Citation: *CT v Canada Employment Insurance Commission*, 2023 SST 1766

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. T.
Representative:	C. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (583043) dated May 23, 2023 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	In person
Hearing date:	September 15, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	October 3, 2023
File number:	GE-23-1686

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant was suspended from his job. The Appellant's employer says that he was placed on an involuntary leave without pay because he went against its COVID-19 vaccination policy: he didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that he should have been given a religious exemption and that because he was following his religious beliefs, he wasn't engaging in misconduct.

[5] The Commission accepted the employer's reason for putting the Appellant on a leave without pay. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

Matters I have to consider first

The Appellant raised the Charter in his submissions

[6] The Appellant raised the *Canadian Charter of Rights and Freedoms*[2] (Charter) in his submissions at the hearing. I asked the Appellant whether he wanted to pursue a Charter argument. If so, the hearing would have to be adjourned so that the Appellant

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[1] Section 31 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disentitled from receiving benefits.
[2] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11

could take appropriate steps to pursue a constitutional argument. I made it clear that I could not make any findings about the Charter arguments if we proceeded today.

[7] The Appellant and his representative, who is not a lawyer, confirmed that the Appellant wanted to proceed today. The Appellant did not want to adjourn the hearing in order to follow the steps required to argue a Charter issue. As a result, the hearing proceeded.

The Appellant has a matter before the Ontario Labour Board

[8] The Appellant said that his union was bringing his case before the Ontario Labour Board. The main issue is the denial of his application for a religious accommodation applicable to the employer's COVID-19 vaccine policy. The Appellant did not know when his matter would be heard but he had been told last year that the process would take several years. He had no current updates to provide.

[9] I asked the Appellant if he wanted to adjourn this hearing until the Ontario Labour Board made a decision as that ruling might provide relevant information that I could consider in his appeal.

[10] The Appellant took a short break to consider what he wanted to do. After the break, the Appellant and his representative confirmed that the Appellant wanted to proceed today. As a result, the hearing proceeded.

Issue

[11] Did the Appellant get suspended from his job because of misconduct?

Analysis

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

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[3] See sections 30 and 31 of the Act.

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

Why did the Appellant get suspended from his job?

[14] I find that the Appellant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

[15] The Appellant agrees that he was suspended because he did not comply with the employer's COVID-19 vaccination policy. He also says he was subject to harassment at his workplace prior to the suspension and that this harassment was about the Appellant's stance regarding the vaccine policy. The Appellant clarified that although it was a manager who was harassing him, the manager was not the person responsible for suspending him.

[16] The Commission says that the Appellant was suspended from his job because he refused to comply with the employer's COVID-19 vaccination policy.

[1] I find that the parties agree that the reason the Appellant was suspended from his job was because he did not comply with the employer's COVID-19 vaccination policy.

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

[17] The reason for the Appellant's suspension is misconduct under the law.

[18] 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 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.

[19] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] 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.[6]

[20] 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 or suspended because of that.[7]

[21] The Commission has to prove that the Appellant was suspended 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 from his job because of misconduct.[8]

[22] 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 or whether the employer should have made accommodations for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[23] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[10] 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

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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.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[24] In response to Mr. McNamara's arguments, the FCA stated that it has consistently held 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." 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)*.[11] 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 Federal 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.[12]

[26] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[13] 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.[14]

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

[27] These cases are not about COVID vaccination policies. But, the principles in those cases are relevant.[15] 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 did not do and whether that amounts to misconduct under the Act.

[28] The Commission says that there was misconduct because:

- The employer had a COVID-19 vaccination policy that was put in place during the pandemic with the aim of protecting the health and safety of employees
- The employer clearly notified the Appellant about its expectations about getting vaccinated in October 2021
- The employer sent letters to the Appellant in December 2021 and January 2022 to further communicate what it expected
- The Appellant knew or should have known what would happen if he didn't follow the policy.

[29] The Appellant says that there was no misconduct because even though he largely agrees with the facts of the case:

- His religious accommodation request was wrongfully denied, freedom of religion is a protected ground, and he says that exercising a religious belief can never be misconduct
- The Appellant had a good reason for not getting vaccinated: getting vaccinated went against his deeply held beliefs, therefore he did not engage in misconduct by refusing vaccination

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[15] See also recent Federal Court decisions where the principles in these cases were applied to misconduct and COVID-19 vaccine policies within the EI context: *Cecchetto v. Canada (Attorney General),* 2023 FC 102, *Milovac v Canada (Attorney General)*, 2023 FC 1120, *Kuk v Canada (Attorney General),* 2023 FC 1134.

- He says that the Commission breached procedural fairness in how it investigated and adjudicated the Appellant's case especially in regard to the Appellant's religious accommodation request

- He was harassed before and after he was suspended because of the employer's COVID-19 vaccination policy

- The employer's policy contained a section on the duty to accommodate as well as a section that said harassment would not be tolerated. The employer breached the policy by failing to accommodate up to undue hardship and engaging in harassment of the Appellant

- The employer's COVID-19 policy discriminated against the unvaccinated

- The employer COVID-19 vaccination policy went against the law

- The employer applied a new condition of employment that was not in the Appellant's collective agreement.

[30] The employer's COVID-19 vaccination policy says that:

- Its objective was the protection of the health and safety of employees

- Its objective was to improve vaccination rates across Canada of employees in the core public administration through COVID-19 vaccination

- Given that operation requirements may include ad hoc onsite presence, all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues and clients from COVID-19

- All employees are to be fully vaccinated unless accommodated based on a medical contraindication, religion or another prohibited ground for discrimination as defined under the *Canada Human Rights Act*

- The consequences of non-compliance include placing them on administrative leave without pay.

[31] I find that the Commission has proven that there was misconduct. The Appellant knew what he had to do under the COVID-19 vaccination policy and what would happen if he didn't follow it. It is well established that a deliberate violation of the employer's policy is considered misconduct under the EI Act.[16] The Appellant made a personal and deliberate choice to not follow the employer's COVID-19 vaccination policy.

[32] The facts are clear and largely uncontested:

- The employer had a COVID-19 vaccination policy that said the policy was a health and safety policy that required all employees to be vaccinated
- The employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated and repeated that information to the Appellant in December after his religious accommodation request was denied and again in January
- The employer stated that a consequence of non-compliance with the policy included leave without pay.

[33] The evidence before me was that the Appellant agreed he was aware of the policy, that he knew his application for a religious exemption was denied prior to suspension, and that he then made a deliberate choice not to follow the policy. He also knew that as a result of not following the policy he could be suspended from his job. He made a voluntary decision not to comply with the policy and this constitutes misconduct under the Act.

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[16] See *Paradis v Canada (Attorney General),* 2016 FC 1282; *Canada (Attorney General) v McNamara,* 2007 FCA 107

[34] I am not able to address most of the legal arguments put forward by the Appellant and his representative because they fall outside of my jurisdiction. As Justice Pentney stated in *Cecchetto v. Canada (Attorney General)*:[17]

> [I]t is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.

[35] However, I will address the Appellant's main points to show why I those arguments were unsuccessful.

[36] The Appellant argued that procedural fairness had not been followed by the Commission in reaching its decision and reconsideration decision. Namely, the Appellant thought that the investigation that was conducted was not well done and that the Commission wrongly determined that the Appellant's choice to not get vaccinated was a personal choice and not a religious one.

[37] This is not a judicial review. I have no authority over the internal processes of the Commission. I only have jurisdiction over the issue before me which is whether or not the Appellant committed misconduct. I have no authority to consider whether the Commission breached procedural fairness. I can only consider whether the evidence presented meets the test for misconduct. In this case, the Appellant agreed that the facts were largely uncontested.

[38] The Appellant also argued that exercising a religious right can never be misconduct under the law. As I explained to the Appellant, I also have no jurisdiction to reconsider the employer's denial of the Appellant's request for a religious exemption. That is for another court or tribunal to decide. I also note that the Appellant is already pursing that issue in other more appropriate venues such as the Ontario Labour Board.

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[17] 2023 FC 102 at para. 46

[39] The Appellant also raised arguments related to this Tribunal's General Division decision in *A.L. v Canada Employment Insurance Commission* (AL).[18] First, as the Appellant acknowledged, Tribunal decisions are not binding. Secondly, this case was recently overturned by the Appeal Division.[19] Nevertheless, the Appellant argued that, much like the General Division decision in AL, the Appellant had no choice but to not comply with the employer's policy. He felt the policy's objective was to force him to take medical treatment against his will, that he had a right to bodily integrity and that the employer's policy was unilateral. I find that these arguments are essentially about whether the Appellant agrees or not with the employer's COVID-19 vaccination policy and not about whether he is entitled to EI.[20] Therefore, these are not arguments that I can consider with regard to the test for misconduct.

[40] The Appellant also said he had been harassed about his vaccination status and that this is also prohibited by the employer's policy. The Appellant supported his evidence with the report that was issued by a third party as a result of the investigation into the harassment. The report found that the Appellant had been harassed and recommended training to managers. With regard to the harassment, I do not find that there is a nexus between the Appellant's harassment and the Appellant's decision not to comply with the employer's COVID-19 policy. This case is not analogous to that of *Astolfi v. Canada (Attorney General)*[21] where the Federal Court found that Appellant's refusal to attend at the workplace (the alleged misconduct) was a direct result of the employer's alleged harassment prior to the misconduct. In the case before me, there is no direct link between the manager's harassment of the Appellant and the Appellant's choice not to follow the employer's COVID-19 vaccination policy. In other words, there was no cause and effect between the harassment and the Appellant's action. As a result, the harassment by the manager does not change the fact that the Appellant committed misconduct.

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[18] 2022 SST 1428.
[19] See *Canada Employment Insurance Commission v AL*, 2023 SST 1032
[20] See *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para. 39.
[21] 2020 FC 30

[41] The Tribunal has a very narrow and specific focus on whether the Appellant's actions were misconduct within the meaning of the EI Act. In this case, the Commission has shown that the Appellant made a conscious choice not to follow his employer's COVID-19 policy and that the Appellant's failure to comply with the policy meets the test for misconduct within the meaning of EI Act.

So, did the Appellant get suspended from his job because of misconduct?

[42] Based on my findings above, I find that the Appellant was suspended from his job because of misconduct.

[43] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated in accordance with the employer's COVID-19 vaccination policy was likely to cause him to be suspended from his job.

Conclusion

[44] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[45] This means that the appeal is dismissed.

Marisa Victor

Member, General Division – Employment Insurance Section