination policy.

- The Appellant **willfully** went against the employer's vaccination policy. The Appellant told the Commission that he was unwilling to disclose his vaccination status.[21] The Appellant testified that he had followed the employer's policy as it developed throughout the fall of 2022. He gladly wore a mask, limited contact with clients and did COVID-19 rapid testing twice a week. He said that he attended a mandatory vaccine education course. However, he drew the line and refused when the employer's policy required actual vaccination. The Appellant testified that he made a conscious decision not to attest, and later prove, his vaccination status as it was none of his employer's business.

[21] See pages GD3-18, GD3-20

- The Appellant has repeatedly said that he deliberately refused to say whether or not he had been vaccinated or not. The Appellant does not dispute this. Therefore, I can only find that the Appellant's non-compliance with this employer's COVID-19 policy was willful.

So, was the Appellant suspended because of misconduct?

[37] Based on my findings above, I find that the Appellant was suspended because of misconduct.

[38] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to say whether he had been vaccinated was likely to cause him to be suspended.

Conclusion

[39] The Commission has proven that the Appellant was suspended because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[40] This means that the appeal is dismissed.

Jean Yves Bastien
Member, General Division – Employment Insurance Section