



Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 436

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

Decision

Appellant: C. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (515214) dated September 25, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: In person

Hearing date: March 22, 2023

Hearing participant: Appellant

Decision date: April 7, 2023

File number: GE-22-3555

Decision

[1] C. L. is the Appellant. I am dismissing his appeal.

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

Overview

[3] The Appellant's employer says he was suspended and then dismissed because he didn't comply with the employer's mandatory COVID-19 vaccination policy. He refused to get fully vaccinated against COVID-19.

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

[5] The Commission accepted the employer's reason for the suspension and dismissal. The Commission determined the Appellant was suspended and dismissed due to his misconduct. Because of this, the Commission decided the Appellant was disqualified from receiving EI benefits.

[6] The Appellant disagrees with the Commission's decision to deny him EI benefits. He appeals to the Social Security Tribunal (Tribunal) General Division.

Matters I have to consider first

Potential added party

[7] 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

¹ See sections 30 of the *Employment Insurance Act* (EI Act).

party to this appeal. This is because there is nothing in the file that indicates this decision would impose any legal obligations on the employer.

Late document

[8] In the interest of justice, I have accepted the document received after the March 22, 2023, hearing.²

[9] During the hearing the Appellant read a written statement. He asked that the document be added to his appeal record.

[10] To uphold the principles of natural justice and procedural fairness, I gave the Claimant leave to submit a copy of that statement immediately after the hearing. The Commission was sent a copy of that document. The Commission would have had the opportunity to respond to that statement had they appeared at the hearing. So, I find there would be no prejudice to either party if the late document was added to the appeal docket.

Issues

[11] Was the Appellant suspended and dismissed because of misconduct?

Analysis

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

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

² Section 42 of the *Social Security Rules of Procedures* state that after considering any relevant factor the Tribunal may give a party permission to file documents after the filing deadline.

³ See sections 30 and 31 of the EI Act.

Why was the Appellant dismissed?

[14] There is no dispute that the Appellant was suspended and then dismissed because he refused to get fully vaccinated with the COVID-19 vaccine by January 5, 2022, as required by the employer's policy. He admits that he made a personal choice not to get vaccinated. The Appellant testified and confirmed this was the reason why he was suspended and dismissed.

[15] So, I find the Appellant was suspended and then dismissed from his job because he refused to be fully vaccinated against COVID-19, as required by the employer's mandatory COVID-19 vaccination policy.

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

[16] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[17] 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

[18] 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 EI law.⁶

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

[20] The Commission has to prove the Appellant was dismissed because of misconduct. The Commission has to prove this on a balance of probabilities. This

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 was dismissed because of misconduct.⁸

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

- The Appellant was made aware of the employer's mandatory policy on December 1, 2021. This policy requires all employees to be fully vaccinated against COVID-19, no later than January 5, 2022.
- The Appellant made a personal choice not to get the second dose.
- The Appellant knew and understood that he may be put on unpaid leave (suspended) and may be subject to termination from employment if he failed to comply with the policy.
- The Appellant didn't request a religious or medical exemption.

[22] The Appellant says the employer's mandatory policy didn't provide him with any ability to give informed consent. It goes against his conscience and right to bodily autonomy. He says his employer refused to accommodate his requests to allow other testing methods. His employer refused his request to allow him to continue working from home. He argued that he was looking for any other option to continue working without taking the vaccine.

[23] The Appellant says his refusal to take the COVID-19 vaccine didn't impair his ability to perform his duties. He had worked from home since March 2020. He argued that his dismissal was not proportional to non-compliance because he had successfully worked from home for over a year.

[24] Where a claimant, through his own actions, can no longer perform the services required from him under the employment contract and as a result loses his employment, that claimant "cannot force others to bear the burden of his unemployment, no more

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

than someone who leaves the employment voluntarily."⁹ After his suspension and dismissal, the Appellant was unable to perform the services under his employment contract, notwithstanding his ongoing ability to do so. His suspension and dismissal were a direct result of his non-compliance with the employer's vaccination policy. That non-compliance, and the resulting suspension and dismissal based on his non-compliance, are what prevented the Appellant from carrying out his duties.¹⁰

[25] The Appellant says he didn't breach an expressed or implied duty of his employment contract. Instead, he says it was the employer who unilaterally changed his employment contract.

[26] This case isn't a question of deciding whether the suspension and dismissal are justified under the meaning of labour law. Rather, I must determine, according to an objective assessment of the evidence, whether the Appellant's actions were such that he could normally foresee they would likely result in his suspension and dismissal.¹¹

[27] The Appellant knew the policy required all employees to be fully vaccinated against COVID-19, by January 5, 2022. The policy applied to everyone and it "didn't matter where you worked." He also knew that those not fully vaccinated may be subject to disciplinary action including leave without pay (suspension) and termination.

[28] During the hearing, the Appellant referred to another decision issued by a different member of this Tribunal in *AL v CEIC*.¹² He says his appeal is like *AL*'s because they argued their misconduct was not a breach of duty. He asserts there is no provincial or federal legislation that required him to be vaccinated against COVID-19 so it was voluntary.

⁹ *Canada (Attorney General) v Wasylika*, 2004 FCA 219; *Canada (Attorney General) v Lavallée*, 2003 FCA 255; *Canada (Attorney General) v Brisette*, A-1342-92.

¹⁰ *Canada (Attorney General) v Tucker*, A-381-85. As the majority said, "to constitute misconduct, the act complained of must have been wilful or at least of such carelessness or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance."

¹¹ See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

¹² The Claimant submitted a copy of the Tribunal's decision, *AL v Canada Employment Insurance Commission (AL v CEIC)*, GE-22-1889.

[29] I note that *AL* was a unionized employee whose collective agreement didn't require vaccination against COVID-19. The Appellant was not a unionized employee. *AL* worked in health care directly with patients, but she worked alone at home, as did the Appellant.

[30] That said, I am not bound by other decisions made by this Tribunal.¹³ This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[31] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on his findings regarding the employer's unilateral actions to impose the policy and whether the Claimant was legally justified in refusing to get vaccinated against COVID-19.

[32] But the law doesn't say I have to consider how the employer behaved.¹⁴ Instead, I have to focus on what the Claimant did and whether that amounts to misconduct under the EI Act.¹⁵

[33] As stated above, I am not bound by other decisions made by this Tribunal.¹⁶ I am bound by decisions issued by the Federal Court and Federal Court of Appeal.

[34] The Federal Court recently issued a decision in *Cecchetto v Attorney General of Canada*, where the Court dismissed an application for judicial review in a matter regarding a claimant's refusal to take the COVID-19 vaccine.¹⁷

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*.

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 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*.

¹⁷ See *Cecchetto v Attorney General of Canada*, 2023 FC 102.

[35] The claimant in *Cecchetto* worked at a hospital and was denied EI benefits because they were found to have been suspended and then dismissed from their job due to misconduct. That claimant didn't comply with the provincial directive requiring mandatory COVID-19 vaccination for hospital workers.

[36] In *Cecchetto*, the Court 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.

[37] 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 Appellant.¹⁸ Such issues may be dealt with in other forums.¹⁹ I can consider only one thing: whether the Appellant's action or inaction is misconduct under the EI Act.

[38] I acknowledge the Appellant may have a right to decide whether to be fully vaccinated against COVID-19. But he knew there were consequences if he refused to follow the employer's policy to be fully vaccinated against COVID-19. In this case that was suspension and dismissal from his employment.

[39] Based on the facts set out above, I find the Commission has shown misconduct because the Appellant's refusal to be fully vaccinated against COVID-19, was deliberate or intentional. There was a cause-and-effect relationship between his refusal to be fully vaccinated and his suspension and dismissal. So, I find the Appellant lost his job because of misconduct.

[40] The Appellant's claim (benefit period) started on April 10, 2022, after he was dismissed. This means he is disqualified from receiving EI benefits as of April 10, 2022.

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

¹⁹ 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.

Conclusion

[41] The Commission has proven the Appellant was suspended and then dismissed because of misconduct.

[42] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section