



Citation: *RS v Canada Employment Insurance Commission*, 2023 SST 1223

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: R. S.

Respondent: Canada Employment Insurance Commission

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

Tribunal member: Glenn Betteridge

Type of hearing: In person

Hearing date: August 10, 2023

Hearing participant: Appellant

Decision date: August 31, 2023

File number: GE-23-1265

Decision

[1] R. S. is the Appellant in this appeal. I am dismissing his appeal.

[2] He didn't follow his employer's mandatory COVID-19 vaccination policy. And his employer suspended and dismissed him because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven that he was suspended then lost his job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, he did something that caused him to be suspended and to lose his job.

[4] This means he can't get Employment Insurance (EI) benefits.¹

Overview

[5] The Appellant lost his job working as a pilot for a Canadian passenger airline (employer). His employer suspended him from November 2 through November 30, 2021. Then it terminated his employment effective December 1, 2021.

[6] His employer said it suspended him and terminated his employment because he didn't comply with its mandatory COVID-19 vaccination policy (vaccination policy).

[7] The Commission accepted the employer's reason for the suspension and termination. It decided the Appellant was suspended then lost his job for a reason that counts as misconduct under the EI Act.² So the Commission didn't pay him EI regular benefits.

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.

² In its representations (GD4), the Commission clarified the decisions in made in the Appellant's claim for EI benefits. It says, "... claimant was first suspended before being terminated for the same issue. Therefore, there should have been a disentitlement for the period of the suspension under section 31 of the Act from November 8, 2021, followed by the indefinite disqualification to regular benefits under section 30(1) from November 28, 2021, instead of from November 7, 2021." At the hearing the Appellant acknowledged and agreed that these were the decisions he was appealing.

[8] The Appellant doesn't agree. He says his employer fired him for defending his rights, which his employer deemed non-compliance. His employer didn't fulfill its responsibility to accommodate his religious beliefs. His employer breached his collective agreement. He is entitled to EI benefits because he paid into the program, and he was fired by no fault of his own.

[9] I have to decide the reason the Appellant's employer suspended him and terminated his employment, and whether that reason is misconduct under the EI Act.

Matter I have to consider first

Documents sent to the Tribunal after the hearing

[10] At the hearing, the Appellant said his union entered into a letter of understanding (LOU) with his employer about its vaccination policy. He said it was relevant to his legal argument that the vaccination policy was a new condition of employment. So he didn't have to follow it.

[11] I said he could refer to the LOU during the hearing and send it to the Tribunal after the hearing. And he did.³

[12] The Tribunal sent it to the Commission and gave it an opportunity to respond.

[13] I will accept the LOU the Appellant sent to the Tribunal after the hearing, for three reasons:

- I gave him the opportunity to send it in
- it is relevant to an argument the Appellant is making about a legal issue I have to decide (whether his conduct was wilful)
- it would not be unfair to the Commission because the Commission had an opportunity to respond

³ The LOU is RGD5.

[14] So I will consider the LOU when I make my decision.

Issue

[15] I have to decide whether the Appellant was suspended and dismissed from his job for a reason the EI Act considers misconduct.

Analysis

[16] 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

[17] I have to decide two things:

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

The reason the Appellant was suspended and lost his job

[18] I find the Appellant's employer suspended then dismissed him because he didn't comply with its vaccination policy.

[19] The Appellant testified at the hearing his employer suspended and dismissed him for asking for insisting on informed consent for COVID vaccination. And for challenging the employer's legal right to demand his private medical information. He says similar things in his EI application, where he writes, "It is against the law to punish a person who is defending their rights."⁵

[20] The Commission says the employer suspended then dismissed the Appellant because he didn't give proof of COVID vaccination. He was required to do this under the employer's vaccination policy, based on the federal mandate for airlines. The

⁴ See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

⁵ See GD3-9, GD3-10, and GD3-12.

Commission's evidence includes its call with the employer, the employer's vaccination policy, and the employer's correspondence with the Appellant.⁶

[21] I accept the Commission's evidence that the employer suspended and dismissed the Appellant for not complying with his employer's vaccination policy. I prefer the Commission's evidence to the Appellant's evidence for four reasons.

[22] First, the Appellant doesn't offer any supporting evidence for the reason he gave for losing his job. And without any evidence to support it, I find the reason he says he was suspended and dismissed is part of his legal argument—not a fact.

[23] Second, most of the Commission's evidence comes from documents from the Appellant or his employer. I have no reason to doubt these documents are real and true. They are detailed and clearly state the reason the Appellant was suspended and dismissed. And these documents are consistent with one another and support what the employer told the Commission.

[24] Third, the reason the employer gave flows directly from its vaccination policy and makes sense in the circumstances. The employer published its policy. Warned the Appellant. Suspended the Appellant and warned him continued non-compliance would result in termination of his employment. Then it terminated his employment for cause because he didn't comply with its vaccination policy.

[25] Fourth, there is nothing in the correspondence between the employer and the Appellant that shows me his employer was retaliating against him. The employer's correspondence has a professional tone. The employer did what it said it would do. It followed its own policy and process.

⁶ The following evidence supports what the Commission says about the reason: Commission's notes of it call with the employer (GD3-24); vaccination policy (GD3-35 through GD3-39); employer's mandatory vaccination update and declaration required (GD3-45 and GD3-46); emails between the Appellant and human resources (GD3-47 through GD3-53; GD3-55 through GD3-62; GD3-65 through GD3-73; GD3-85 through GD3-89); employer "failure to declare" email to Appellant (GD3-54); suspension letter (GD3-62 to GD3-64); Appellant's request for accommodation and employer's response (GD3-73 through GD3-80; GD3-83 and GD3-84); termination letter (GD3-94 through GD3-96).

[26] So based on the evidence I have accepted, I find the reason the employer suspended the Appellant then terminated his employment was because he didn't follow its vaccination policy.

The reason is misconduct under the law

[27] The Appellant's refusal to follow his employer's vaccination policy is misconduct under the EI Act.

– What misconduct means under the EI Act

[28] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the legal questions I have to consider when I make my decision.

[29] The Commission has to prove that it's more likely than not the Appellant lost his job because of misconduct.⁷

[30] I have to focus on what the Appellant did or didn't do, and whether his conduct amounts to misconduct under the EI Act.⁸ As a general rule, I have to focus on the employee's conduct, not the employer's conduct. However, the Tribunal can consider an employer's conduct before the alleged misconduct if the **employer's conduct caused or contributed to** the misconduct. This is important when considering whether the employee's conduct was intentional.⁹

[31] But I can't consider whether his employer adoption of the policy was reasonable, whether the policy itself was reasonable, or whether suspension and dismissal were reasonable penalties.¹⁰

[32] The Appellant doesn't have to have wrongful intent. In other words, he didn't have to mean to do something wrong for me to decide his conduct is misconduct.¹¹ To

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88 (FCA).

⁸ This is what sections 30 and 31 of the EI Act say.

⁹ See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Attorney General of Canada v Secours*, A-352-94 (FCA).

be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.¹² And misconduct also includes conduct that is so reckless that it's almost wilful.¹³

[33] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being suspended and let go because of that.¹⁴

[34] I can only decide whether there was misconduct under the EI Act.¹⁵ I can't make my decision based on other laws. This includes human rights laws, labour law and collective agreements, and employment law about wrongful dismissal.

[35] The Federal Court recently released its first decision in a case where a person was refused EI benefits for misconduct where they didn't comply with their employer's COVID vaccination policy.¹⁶ In the Cecchetto decision, the Court confirmed the "important, but narrow and specific role" of the Tribunal. The Tribunal has to decide two things: why the appellant was dismissed and whether that reason is "misconduct" under the EI Act.¹⁷

[36] The Federal Court then said the Tribunal doesn't have the legal power to assess or rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic. So the Tribunal doesn't have to deal with these arguments. And the courts will not interfere with Tribunal decisions where they don't.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96 (FCA).

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.

¹⁶ See [Cecchetto v Canada \(Attorney General\), 2023 FC 102](#) (Cecchetto).

¹⁷ See paragraphs 46 to 48 in Cecchetto.

[37] Finally, the Federal Court confirmed that an EI appeal to the Social Security Tribunal isn't the proper way to challenge their employer's policy and conduct.¹⁸ It said people in the Appellant's situation have other legal options to do that.

– **What the Commission and the Appellant say**

[38] The Commission says the Appellant was suspended and dismissed because of his own misconduct.¹⁹ He willfully refused to comply with his employer's vaccination policy. And there is a clear causal link between his refusal, and his suspension and dismissal. His employer communicated a clear vaccination policy to employees. He was aware that his refusal to comply with that policy would cause a loss of employment. And application of the policy was reasonable because it involved public airline travel during a pandemic.

[39] The Commission says he willfully refused to comply with the vaccination policy because he didn't agree with it. So he jeopardized his ongoing employment.

[40] Finally, the Commission says the Commission and the Tribunal can't consider whether the employer acted fairly or reasonably by adopting its vaccination policy.

[41] The Appellant says refusing to comply with his employer's vaccination policy isn't misconduct.²⁰ His employer mistreated and harmed him when it fired him. It didn't fulfill its responsibility. He was suspended and his employment was terminated by no fault of his own.

[42] The Appellant says his conduct wasn't wilful. He didn't believe his employer would terminate him when it did because he was still pursuing a religious

¹⁸ The Federal Court says in Cecchetto at paragraph 46: "... it is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It isn't unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate." Then the Federal Court pointed out (at paragraph 50) there are other types of legal cases, under laws other than the EI Act, appellants can use to challenge COVID vaccination policies and mandates.

¹⁹ See the Commission's legal arguments in its representations at GD4-3 through GD4-7.

²⁰ I have summarized the Appellant's position and arguments from his appeal document (GD2), documents he sent to Tribunal before the hearing (GD6, 7, 8, 9, 13, 14, and RGD2), his testimony at the hearing, and the document he sent in after the hearing (RGD5).

accommodation (exemption from the policy). He thought it would be approved. He was entitled to an accommodation based on his religious beliefs. His employer had no right to question his religious beliefs. Or to say his reasons for refusing to get vaccinated were secular. The vaccination policy went against his religious beliefs, because COVID vaccines were developed from abortions. And he must follow the word of God, not man. So his refusal to follow the vaccination policy wasn't reckless, negligent, or careless.

[43] Finally, he says he is entitled to EI benefits because he paid for them and his employer fired him for no fault of his own. He worked diligently for 25 years. He paid all his taxes. He has never been in trouble with the law. So he is fully entitled to his share of the benefits Canada provides to its citizens. The Commission didn't deal with his EI claim fairly or reasonably. And that goes against the Common Law. So restitution must be administered to him immediately because he was harmed by his employer and harmed by Service Canada (the Commission) for many months.

– **The Commission has proven misconduct under the EI Act**

[44] The Commission has proven the Appellant's refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

[45] The Appellant and the Commission agree on the essential facts in this appeal—except for one. The Appellant argues his refusal to follow his employer's vaccination policy wasn't wilful or reckless to the point of being wilful.

[46] I accept the Appellant's evidence about the other essential facts the Commission has to prove to show his conduct was misconduct. I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his documents, and said at the hearing) about the vaccination policy, his request for a religious exemption, his suspension, and his dismissal. His evidence is consistent. He said the same thing to the Commission and the Tribunal. And his story about what he did, what his employer did, and what he knew at what point in time stayed essentially the same over time. And his evidence is supported by the documents his employer sent to the Commission.

[47] I accept the Commission's evidence because it's consistent with the Appellant's evidence. What the employer said to the Commission, its policy, and what it wrote in its letters to the Appellant and its termination letter is consistent. It matches the Appellant's evidence about what took place. And there is no evidence that goes against the Commission's evidence.

[48] Based on the evidence I have accepted, I find that the Commission has proven:

- the employer had a vaccination policy²¹
- under that policy the Appellant had to be fully vaccinated and give proof to his employer by October 31, 2021, or he would be subject to discipline up to and including termination of employment for cause²²
- the Appellant knew these things because his employer told him in writing in the vaccination policy, update email, and suspension letter²³
- the Appellant requested an accommodation on religious grounds, but his employer told him in writing his request was declined²⁴
- the Appellant didn't comply with the vaccination policy
- because of this, his employer suspended him and then terminated his employment for cause²⁵

[49] I don't accept the Appellant's arguments that his conduct wasn't wilful or reckless, so his conduct doesn't count as misconduct. Based on the evidence I have accepted, I find **he knew or should have known** his employer would suspend and then

²¹ See the vaccination policy (GD3-35 through GD3-39).

²² See section 2 of the vaccination policy, at GD3-37.

²³ See employer's mandatory vaccination update and declaration required (GD3-45 and GD3-46); employer "failure to declare" email to Appellant (GD3-54); suspension letter (GD3-62 to GD3-64); termination letter (GD3-94 through GD3-96).

²⁴ See the Appellant's request for accommodation (GD3-73 through GD3-80) and his employer's response (GD3-83 and GD3-84).

²⁵ See the suspension letter (GD3-62 to GD3-64) and the termination letter (GD3-94 through GD3-96).

terminate his employment if he didn't follow its vaccination policy. His employer clearly communicated what would happen if he didn't comply—in its policy, in its suspension letter, and in its termination letter. So I find he **consciously, deliberately, and intentionally refused to comply** with the vaccination policy because he didn't agree with it, and he didn't agree that it should apply to him.

[50] My finding is supported by the emails and legal notices the Appellant sent to his employer.²⁶ The confrontational words and tone the Appellant used in these emails and notices shows me the Appellant's refusal to comply with his employer's vaccination policy was conscious, deliberate, and intentional.

[51] I find it was unreasonable for the Appellant to continue to believe his employer would grant him a religious accommodation after it refused to do that. That belief was not based on the objective circumstances. It was based on his commitment to his religion and his interpretation of the law. His strongly held opinions and beliefs about religion and the law might have prevented him from knowing the consequences. But this doesn't change the legal test or the fact **he should have known the consequences**.

[52] So based on the evidence I have accepted, the legal test for misconduct, and my findings, the Commission has proven the Appellant was suspended and dismissed for misconduct under the EI Act.

– **The Appellant's other arguments**

[53] Based on the Cecchetto decision, and a recent decision of the Tribunal's Appeal Division, I don't have to consider the following arguments the Appellant made or laws he relied on:

- The Commission breached common law fairness when it didn't properly investigate his EI claim.

²⁶ See the emails between the Appellant and human resources and the legal notices he sent to his employer (GD3-47 through GD3-53; GD3-55 through GD3-62; GD3-65 through GD3-73; GD3-85 through GD3-89).

- He upheld the terms of his contract (collective agreement) and it's impossible for him to be held negligent where he was upholding his contract.
- His employer breached the collective agreement, which is the controlling document, not its vaccination policy.
- The LOU proves that the vaccination policy hadn't been agreed upon by the parties to the collective agreement (in other words, it was repugnant to his collective agreement) so he didn't have to follow it.²⁷
- Under the collective agreement, pilots can't be held to a higher standard of health or health investigation than category 1.
- His employer didn't meet its fiduciary obligations in the accommodation process because it refused to meet with him to discuss his accommodation request. And because it didn't accept his sworn affidavit.
- His employer tried to breach his medical privacy.
- His employer failed under human rights law (*Canadian Human Rights Act*) to accommodate him on religious grounds.
- *Criminal Code* assault offence.
- *Canadian Bill of Rights*.
- Case law about the authority of affidavits.
- Canadian case law about consent to medical treatment and privacy of medical information.²⁸

[54] The Appellant and his union have filed a grievance challenging his suspension and termination by his employer. The Appellant has also filed a complaint with the Canadian Human Rights Commission and a complaint with the Office of the Privacy Commissioner of Canada. As the Federal Court said in *Cecchetto*, and many times before that, the Appellant can make these arguments in those legal proceedings.

²⁷ See GRD5 for the LOU and an email with the Appellant's argument based on the LOU. The Appellant says the LOU refers to legislation imposed by the government. He says no legislation was imposed. So the LOU is "void ab initio." This means the vaccination policy was a new condition of employment his employer and the union hadn't agreed upon. And he was only bound to follow the conditions of employment previously agreed upon.

²⁸ See *CEIC v AL* (File AD-23-13; August 1, 2023; Lafontaine, Lew, Nawaz), reversing *AL v CEIC*, 2022 SST 1428.

[55] The Appellant also argued that section 7.2.5 of the EI *Digest of Benefit Entitlement Principles* (Digest) supports his argument that there isn't misconduct.²⁹ He says the Digest justifies his non-compliance with his employer's vaccination policy. When he was hired, there was nothing in his contract about COVID-19 vaccination. So his employer's vaccination policy was a unilateral change to his contract. The Digest says he can refuse to follow it, and that won't count as misconduct.

[56] I don't have to follow the Digest. It is the Commission's guide for its staff—how the Commission should interpret and apply the EI Act when investigating and assessing EI claims. I have reviewed the section of the Digest the Appellant cited. It doesn't bind the Tribunal. In other words, I don't have to follow it. I do have to follow the Federal Courts' decisions, which I summarized above where I reviewed the law about misconduct. And I have done that in this decision.

[57] The Appellant says his employer didn't have to mandate COVID vaccination for crew members because the federal government's *Interim Order for Civil Aviation during COVID-19 (No 43)* says so. One Tribunal case suggested the Tribunal might admit that *Interim Order* into evidence and consider it.³⁰ At paragraph 46, Member Lew writes: "Even if the Interim Order and Transport Regulations are admitted into evidence at the General Division, that does not necessarily establish that the Claimant could not have, at the relevant time, known nor expected that his conduct could not possibly have led to dismissal." In other words, the appellant in that case might rely on the *Interim Order* (when the case was returned to the General Division) to argue his conduct wasn't wilful.

[58] I accept the Appellant's testimony he was aware of the *Interim Order* in September 2021. But nothing in the *Interim Order* or the Appellant's awareness of it changes my finding that his conduct was wilful. His employer specifically and repeatedly told him about the consequences of not following its vaccination policy. The Appellant's legal interpretation of the *Interim Order* (which I believe is mistaken) doesn't change

²⁹ [Section 7.2.5 of the Digest](#) sets out the Commission's policy for the "Interpretation of meaning of Misconduct."

³⁰ The Appellant cited a decision of the Tribunal's Appeal Division: *RS v Canada Employment Insurance Commission*, 2023 SST 527.

what he knew or should have known. It's his legal argument, not knowledge about his actual circumstances. Above I found he **knew or should have known** about his employer's vaccination policy, what he had to do, by when, and the consequences of not doing it.

[59] The Appellant has an impressive history of working and contributing to the EI program. But this doesn't automatically entitle him to benefits. The EI Act creates an insurance plan. Like other insurance plans, someone who makes a claim for a benefit needs to show they meet all the conditions required to get that benefit.³¹ Unfortunately for the Appellant, he doesn't. Sections 30 and 31 of the EI Act disentitle and disqualify him from getting benefits because he lost his job for misconduct.

Conclusion

[60] The Commission has proven that the Appellant was suspended and lost his job because he refused to comply with his employer's vaccination policy.

[61] The Commission has also proven his refusal to comply with his employer's vaccination policy is misconduct under the EI Act.

[62] Because of this, he can't get EI benefits.

[63] So I have to dismiss his appeal.

Glenn Betteridge
Member, General Division – Employment Insurance Section

³¹ See *Pannu v Canada (Attorney General)* 2004 FCA 90.