



Citation: *OK v Canada Employment Insurance Commission*, 2023 SST 1196

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

# **Decision**

**Appellant:** O. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (506017) dated August 23, 2022 (issued by Service Canada)

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**Tribunal member:** Suzanne Graves

**Type of hearing:** In person

**Hearing date:** March 15, 2023

**Hearing participant:** Appellant

**Decision date:** April 19, 2023

**File number:** GE-22-3140

## Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proved that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

[3] I don't have the authority to make a decision about whether the Appellant's employer violated his rights based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any other laws that protect rights and freedoms. These laws are enforced by different courts and tribunals.

## Overview

[4] The Appellant worked as a recreation therapist for a hospital. He was suspended, and later dismissed from his job. The Appellant's employer told the Commission that he was let go because he went against its vaccination policy: he didn't get vaccinated against COVID-19.

[5] The Appellant doesn't dispute that this happened but argues that the act of declining medical intervention cannot amount to misconduct. He says his employer demanded that he accept medical treatment, but his employment contract didn't require it. He requests that his human rights as a Canadian citizen be taken into account.

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

[7] The Appellant is appealing the Commission's decision to the Social Security Tribunal (Tribunal).

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<sup>1</sup> Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

## **Matters I have to consider first**

### **The employer is not a party to the appeal**

[8] Sometimes the Tribunal sends an appellant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal wrote to the Appellant's employer asking if it wished to be added as a party, but it did not reply to that letter.<sup>2</sup> To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party as there is no evidence to show that the employer has a direct interest in the outcome of this appeal.

### **I will accept documents sent in after the hearing**

[9] After the hearing, the Appellant sent in additional documents.<sup>3</sup> I accepted the documents as they are relevant to the issues raised in this appeal. The Tribunal sent the documents to the Commission and allowed it time to respond. The Commission made no arguments in reply.

## **Issue**

[10] Did the Appellant lose his job because of misconduct?

## **Analysis**

[11] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). These laws include the *Canadian Bill of Rights*, and a number of other laws that protect rights and freedoms.

[12] The Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's rights or to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

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<sup>2</sup> The Tribunal's notice to the employer, dated October 6, 2022, is at GD5.

<sup>3</sup> The Appellant's additional documents are at GD6, GD7, GD8, and GD9.

[13] This issue is beyond my jurisdiction. You must go to a different tribunal or a court to address that. The Tribunal's role is to decide whether a claimant is disqualified from receiving EI benefits because they lost their employment due to their own misconduct.

[14] 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.<sup>4</sup>

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

### **Why did the Appellant lose his job?**

[16] I find that the Appellant lost his job because he went against his employer's vaccination policy.

[17] The Commission says that the Appellant was dismissed because he didn't take the COVID-19 vaccine, as required by his employer's vaccination policy.

[18] The Appellant doesn't dispute that he decided not to take the COVID vaccine. He argues that he didn't get vaccinated because he didn't have enough information to make an informed decision on whether it was safe or effective. He argues that his employer's decision to impose a vaccine mandate was not based on science, and the policy violated his human rights.

[19] I find that the Appellant lost his job because he did not get vaccinated as required by his employer's COVID-19 policy.

### **Is the reason for the Appellant's dismissal misconduct?**

[20] The reason for the Appellant's dismissal is misconduct under the law. The reasons for my decision are set out below.

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<sup>4</sup> See sections 30 and 31 of the EI Act.

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

[22] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>6</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>7</sup>

[23] 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 let go because of that.<sup>8</sup>

[24] The law doesn't say I have to consider how the employer behaved.<sup>9</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.<sup>10</sup>

[25] I have to focus on the EI Act only. I can't make any decisions about whether the Appellant has options under other laws.

[26] Issues about whether the Appellant was wrongfully dismissed, whether the employer's penalty was too severe, or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.<sup>11</sup>

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See section 30 of the EI Act.

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

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

[27] The Commission is the party that has to prove that the Appellant lost his job because of misconduct. The Commission must prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Appellant was dismissed because of misconduct.<sup>12</sup>

### **The Commission's argument**

[28] The Commission argues there was misconduct because the Appellant's actions were wilful. It says that that the reasonableness of the employer's conduct or policy is not relevant to the Tribunal's decision. The employer had a COVID-19 vaccination policy and it clearly notified him beforehand about its expectations about getting vaccinated.

[29] The Appellant made a deliberate choice not to take the vaccine. The employer told the Appellant what it expected, and so it says he knew or should have known what would happen if he didn't follow the vaccination policy.

### **The Appellant's argument**

[30] The Appellant says he is not generally against vaccines, but that informed consent is important to him, as he has worked in the medical field. He has respect for, and follows the law. He testified that he was fully prepared to do regular testing and to wear any required safety equipment to protect himself and others from COVID-19.

[31] He says that he made multiple attempts to gather information so that he could make an informed decision as to whether to take the COVID vaccine. But his employer gave him only limited and out-of-date information which did not answer his basic questions about the vaccine's efficacy and safety.

[32] The Appellant testified that his employer tried to pressure him into taking the vaccine. His manager even yelled at him unprofessionally, telling him to "just get a ... vaccine," using a swear word. He asked his employer about a potential leave of

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<sup>12</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

absence<sup>13</sup> and for an explanation as to why he could not return to work with regular testing, even after he had contracted COVID and recovered from it.

[33] The Appellant argues that the employer's vaccine mandate was contrary to his employment contract which does not require him to receive medical treatments of this or any other kind. He asks me to consider the decision of this Tribunal in *AL v Canada Employment Insurance Commission*.<sup>14</sup>

[34] In *AL*, the Tribunal decided that an employment condition is established at the outset of an employment relationship. In *AL*, the Tribunal held that when a new condition is to be established at a later time, it opens the employment contract to negotiation. The Appellant argues that no such negotiation has taken place.

[35] He says that changes to his employment contract must be agreed to by both parties unless legislation demands a specific action by an employer and compliance by an employee. His employer stated they were acting under a mandate given to them by Directive 6, but in fact the Directive made no demands for such actions. Despite this, his employer dismissed him for non-compliance with its policy.

[36] The Appellant acknowledges the recent Federal Court decision in *Cecchetto*<sup>15</sup> but argues that the facts of that case differ from his own. He says that, in *Cecchetto*, the claimant did not try to abide by Directive 6. But in his case, the Appellant complied with any and all testing requirements that the employer set out for him.

[37] The Appellant asks that his rights to bodily integrity as a Canadian citizen be taken into account. He argues that other hospitals allow unvaccinated workers to continue to work. He also says the act of declining a medical intervention cannot amount to misconduct.

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<sup>13</sup> The Appellant sent in a copy of the *Ontario Infectious Disease Emergency Leave* (GD-8). He says that he would have qualified for unpaid leave for three of the seven listed reasons (GD9-2).

<sup>14</sup> 2022 SST 1428.

<sup>15</sup> *Cecchetto v. Canada (Attorney General)*, 2023 FC 102. In that case, the claimant argued that the Tribunal did not deal with the fundamental questions about the legality of requiring employees to undergo medical procedures. The Federal Court dismissed the application for Judicial Review.

## My findings

[38] The employer's vaccination policy says that all staff had to provide proof of full vaccination against COVID-19 by November 1, 2021, unless they had a documented human rights exemption.<sup>16</sup>

[39] The policy also states that any employee who didn't attest to their vaccination status would be subject to progressive discipline including being placed on an unpaid leave of absence up to and including termination.<sup>17</sup>

[40] The Appellant doesn't dispute that he knew about the vaccination policy and that the employer told him what would happen if he didn't follow it.

[41] The Tribunal is not the appropriate forum to decide whether an employer has violated a claimant's human and constitutional rights, or whether the employer should have granted an exemption.<sup>18</sup> This was confirmed in the Federal Court's recent decision in *Cecchetto*, regarding misconduct and a claimant's refusal to follow an employer's COVID-19 vaccination policy.<sup>19</sup>

[42] In *Cecchetto*, the Court upheld a decision of the Tribunal's Appeal Division (AD). The AD decided that a claimant, by making a personal and deliberate choice not to follow the employer's vaccination policy, had breached his duties owed to the employer and lost his job due to misconduct. The Court also noted that there are other ways in which the claimant's claim could be brought forward in the legal system.

[43] The Appellant's employer decided, in the context of a global pandemic, to follow public health recommendations to change the terms of employees' contracts to impose

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<sup>16</sup> The employer's vaccination requirement is set out at GD3-38.

<sup>17</sup> This policy wording is at GD3-38.

<sup>18</sup> In *Paradis v. Canada (Attorney General)*, 2016 FC 1282, the claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.

<sup>19</sup> *Cecchetto v. Canada (Attorney General)*, 2023 FC 102. While the circumstances in *Cecchetto* differ in some ways, the findings of that decision are applicable to the facts of this case.



a vaccination policy.<sup>20</sup> The employer's policy required its employees to be vaccinated against COVID-19.

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

[45] The Appellant testified in a forthright and straightforward manner. I understand his reasons for not getting vaccinated against COVID-19. But it is well-established law that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act.<sup>21</sup>

[46] I acknowledge the recent decision of the General Division of this Tribunal in *AL*. But the courts and the Tribunal's AD have held, in similar circumstances, that the Tribunal is not the appropriate forum through which a claimant can obtain the remedy they are seeking.

[47] I find that the Commission has proved there was misconduct because

- the employer had a vaccination policy that said that employees had to be vaccinated by November 1, 2021
- the employer told the Appellant what it expected of its employees in terms of getting vaccinated
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

### **So, was the Appellant dismissed because of misconduct?**

[48] For the above reasons, I find that the Commission has proved that the Appellant lost his job because of misconduct.

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<sup>20</sup> Section 2 of Directive 6 states that a covered organization may require employees to provide either proof of vaccination, or proof of a medical reason for not being vaccinated. (GD3-17 and 18)

<sup>21</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

[49] The Appellant's decision not to be vaccinated led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated would likely lead to further discipline, including dismissal from his job.

## **Conclusion**

[50] The Commission has proved that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[51] This means that the appeal is dismissed.

Suzanne Graves  
Member, General Division – Employment Insurance Section