Citation: *ET v Canada Employment Insurance Commission*, 2023 SST 1194

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. T.
Representative:	Umar Sheikh
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (521186) dated August 26, 2022 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Videoconference
Hearing dates:	May 2, 2023, and June 8, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	June 16, 2023
File number:	GE-22-3180

Decision

[1] E. T. is the Appellant. I am dismissing her appeal.

[2] The Canada Employment Insurance Commission (Commission) has shown the Appellant lost her job because of misconduct (in other words, because she did something that caused her to be suspended and then dismissed). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant worked as a cabin crew member for a federally regulated airline. She was put on unpaid leave (suspended) and then dismissed from her job. The Appellant's employer says she was let go because she didn't comply with the COVID-19 vaccine mandate.

[4] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost her job because of misconduct. Because of this, the Commission decided the Appellant wasn't entitled to receive EI benefits.

[5] Even though the Appellant doesn't dispute that this happened, she says that going against the employer's COVID-19 vaccination policy isn't misconduct.

Matters I have to consider first

Potential added party

[6] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. 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 to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

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[1] See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

Adjournment for additional submissions

[7] I adjourned the May 2, 2023, hearing and requested additional submissions from the Commission. Specifically, I asked the Commission to submit copies of all Records of Employment (ROEs) considered when establishing the Appellant's claim (benefit period). The Tribunal received the additional documents from the Commission on May 3, 2023.[2]

[8] At the adjourned hearing, the Appellant and her representative indicated they had not received copies of the additional documents submitted by the Commission. I requested the registry staff email the documents to them during the hearing. The representative and Appellant both confirmed receipt of those documents.

[9] The representative and Appellant were provided the opportunity to respond to the additional documents during the hearing. So, I find there would be no prejudice to either party if the additional documents were considered.

Issue

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

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.[3]

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

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[2] The additional submissions are at pages GD15-1 to GD15-3.
[3] See sections 30 and 31 of the EI Act.

Why did the Appellant lose her job?

[13] Both parties agree the Appellant was put on leave without pay (suspended) and then dismissed because she refused to disclose whether she had been vaccinated, as required by the mandated COVID-19 vaccination policy.

[14] There is nothing in the file that could make me find otherwise. So, I find the Appellant was suspended and then dismissed from her job because she refused to comply with the mandated COVID-19 vaccination policy.

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

[15] Yes. I find the Commission has proven the Appellant was suspended and dismissed because of her misconduct. Here is what I considered.

[16] To be misconduct, the conduct has to be wilful. This means the Appellant's conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5]

[17] The Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[6]

[18] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.[7]

[19] It is the Commission who has to prove the Appellant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This

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[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means the Commission has to show that it is more likely than not, the Appellant lost her job because of misconduct.[8]

[20] The Commission says there was misconduct for the following reasons:

- On September 5, 2021, the Appellant was notified of the Government of Canada's mandatory vaccination mandate for federally regulated air transportation employees.
- On October 20, 2021, the Appellant became aware of the employer's mandatory vaccination policy requiring all employees to be fully vaccinated against COVID-19. Even though she says she didn't see the actual policy until October 31, 2021.
- The Appellant was aware she was required to declare she was fully vaccinated against COVID-19, by October 31, 2021, to be allowed to continue working.
- The Appellant applied for a religious exemption from the policy, but the employer refused to grant her exemption.
- The Appellant knew she may face disciplinary action, up to and including termination of employment if she failed to disclose that she was fully vaccinated by the deadline.

[21] The Appellant confirmed that her employer suspended her as of November 1, 2021. She was dismissed on December 1, 2021. This is because she failed to comply with the employer's mandated COVID-19 vaccination policy.

[22] The Appellant says she wasn't provided enough time to react. She received a previous email in anticipation of the employer's policy. But she says that email didn't contain the consequences of non-compliance.

[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] The Appellant admits she was aware of the government's mandate and the employer's policy. But she argues she didn't see that policy until October 31, 2021, so she argues she wasn't aware of the consequences.

[24] However, the documents on file show the Appellant was aware of the Federal Government vaccine mandate, and the consequences of non-compliance, as early as September 5, 2021.[9] This is the date she sent an email to the employer's safety email address, expressing her disagreement with that policy.

[25] I find the facts on file don't support the Appellant's argument that she wasn't aware of the consequences of non-compliance until October 31, 2021. This is the date that she says she first saw the employer's policy. I recognize that in her September 5, 2021, email to the employer's safety department the Appellant wrote, "threatening to remove a person from the activity that gains them their livelihood," when speaking about the vaccine mandate. This statement leads me to conclude that it is more likely than not, the Appellant knew that failure to comply with the COVID-19 vaccine mandate would lead to her loss of employment.

[26] The Appellant explained in detail how she wasn't working when the employer's COVID-19 vaccine policy was issued. Specifically, she was on short-term and long-term disability from January 12, 2020, to August 25, 2020. Then from August 28, 2020, to October 4, 2021, she wasn't working but was receiving the Canada Emergency Wage Subsidy (CEWS) benefits. She says that during these periods off work, she didn't have access to the employer's on-line portal which listed the COVID-19 policy information. But, the documents on file show several communications between her and her employer regarding the vaccination policy, which were sent through her personal email, during the periods she wasn't at work.

[27] The Appellant confirmed she submitted two requests for accommodation to not comply with the vaccine mandate. The first was sent to the employer on October 26, 2021, in a registered letter, 5 days before she says she saw the employer's policy.[10] On

[9] See pages GD3-38 to GD3-39.
[10] See pages GD3-32 to GD3-34.

November 17, 2021, she sent an addition to her request for accommodation adding Religious Belief and a Conscience Affidavit.[11] She submitted the second request on November 25, 2021, using the employer's accommodation form.

[28] The Appellant says the employer failed to provide her with enough time to comply. She argued the employer refused her accommodation request on Saturday, November 27, 2021, and dismissed her on December 1, 2021. She argued that this only gave her from Saturday to Wednesday to assess the situation and get a vaccination. The Appellant argued that vaccines were in high demand, so she couldn't get one that quickly. Even if she could have gotten one dose, she still wouldn't have complied.

[29] Respectfully, I disagree with the Appellant. The documents on file show the Appellant was aware of the Federal Government mandate and the consequences of non-compliance as early as September 5, 2021, this was the date of her email to the employer's safety department. She was put on leave without pay effective November 1, 2021, for non-compliance.

[30] Further, I recognize that the employer's November 27, 2021, letter refusing her accommodation request, doesn't state the Appellant had to be fully vaccinated by December 1, 2021. Instead, the next steps listed in the employer's November 27, 2021, refusal letter, states that should she wish to become fully vaccinated against COVID-19 in compliance with the employer's vaccination policy, she was to email the employer no later than 1700MST on Sunday November 28, 2021, **"to discuss reasonable timelines for your compliance."**

[31] The November 27, 2021, email further states that if she fails to inform the employer of her intentions by November 28, 2021, the employer will consider her to be non-compliant with the policy, and her employment will be **terminated for cause** as early as December 1, 2021. (My emphasis added with bold text.)

[32] The Appellant confirmed she didn't respond to the employer by November 28, 2021. The employer contacted her on December 1, 2021, but she doesn't remember

[11] See pages GD3-35 to GD3-37.

whether they discussed her intentions during that call. She does recall being told she was being dismissed just before that conversation ended. She received the termination letter later that day. The representative argued that there was no need for the Appellant to discuss her vaccination status with the employer on December 1, 2021, because the employer was well aware of her status based on her previous submissions.

[33] The Appellant relied on another decision, *TC v CEIC,* issued by this Tribunal's general division. In that case the claimant was successful with their appeal for EI benefits.[12] She says her case is similar because that appellant only had two days notice to comply with the employer's policy.

[34] Respectfully, I am not bound by decisions made by my colleagues at this Tribunal.[13] This means I don't have to follow those decisions. I am however, bound by decisions issued by the Federal courts.

[35] I recognize that in the *T. C.* case, the claimant worked as a driver for a diaper service. In *Conlon* the clamant was given verbal notice to be vaccinated, with only two days to comply. Whereas in this appeal, the Appellant worked for an airline, which falls under the Federal Government mandate. She was given written notice of the Federal Government vaccine mandate as early as September 5, 2021, which she responded to on September 5, 2021. She had several weeks to comply, and when she failed to do so, she was put on leave without pay (suspended) as of November 1, 2021.

[36] The Appellant testified the employer called her on December 1, 2021. Although she initially said the employer asked her about her intentions to be vaccinated or to disclose her vaccination status, she later said she couldn't recall what was specifically discussed during that telephone conversation. She could only recall that she was sent the termination letter after that conversation.

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[12] See *TC v Canada Employment Insurance Commission (CEIC),* GE-22-829.
[13] I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis.*

[37] The Appellant said the employer didn't consider testing for COVID-19 as an alternative. She argued that mandatory vaccination against COVID-19 wasn't part of her original contract for employment. She submitted a copy of her current collective agreement.

[38] The law doesn't say I have to consider how the employer behaved.[14] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.[15]

[39] Further, the Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.[16]

[40] Although not exactly on point, it is important to note that the Federal Court issued a recent decision, *Cecchetto,* on a matter relating to a healthcare worker who refused to be vaccinated, as required by their Provincial Government mandate.[17] The Federal Court upheld the Appeal Division's decision to deny him leave to appeal the General Division's decision, which found he lost his job due to misconduct.

[41] In the *Cecchetto* decision, the Court also confirmed that it is not within the mandate or jurisdiction of the Social Security Tribunal to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy. Put another way, I can't make decisions about whether the Appellant had other options under other laws or whether the employer should have made reasonable arrangements (accommodations) for the

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[14] See section 30 of the EI Act.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General),* 2016 FC 1282.
[17] See *Cecchetto v Canada* (*Attorney General),* 2023 FC 102.

Appellant.[18] I can consider only one thing: whether the Appellant's actions or inaction are misconduct under the EI Act.

[42] I acknowledge the Appellant says she didn't see the employer's policy until October 31, 2021. But the undisputed facts are, the Appellant was aware of the Federal Government mandate as early as September 5, 2021. Her email to the safety department on September 5, 2021, clearly indicates she was aware that failure to comply with the COVID-19 vaccine mandate, requiring all airline staff to be fully vaccinated against COVID-19, would prevent her from being allowed to work. There was no dispute that the Appellant's dismissal was the direct result of her non-compliance with the COVID-19 mandatory vaccination policy.

[43] The Appellant was clearly aware that she would be prevented from working if she failed to declare she was fully vaccinated against COVID-19. So, vaccination was a requirement for her to continue working. Put another way, vaccination against COVID-19 was a condition of continued employment.

[44] I acknowledge the Appellant has a right to decide whether to be vaccinated, but she knew there were consequences if she refused to follow the COVID-19 vaccination mandated policy, which in this case was suspension and then dismissal from her employment.

[45] In my view, the Commission has shown the Appellant lost her job due to misconduct. She didn't lose her job involuntarily because she chose not to comply with the mandated COVID-19 vaccination policy, which is what led to her suspension and dismissal. She acted deliberately. So, I find the Appellant was suspended and then dismissed from her job because of misconduct.

[46] The benefit period was effective on Sunday, January 23, 2022. The Appellant was suspended effective November 1, 2021. She was dismissed on December 1, 2021.

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[18] See *Cecchetto v Attorney General of Canada,* 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

This means the Appellant is disqualified from receiving EI benefits as of Sunday, January 23, 2022, which is the start date of her benefit period.[19]

Other arguments

[47] I acknowledge that the Appellant says the documents submitted by the Commission weren't obtained from the employer. Rather, those documents were given to the Commission from the Appellant. I agree the law states the burden to prove misconduct rests with the Commission. But this doesn't mean the Commission can only obtain documents or evidence from the employer. Nor does it mean the Tribunal may only consider evidence obtained from employer.

[48] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary.[20] This is not an automatic right, even if the Appellant has paid EI premiums.

[49] The Appellant argued that the ROEs state she was on a leave of absence, not dismissed. But it is not the ROE that determines whether there was misconduct or a disqualifying circumstance. Although the ROE may list a different reason for separation, the facts of the case are what leads to a finding of misconduct and disqualification from EI benefits.

[50] As stated in a recent Federal Court of Appeal decision, there is no mechanism by which, this Court or the Social Security Tribunal can compel the [claimant's] employer to correct or change the ROE."[21]

[51] The Federal Government lifted the vaccine mandate several months after the Appellant was dismissed. The Appellant testified that the airline didn't recall her to work.

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[19] Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of a disqualification is the Sunday of the week in which the disqualifying event occurred or the week in which the benefit period starts, whichever is later.
[20] See *Canada (Canada Employment and Immigration Commission*) v *Gagnon*, [1988] 2 SCR 29.
[21] See paragraph [8] in *Vuong v Canada (Attorney General),* 2021 FCA 221.

She said she has since started her own business and has been working in her self-employment since approximately April 2021.

Conclusion

[52] The Commission has proven the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits, effective January 23, 2022.

[53] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section