Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1851

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (~~0~~) [**(535332)**] dated ~~August 4, 2023~~ [**September 8, 2022**] (issued by Service Canada)

Tribunal member:	Bret Edwards
Type of hearing:	Videoconference
Hearing date:	December 12, 2023
Hearing participant:	Appellant
Decision date:	~~December 27, 2023~~
CORRIGENDUM DATE:	December 28, 2023
File number:	GE-23-2172

Decision

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

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

Overview

[3] The Appellant lost his job. The Appellant's employer said he was let go because he didn't follow their mandatory COVID-19 vaccination policy: he didn't provide proof of vaccination or proof of his test results.

[4] Even though the Appellant doesn't dispute that this happened, he says he had concerns about getting vaccinated and didn't feel comfortable uploading his test results electronically as his employer wanted him to do. He also says his employer didn't allow him to submit his test results another way even though some of his co-workers later told him they were allowed to do that.

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

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

[7] The Appellant then appealed the General Division's decision to the Appeal Division. The Appeal Division found the General Division committed a breach of procedural fairness by first not giving the Appellant the option to ask for an adjournment

[1] Section 30 of the *Employment Insurance Act* says that appellants who lose their job because of misconduct are disqualified from receiving benefits.

pending the result of his grievance application before the Ontario Labour Relations Board (OLRB), which the Appellant says is relevant to his appeal.

Matter I have to consider first

I asked the Appellant for more information about his application before the OLRB and he told me he wanted to proceed with the hearing

[8] Before scheduling the hearing, I asked the Appellant for more information about his OLRB grievance application.[2] I did this in response to the Appeal Division's findings, as discussed above.

[9] In response, the Appellant said his OLRB grievance application concluded without involving an arbitrator and that he wanted to proceed with the hearing.[3]

[10] So, I proceeded to schedule the hearing based on what the Appellant said.

Issue

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

Analysis

[12] To answer the question of whether the Appellant lost 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?

[13] I find the Appellant lost his job because he didn't follow his employer's mandatory COVID-19 vaccination policy: he didn't get vaccinated and provide proof of vaccination or provide proof of his test results.

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[2] RGD2-1 to RGD2-3, RGD4-1 to RGD4-3, RGD6-1 to RGD6-3.
[3] RGD7-1.

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

[15] The Commission says the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant was let go because he didn't follow their mandatory COVID-19 vaccination policy.[4] The Appellant's termination letter says this too.[5] And the Appellant agrees that he was let go for this reason, specifically that he was unvaccinated and refused to electronically upload his COVID-19 test results.[6]

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

[16] The reason for the Appellant's dismissal is misconduct under the law.

[17] 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 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.

[18] Case law says that to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.[7] Misconduct also includes conduct that is so reckless that it is almost wilful.[8] 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.[9]

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[4] GD3-22, GD3-29.
[5] GD2-
[6] GD3-25, hearing recording.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[9] See *Attorney General of Canada v Secours*, A-352-94.

[19] 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 dismissed because of that.[10]

[20] The Commission has to prove the Appellant was 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 dismissed from his job because of misconduct.[11]

[21] 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 dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[12] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*.[13] 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.

[23] 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."

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[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[24] 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.

[25] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[14] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug 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.[15]

[26] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General)*.[16] 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.[17]

[27] 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 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.

[28] The Commission says there was misconduct because the Appellant knew his employer had a mandatory COVID-19 vaccination policy and knew he could be

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[14] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[15] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[16] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[17] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

dismissed for not following it, but he chose not to follow it anyway by refusing to provide proof of vaccination or proof of test results as the policy required.[18]

[29] The Appellant says there was no misconduct because he didn't feel comfortable uploading his test results electronically. He was the victim of a previous privacy breach with his employer that was unresolved, and they wouldn't allow him to provide proof of his test results another way even after he asked. He also didn't trust his employer to protect his private information given what had happened before.[19]

[30] The Appellant's employer told the Commission[20]:

- They implemented a COVID-19 vaccination policy for all employees.
- They announced the policy on September 24, 2021.
- Employees had until November 15, 2021 to show proof of vaccination.
- Employees who didn't get vaccinated or didn't wish to provide proof of vaccination needed to do weekly testing.
- Their policy warned that failure to get vaccinated or provide proof of vaccination or do weekly testing would lead to disciplinary measures up to and including termination.
- The Appellant failed to provide proof of vaccination or his test results.
- They issued the Appellant a written warning on November 17, 2021.
- They gave the Appellant a 1-day suspension on November 18, 2021, followed by a 3-day suspension on November 19, 2021, and a 5-day suspension on November 24, 2021, all for not following their policy.
- They terminated the Appellant on December 2, 2021 for not following their policy.

[18] GD4-3.
[19] GD3-25, hearing recording.
[20] GD3-22, GD3-29.

- The Appellant didn't submit a medical or religious exemption request.

[31] The Appellant's employer's COVID-19 vaccination policy says the following:

- It applies to all employees.[21]
- All employees must provide proof of full vaccination by October 15, 2021.[22]
- Employees can ask for a medical or religious exemption.[23]
- All employees who haven't provided proof of full vaccination by October 15, 2021 must provide proof of vaccination by November 14, 2021.[24]
- Employees who don't provide proof of full vaccination by November 14, 2021 and don't qualify for an exemption will have to provide a declaration confirming that they're voluntarily choosing not to be fully vaccinated and take regular COVID-19 tests.[25]
- Employees who don't follow the policy may face discipline up to an unpaid leave of absence.[26]

[32] The Appellant says[27]:

- He knew about his employer's policy and the deadlines.
- He didn't get vaccinated or provide proof of vaccination. He also didn't provide proof of his test results.
- His employer asked him to upload his test results electronically and he wasn't comfortable doing that because he was the victim of a previous privacy breach with his employer that was still unresolved. He learned that a few years after the incident, his employer had released his private information to the insurance industry without his knowledge or consent.

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[21] GD3-36.
[22] GD3-37.
[23] GD3-37.
[24] GD3-37.
[25] GD3-37 to GD3-38.
[26] GD3-40.
[27] GD2-3, GD3-25, hearing recording.

- His employer sent him a letter on November 30, 2021 about his refusal to upload his test results electronically. The letter didn't address his concerns because he had no reason to trust them given what had happened before with the previous privacy breach. He was also worried his employer would take his private medical information and share it without his knowledge or consent since it had happened before.
- He asked his employer if he could show them his test results in person instead. They said no.
- He made it abundantly clear to his employer that he was prepared to do the test and was just seeking an accommodation. But they refused to accommodate him.
- He's still in touch with some former co-workers and they told him that his employer allowed them to provide proof of their test results another way.
- He knew that he could be let go if he didn't follow his employer's policy. His employer gave him a verbal warning, a written warning, a 1-day suspension, a 3-day suspension, and a 5-day suspension before dismissing him.
- His OLRB application concluded without involving an arbitrator. But what came out of that was that he found out none of the members of his union lost their jobs because of mandates. This means his employer unilaterally introduced a new policy and made that a condition of his employment despite what his collective agreement said.
- His employer didn't have the right to require him to disclose his private medical information. Every person has the right to make individual choices about what medical information they choose to disclose.
- His employer didn't address the risks associated with the vaccine and vaccine testing and he didn't consent to submit to a medical procedure.
- Asking someone to submit to medical treatment without express informed voluntary consent is considered assault under the Criminal Code.

- Another decision from the Tribunal's General Division (GE-22-1889, which is *A.L. v Canada Employment Insurance Commission*) supports his arguments.

[33] The Appellant also submitted the following documents:

- A 1-day suspension letter from his employer, dated November 18, 2021. It says he's failed to disclose the results of his COVID-19 rapid test and is therefore in violation of their policy. He's already received a written warning, so he's being issued a 1-day suspension, which will be served November 18, 2021. If he continues not to provide his test results at the next opportunity, he may face more disciplinary action up to and including termination.[28]
- A 3-day suspension letter from his employer, dated November 19, 2021. It says he's failed to disclose the results of his COVID-19 rapid test and is therefore in violation of their policy. He's already received a written warning and 1-day suspension, so he's being issued a 3-day suspension, which will be served on November 19, 22, and 23, 2021. If he continues not to provide his test results at the next opportunity, he may face more disciplinary action up to and including termination.[29]
- The termination letter from his employer, dated December 1, 2021. It says they sent him various details about their policy (referred to as a directive) in September and October 2021, including reminding him about the testing requirement if he didn't provide proof of full vaccination. Their records show he's failed to disclose the results of his tests and is therefore in violation of their policy. He's already received a written warning, 1-day suspension, 3-day suspension, and 5-day suspension for violating their policy. They also sent him an email on November 30, 2021 to provide him with more information about the privacy protocols in place to protect employee test results and had hoped it would address his concerns. But they've just received his email on December 1,

[28] GD2-8 to GD2-9.
[29] GD2-11 to GD2-12.

> 2021, which clearly indicates he won't comply with their policy. So, he's being terminated for cause effective today for continuing not to follow their policy.[30]

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

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

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

[37] There is evidence the Appellant knew about his employer's policy. He said he knew about it, as noted above.

[38] There is also evidence the Appellant chose not to follow his employer's policy. He said he didn't any of the things the policy required, which was to get vaccinated and provide proof of vaccination, or provide proof of his test results, as noted above.

[39] I acknowledge the Appellant says he wasn't comfortable providing proof of his test results electronically because he was the victim of a previous privacy breach involving his employer.

[40] I also acknowledge the Appellant says his employer's November 30, 2021 letter about his concerns with providing proof of his test results electronically didn't reassure him because he didn't trust his employer given the previous privacy breach.

[41] And I acknowledge the Appellant says his employer didn't have the right to require him to disclose his private medical information, his employer didn't address the risks associated with the vaccine and vaccine test, and his employer asking him to

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[30] GD2-6.

submit to medical treatment without express informed voluntary consent is considered assault under the Criminal Code.

[42] But 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 dismissal.

[43] 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.

[44] I also acknowledge the Appellant says that what came out of his OLRB grievance application was that none of the members of his union lost their jobs because of mandates, which means his employer unilaterally introduced a new policy and made that policy a condition of his employment despite what his collective agreement said.

[45] But I find the Appellant's OLRB grievance application doesn't help to show he didn't commit misconduct. This is because his arguments about the relevance of the application in this appeal relate to his employer's actions (they unilaterally introduced a new policy despite what his collective agreement said) and not his own. As discussed above, I can only look at the Appellant's actions leading up to his dismissal.

[46] For these reasons, I give the OLRB grievance application little weight here.

[47] 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 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).[31]

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[31] See hearing recording. The decision the Appellant refers to is *A.L. v Canada Employment Insurance Commission,* SST General Division, GE-22-1889.

[48] 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.

[49] 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.[32]

[50] 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.

[51] 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.[33]

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

[53] 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 do any of the things the policy required, specifically get vaccinated and provide proof of vaccination or provide proof of his test results. His employer also told him (in the 1-day and 3-day suspension letters) that he had to do one of these things, as noted above, but he still didn't do them. In my view, this shows his actions were intentional.

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

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[32] *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[33] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

[55] There is evidence the Appellant's employer told him he could be dismissed if he didn't follow their policy. This is clearly stated in the 1-day and 3-day suspension letters that they sent the Appellant, as noted above. And I find the Appellant received these letters since he, and not the Commission, submitted them as evidence. In my view, this means he knew or should have known from the letters alone that not following his employer's policy could lead to him being dismissed.

[56] I acknowledge the Appellant says he asked his employer if he could provide proof of his test results without submitting them electronically, but they said no.

[57] And I acknowledge the Appellant says he later found out from some former co-workers that his employer had allowed them to provide proof of their test results without submitting them electronically after they asked.

[58] I believe the Appellant when he says this. But I find that him discovering after the fact that some co-workers didn't have to provide proof of their test results electronically doesn't mean that all employees who asked for this accommodation got it except for him. The Appellant hasn't submitted any physical evidence to show this was the case. He also doesn't say that he knows for sure that all other employees who asked for the accommodation got it, only that the people he spoke to did. These are two different things.

[59] In my view, since the Appellant doesn't indicate that he knows he was the only person who wasn't accommodated when it came to the test results, this means it's plausible that other employees could have also found themselves in his situation and weren't allowed to submit their test results another way after they asked if they could.

[60] In other words, I find there isn't enough evidence to show the Appellant's employer decided only to deny the Appellant the opportunity to provide proof of his test results without submitting them electronically. As it stands, the evidence simply shows that only some employees who asked for this accommodation got it, which isn't the same as showing the Appellant was explicitly singled out in some way.

[61] As a result, I find the Appellant still should have known he could be dismissed after his employer told him he had to submit his test results online. Even though his employer appears to have accommodated some other employees, he wasn't given the same accommodation when he asked. This means he still had to submit his test results electronically to follow his employer's policy. And since his employer had already told him (in his suspension letters) that he could be dismissed if he didn't follow their policy and he didn't go on to submit his test results electronically, he should have known he could be let go at that point.

[62] I also acknowledge the Appellant objects to how his employer handled his request to submit his test results another way. 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.

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

[64] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his 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 dismissed.

So, did the Appellant lose his job because of misconduct?

[65] Based on my findings above, I find the Appellant lost his job because of misconduct.

[66] This is because the Appellant's actions led to his dismissal. He acted deliberately by not doing any of the things his employer's policy required, specifically getting vaccinated and providing proof of vaccination, or providing proof of his test results. He knew or ought to have known that not doing these things was likely to cause him to be dismissed from his job.

Conclusion

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

[68] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section