



Citation: *JR v Canada Employment Insurance Commission*, 2023 SST 1224

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

# Decision

**Appellant:** J. R.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (462770) dated April 12, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** Teleconference

**Hearing date:** August 29, 2023

**Hearing participant:** Appellant

**Decision date:** September 5, 2023

**File number:** GE-23-1370

## Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant was suspended and later dismissed from his job because of misconduct (in other words, because he did something that caused him to be suspended and later dismissed from his job).

[3] This means the Appellant is disentitled from receiving Employment Insurance (EI) benefits for the period he was suspended.<sup>1</sup> It also means the Appellant is disqualified from receiving EI benefits once his suspension turned into a dismissal.<sup>2</sup>

## Overview

[4] The Appellant was suspended from his job on November 21, 2021. He was later dismissed from his job on December 31, 2021. The Appellant's employer said he was suspended and later dismissed because he didn't follow their mandatory COVID-19 vaccination policy: he didn't provide proof of vaccination.

[5] Even though the Appellant doesn't dispute that this happened, he says his employer acted unfairly when they decided to suspend and later dismiss him.

[6] The Commission accepted the employer's reason for the suspension and later dismissal. It decided the Appellant was suspended and later lost his job because of misconduct. Because of this, the Commission decided the Appellant is disentitled from receiving EI benefits from November 21, 2021 to December 31, 2021 (the period of his suspension) and disqualified from receiving EI benefits from January 1, 2022 onwards (once he lost his job).

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

<sup>2</sup> Section 30 of the Act says that appellants who are dismissed from their job because of misconduct are disqualified from receiving benefits.

[7] The Appellant appealed the Commission's decision to the Tribunal's General Division. The General Division summarily dismissed the Appellant's appeal.

[8] The Appellant then appealed the General Division's Decision to the Appeal Division. The Appeal Division found the General Division made an error by choosing to summarily dismiss the appeal and returned the matter to the General Division for reconsideration.

## **Issue**

[9] Was the Appellant suspended and later dismissed from his job because of misconduct?

## **Analysis**

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

### **Why was the Appellant suspended and later dismissed from his job?**

[11] I find the Appellant was suspended and later dismissed from his job because he didn't follow his employer's mandatory COVID-19 vaccination policy: he didn't provide proof of vaccination.

[12] The Appellant and the Commission agree on why the Appellant was suspended and later dismissed from his job.

[13] The Commission says the reason the employer gave is the real reason for the suspension and later dismissal.<sup>3</sup> The employer told the Commission that the Appellant was suspended and later let go because he didn't follow their mandatory COVID-19

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<sup>3</sup> GD4-5 to GD4-6.

vaccination policy.<sup>4</sup> And the Appellant agrees that he was suspended and later let go for this reason.<sup>5</sup>

### **Is the reason for the Appellant's suspension and later dismissal misconduct under the law?**

[14] The reason for the Appellant's suspension and later dismissal is misconduct under the law.

[15] 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 suspension and later 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.

[16] Case law says that to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.<sup>6</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>7</sup> 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.<sup>8</sup>

[17] 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 and later dismissed because of that.<sup>9</sup>

[18] The Commission has to prove the Appellant was suspended and later dismissed from his job 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 and later dismissed from his job because of misconduct.<sup>10</sup>

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<sup>4</sup> GD3-17, GD3-21.

<sup>5</sup> GD3-19, GD3-51, GD3-65.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>8</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>9</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>10</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[19] 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 and later dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>11</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*.<sup>12</sup> 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.

[21] In response to Mr. McNamara's arguments, the Court 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."

[22] In the same case, 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.

[23] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.<sup>13</sup> Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug

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<sup>11</sup> See *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

<sup>12</sup> See *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

<sup>13</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

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 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.<sup>14</sup>

[24] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General)*.<sup>15</sup> 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.<sup>16</sup>

[25] 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 and later dismissing the Appellant. Instead, I have to focus on what the Appellant did or didn't do and whether that amounts to misconduct under the Act.

[26] The Commission says there was misconduct because the Appellant knew his employer had a mandatory COVID-19 vaccination policy and knew he could be suspended and later dismissed for not following it, but he chose not to follow it anyway by refusing to provide proof of vaccination as the policy required.<sup>17</sup>

[27] The Appellant says there was no misconduct because his employer acted unfairly by introducing a mandatory COVID-19 vaccination policy that wasn't part of his original work contract, asking him to follow the policy even though he was on medical

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<sup>14</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

<sup>15</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>16</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

<sup>17</sup> GD4-6.

leave, and denying his requests to be medically and religiously exempted from the policy.<sup>18</sup>

[28] The Appellant's employer sent the Commission the following documents about their mandatory COVID-19 vaccination policy:

- A copy of their policy, effective September 7, 2021<sup>19</sup>. It says:
  - All employees must confirm their vaccination status by September 20, 2021, and have two doses of an approved COVID-19 vaccine by October 30, 2021.<sup>20</sup>
  - Employees may also request an accommodation under the policy.<sup>21</sup>
  - Employees are expected to follow the policy as a condition of employment.<sup>22</sup>
- An email to employees, dated September 29, 2021. It says:
  - Employees now have until October 6, 2021 to disclose their vaccination status.<sup>23</sup>
- An email to employees, dated October 15, 2021. It says:
  - Employees now have until November 20, 2021 to get two doses of an approved COVID-19 vaccine.<sup>24</sup>
  - Effective November 21, 2021, employees who haven't gotten a second dose will be immediately placed on an unpaid absence and be given up to December 30, 2021 to follow their policy.<sup>25</sup>

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<sup>18</sup> GD2-6.

<sup>19</sup> GD3-28.

<sup>20</sup> GD3-26.

<sup>21</sup> GD3-26 to GD3-27.

<sup>22</sup> GD3-28.

<sup>23</sup> GD3-33.

<sup>24</sup> GD3-41.

<sup>25</sup> GD3-41.

- Effective December 31, 2021, employees who are still unvaccinated will have their employment terminated with cause.<sup>26</sup>
- Employees who don't share their vaccination status will be considered unvaccinated as per their policy.<sup>27</sup>
- An email to employees, dated October 28, 2021. It says:
  - Employees who are on short-term disability (STD) (meaning sick leave) still need to follow their policy.<sup>28</sup>
  - Any employees who were on approved STD leave prior to the launch of their policy and who remain absent as well as non-compliant with their policy as of November 20, 2021 will have their absence reviewed in advance of November 20, 2021 to determine their eligibility for STD.<sup>29</sup>
  - Any employees who went on STD leave after the launch of their policy and aren't compliant with their policy as of November 20, 2021 will be placed on an unpaid leave of absence, effective November 21, 2021.<sup>30</sup>
  - Employees have started to get letters letting them know if their accommodation requests were denied. These employees have been given two weeks to follow their policy.<sup>31</sup>
  - Employees who have waited until after October 29, 2021 to seek an accommodation (medical and non-medical) and who remain non-compliant with their policy as of November 20, 2021 will be placed on unpaid leave while their request is considered.<sup>32</sup>
- An email to employees, dated November 17, 2021. It says:
  - The final date to follow their policy is end of day, November 20, 2021.<sup>33</sup>

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<sup>26</sup> GD3-41.

<sup>27</sup> GD3-41.

<sup>28</sup> GD3-43.

<sup>29</sup> GD3-43.

<sup>30</sup> GD3-43 to GD3-44.

<sup>31</sup> GD3-44.

<sup>32</sup> GD3-44.

<sup>33</sup> GD3-47.



- All employees have until then to get two vaccine doses and update their status with proof of vaccination.<sup>34</sup>
- Effective November 21, 2021, employees who haven't gotten a second dose will be immediately placed on an unpaid absence and be given up to December 30, 2021 to follow their policy.<sup>35</sup>
- Effective December 31, 2021, employees who are still unvaccinated will be terminated with cause.<sup>36</sup>
- Employees who don't share their vaccination status will be considered unvaccinated as per their policy.<sup>37</sup>

[29] The Appellant says:

- He knew about his employer's mandatory COVID-19 vaccination policy.<sup>38</sup>
- He didn't provide proof of vaccination by his employer's deadline.<sup>39</sup> He heard some positives about the COVID-19 vaccine, but also more negatives, and he wanted to get the right information about it before getting the vaccine.<sup>40</sup>
- He went on sick leave on October 7, 2021.<sup>41</sup>
- He heard about the policy around the time he went on sick leave. His supervisor told him everything would be okay when he came back to work.<sup>42</sup>
- He got a letter in October 2021 saying that unvaccinated employees would be placed on unpaid leave as of November 21, 2021.<sup>43</sup>

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<sup>34</sup> GD3-47.

<sup>35</sup> GD3-47.

<sup>36</sup> GD3-48.

<sup>37</sup> GD3-48.

<sup>38</sup> GD3-51, GD3-67.

<sup>39</sup> GD3-51.

<sup>40</sup> See hearing recording.

<sup>41</sup> GD2-6.

<sup>42</sup> See hearing recording.

<sup>43</sup> GD3-51.

- He got another letter in late November 2021 saying that unvaccinated employees on an unpaid absence would be terminated with cause on December 31, 2021.<sup>44</sup>
- He asked for medical and religious exemptions from the policy in November 2021, but his employer verbally denied these requests.<sup>45</sup>
- His employer unfairly denied his exemption requests. He provided them with evidence that his religious beliefs are sincere.<sup>46</sup> He also made it clear to them that he had medical concerns and mental health challenges and wanted to talk to their Occupational Health specialist first before getting vaccinated, but he couldn't get an appointment until February 2022.<sup>47</sup>
- His employer unfairly introduced their policy. It wasn't part of his original work contract, so he shouldn't have had to follow it.<sup>48</sup>
- His employer unfairly asked him to follow their policy even though he was on sick leave and dealing with stress and anxiety.<sup>49</sup>
- Another decision from the Tribunal's General Division (GE-22-1889, which is *A.L. v Canada Employment Insurance Commission*) supports his arguments.<sup>50</sup>
- He has the right to not get vaccinated and exercising this right isn't misconduct.<sup>51</sup>
- He's paid into EI for years and feels that the system has now failed him. He has bills and taxes he's struggling to pay because he was denied benefits.<sup>52</sup>

[30] I sympathize with the Appellant, but I find the Commission has proven there was misconduct for the following reasons.

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<sup>44</sup> GD3-51.

<sup>45</sup> See hearing recording.

<sup>46</sup> GD3-71 to GD3-74.

<sup>47</sup> GD2-6, GD3-19, GD3-51, GD3-67, GD10-2.

<sup>48</sup> See hearing recording.

<sup>49</sup> GD3-51, GD3-67, GD10-2, hearing recording.

<sup>50</sup> See hearing recording.

<sup>51</sup> See hearing recording.

<sup>52</sup> GD3-67.

[31] I find the Appellant committed the actions that led to his suspension and later dismissal, as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[32] I further find the Appellant's actions were intentional as he made a conscious decision not to follow his employer's policy.

[33] There is evidence that the Appellant knew about his employer's policy. He said he knew about it, as noted above. He also asked for medical and religious exemptions, which shows he knew about the policy and its requirements.

[34] There is also evidence that the Appellant chose not to follow his employer's policy. He said he didn't get vaccinated by the policy deadlines (November 20, 2021 and December 30, 2021), as noted above.

[35] I acknowledge the Appellant says his employer should have approved his medical exemption request because he had medical concerns and mental health challenges that he was trying to address by making an appointment to see his employer's Occupational Health specialist, but he couldn't see them by the policy deadlines.

[36] I also acknowledge the Appellant says his employer should have approved his religious exemption request because he gave them evidence that his religious beliefs are sincere.

[37] And I acknowledge the Appellant says his employer's policy wasn't part of his original work contract, so he shouldn't have had to follow it.

[38] Unfortunately, I find these arguments aren't relevant here because they relate to things the Appellant's employer did or didn't do. As discussed above, the Act and the Court say that I must focus on the Appellant's (and not the employer's) actions when analyzing misconduct. This means I can only look at what the Appellant did or didn't do leading up to his suspension and later dismissal.

[39] In other words, I can't look at whether the Appellant's employer acted unfairly for the reasons he says. If the Appellant wants to pursue these arguments, he needs to do that at another tribunal or decision-making body.

[40] I also acknowledge the Appellant says that he has the right not to get vaccinated and that exercising this right isn't misconduct.

[41] I agree with the Appellant that he does have the right to choose whether to get vaccinated. But I find that his decision to exercise this right is still misconduct. I see his decision as willful since it involved a conscious and intentional choice on his part to not get the COVID-19 vaccine even though his employer's policy required it, and the Court says a willful action can be considered misconduct, as discussed above.

[42] Additionally, I acknowledge the Appellant feels another decision from the Tribunal's General Division (I will refer to it as A.L.) supports his arguments. He says that the appellant in A.L. was in a similar situation to him (they were dismissed for not following their employer's mandatory COVID-19 vaccination policy) and won their appeal, so he should too.<sup>53</sup>

[43] I note that I'm not bound by prior decisions of the Tribunal. This means I can decide for myself if I agree with these decisions and if they help support an appellant's appeal.

[44] In this case, I also note the Tribunal's Appeal Division recently overturned A.L. The three-member panel unanimously concluded that the General Division Member who allowed A.L.'s appeal made two errors. First, they interpreted the meaning of misconduct under the Act. And second, they went beyond their jurisdiction by deciding the merits of a dispute between an employer and an employee, which falls outside of EI law.<sup>54</sup>

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<sup>53</sup> See hearing recording. The decision the Appellant refers to is *A.L. v Canada Employment Insurance Commission*, SST General Division, GE-22-1889.

<sup>54</sup> *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.

[45] I agree with the Appeal Division's findings. It's also my view that the General Division Member who allowed A.L.'s appeal went well beyond what the Tribunal's focus on misconduct should be when they made their findings.

[46] And I note the Court has recently said in another decision that A.L. doesn't establish any kind of blanket rule that applies to other factual situations and is not binding on the Court, which means they don't have to follow its decision.<sup>55</sup>

[47] For these reasons, I won't follow A.L. myself and don't give it much weight here.

[48] So, while I acknowledge the Appellant's concerns about his employer's mandatory COVID-19 vaccination policy, I find the evidence shows he made a conscious decision not to follow it. He didn't provide proof of vaccination even though the policy required employees to do this, as noted above, which shows his actions were intentional.

[49] I also find the Appellant knew or should have known that not following his employer's policy could lead to him being suspended and later dismissed.

[50] There is evidence that the Appellant's employer told him he would be suspended if he didn't follow their policy. The Appellant said he got an email in October 2021 saying that unvaccinated employees would be placed on unpaid leave on November 21, 2021, as noted above.

[51] There is also evidence that the Appellant's employer later told him he would be dismissed if he didn't follow their policy. The Appellant said he got an email in late November 2021 saying that unvaccinated employee on unpaid leave would be terminated with cause on December 31, 2021, as noted above.

[52] I acknowledge the Appellant says his employer asked him to follow their policy even while he was on STD (sick leave) and then suspended and later dismissed him when he didn't do that.

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<sup>55</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

[53] Unfortunately, I find the evidence shows the Appellant still had to follow his employer's policy even while he was on STD. As noted above, the Appellant's employer said that any employees who went on STD after the launch of their policy and weren't compliant with their policy as of November 20, 2021 would be placed on unpaid leave on November 21, 2021. And as noted above, the policy was introduced on September 7, 2021 and the Appellant went on sick leave on October 7, 2021, which I find means he went on STD after the policy was introduced and therefore still had to follow the policy.

[54] Since the Appellant still had to follow his employer's policy even while he was on sick leave, I find this means he should have known that he could be suspended and later dismissed if he didn't follow the policy.

[55] I understand the Appellant is upset that his employer made him follow their policy even though he was struggling with mental health challenges and had to go on sick leave in part because of that.<sup>56</sup> Unfortunately, as discussed above, I must focus only on the Appellant's actions when analyzing misconduct, so what his employer did or didn't do in this situation isn't relevant here. If the Appellant wants to pursue these arguments, he needs to do that at another tribunal or decision-making body.

[56] I also acknowledge the Appellant says his employer verbally denied his medical and religious exemption requests. There is no letter from the Appellant's employer about this matter on file, and the Commission doesn't appear to have asked them about it when they spoke.<sup>57</sup> Since there's no evidence to refute what the Appellant says, I conclude that it's likely the Appellant's employer only verbally denied his medical and religious exemption requests.

[57] But even so, I find the Appellant still should have known he could be suspended and later dismissed if he didn't follow his employer's policy. This is because there's no evidence to show the Appellant's employer had to notify employees in writing that their

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<sup>56</sup> For the Appellant's evidence about his sick leave and mental health challenges, see GD3-54 to GD3-62.

<sup>57</sup> GD3-17, GD3-21. The Appellant's employer also didn't send the Commission copies of any letters they sent to the Appellant denying his religious and medical exemption requests.

exemption request was denied before they suspended or dismissed employees who didn't follow their policy.

[58] Instead, I find the evidence (specifically the Appellant's employer's October 28, 2021 email) only shows that employees were starting to get letters about their exemption requests in late October 2021, as discussed above. But I find this doesn't mean that **all** affected employees were getting letters or would be getting them. In my view, it's reasonable to believe that if the Appellant's employer was required to tell employees in writing that their exemption request was denied, there would be clear evidence of this somewhere, such as in the policy itself or in one of the emails they sent to employees.

[59] Given the lack of clear evidence that employees were supposed to receive exemption denial letters in writing, I find the fact the Appellant's employer verbally told him that his exemption requests were denied should have been enough to make him realize that he still had to follow their policy by the appropriate deadlines and that he would be suspended and later dismissed if he didn't do that.

[60] I acknowledge the Appellant objects to how his employer handled his religious and medical exemption requests, including how they communicated their decision on these requests to him. But again, as discussed above, I must focus only on the Appellant's actions when analyzing misconduct, so his employer's conduct isn't relevant here.

[61] Taken together, I find the evidence shows the Appellant knew or should have known that he could be suspended and later dismissed for not following his employer's policy, for the reasons above.

[62] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his suspension and later dismissal (he didn't follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being suspended and later dismissed.

**So, was the Appellant suspended and later dismissed from his job because of misconduct?**

[63] Based on my findings above, I find the Appellant was suspended and later dismissed from his job because of misconduct.

[64] This is because the Appellant's actions led to his suspension and later dismissal. He acted deliberately by not providing proof of vaccination as his employer's policy required. He knew or ought to have known that not doing this was likely to cause him to be suspended and later dismissed from his job.

[65] I acknowledge the Appellant says he's entitled to EI because he has been contributing to it for many years and now faces financial challenges from being denied benefits.

[66] I understand the Appellant's argument and truly sympathize with his situation. But unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. In this case, the Appellant doesn't meet those requirements as he was suspended and later dismissed from his job because of misconduct.

**Conclusion**

[67] The Commission has proven the Appellant was suspended and later dismissed from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits for the period of his suspension and is disqualified from receiving EI benefits once his suspension turned into a dismissal.

[68] This means the appeal is dismissed.

Bret Edwards  
Member, General Division – Employment Insurance Section