Citation: *YL v Canada Employment Insurance Commission*, 2024 SST 35

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Y. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 2, 2023 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	December 18, 2023
Hearing participant:	Appellant
Decision date:	~~January 5, 2023~~
CORRIGENDUM DATE:	January 10, 2024
File number:	GE-23-3077

Decision

[1] I am dismissing the appeal with modification. The Tribunal disagrees in part with the Appellant.[1]

[2] In this appeal the Canada Employment Insurance Commission (Commission) has not proven that the Appellant's employer placed him on unpaid leave because of misconduct.

[3] In this appeal, the Canada Employment Insurance Commission has proven that the employer terminated his employment in April 2022 because of misconduct. In other words, because he did something that caused him to be dismissed from his job.

[4] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his dismissal. This is what the Commission decided. In other words, the Commission made the correct decision in his EI claim.

Overview

[5] His employer put him on an involuntary unpaid leave of absence starting November 1, 2021. The employer then dismissed him effective April 22, 2022. The Commission is saying the employer put him on leave and dismissed him because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[6] The Commission decided that the Appellant was suspended and dismissed from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission was unable to pay him EI benefits starting June 5, 2022.[2]

[7] I have to decide whether the Appellant was suspended then dismissed from his job for misconduct under the EI Act.

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[1] A person who applies for employment insurance (EI) benefits is called a "Claimant." A person who appeals a decision of the Canada Employment Insurance Commission (Commission) is called an "Appellant."
[2] See GD3 page 26.

Matters I have to consider first

The Appellant's appeal was returned to the General Division

[8] The Appellant first appealed to the General Division in June 2023. This was concerning a reconsideration decision dated October 12, 2022. Appellants have 30 days after which they were communicated a decision to file an appeal.[3] The Tribunal, however, has the authority to allow more time (up to a year) when an explanation is found to be acceptable.[4]

[9] The General Division reviewed the reasons the Appellant provided and did not accept his late appeal. The Appellant then made a request to the Appeal Division.

[10] The Appeal Division member found that the Appellant did provide an acceptable reason for the delay. The Member ordered the appeal to be returned to the General Division for a hearing.

[11] This decision is the result of that hearing.

The Tribunal does not accept links or attachments via online shared folders or web links

[12] On December 7, 2023, the Appellant shared a link to a tweet. He also included a link to a Google drive which would include a contract that the government would have signed agreeing to purchase vaccines.

[13] In response to this, the Tribunal replied to the Appellant on December 7, 2023. The reply says that the Tribunal does not accept links or attachments via online shared folders or web links.[5]

[14] This was discussed during the hearing. The Appellant acknowledged that he had received the notice that links or online shared documents are not permissible.

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[3] See section 52(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).
[4] Section 52(2) of the DESD Act says that the Social Security Tribunal may allow up to a year. See also section 27(2) of the *Social Security Tribunal Rules of Procedure*.
[5] See RGD02.

[15] The Appellant did not raise a concern with this during the hearing.

[16] The Appellant was given an opportunity to provide additional submissions in an acceptable format via the email dated December 7, 2023. He was also given an opportunity at the start of the hearing. The Appellant declined to submit anything more.

[17] The Appellant did speak about this evidence during the hearing. I have no reason to doubt what the links contained. As explained in this decision, the Appellant has proven himself to be credible. I therefore considered the evidence the Appellant provided verbally during the hearing.

Issue

[18] Was the Appellant suspended then dismissed and was it misconduct under the EI Act?

Analysis

[19] 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.

[20] I have to decide two things:

- The reason the Appellant was suspended then terminated from his job.
- Whether the EI Act considers that reason to be misconduct.

[21] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule.

The reason the Appellant was suspended then terminated or dismissed

[22] I find the Appellant's employer suspended and dismissed him because he didn't comply with its vaccination policy.

[23] The Appellant and the Commission agree that the Appellant was suspended on November 1, 2021. They also agree that the Appellant was then terminated on April 22, 2022. The reason was non-compliance with the new mandatory vaccine policy. The parties do not agree on the misconduct part.

[24] I have no reason to believe any other reason why the Appellant is no longer working. There is nothing in the file or in testimony to make me doubt this finding. Based on the evidence before me, I find non-compliance with the vaccination policy as the reason the Appellant is no longer working with the employer.

Is the reason misconduct under the law?

[25] I find that the unpaid leave of absence **is not misconduct** under the EI Act. I find that the Appellant's dismissal or termination **is misconduct** under the EI Act. My analysis is in the following paragraphs.

What misconduct means under the EI Act

[26] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the issues I have to consider when making my decision.

[27] The Commission has to prove it's more likely than not he was dismissed from his job because of misconduct, and not for another reason.[6]

[28] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[7] I can't consider whether the employer's policy is reasonable, or whether a suspension or termination was a reasonable consequence.[8]

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[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[7] This is what sections 30 and 31 of the EI Act say.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[29] The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.[9] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[10] And misconduct also includes conduct that is so reckless that it is almost wilful.[11]

[30] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being let go because of that.[12]

[31] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[13] I can't decide whether the Appellant was constructively or wrongfully dismissed under employment law. I can't interpret an employment contract or decide whether an employer breached a collective agreement.[14] I also can't decide whether an employer discriminated against the Appellant or should have accommodated them under human rights law.[15] And I can't decide whether an employer breached the Appellant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Appellant say

[32] The Commission says that there was misconduct under the EI Act because the evidence shows

- The employer had a vaccination policy and communicated that policy to all staff.

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[9] See *Attorney General of Canada v Secours*, A-352-94.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- Under the vaccination policy, all employees needed to comply with the policy or face suspension and possible dismissal.
- Employees who did not want to be vaccinated needed to submit an exemption request and have this request accepted by the employer.
- The Appellant knew what he had to do under the policy.
- He also knew his employer could put him on unpaid leave or dismiss him for non-compliance with the policy.
- The employer first suspended the Appellant without pay then dismissed him effective April 22, 2022, because he didn't comply with its vaccination policy.

[33] The Appellant says there was no misconduct under the EI Act because of the following:

- The Appellant had submitted a vaccine exemption request on September 19, 2021.[16]
- He was originally denied on September 28, 2021.[17]
- He supplied additional information on October 4, 2021.[18]
- He was suspended on November 1, 2021.[19] His exemption was still under review. He argues he was still complying as of November 1, 2021.
- He was denied the exemption request on November 8, 2021.[20] The problem is that he was already suspended without pay.
- The government acknowledged when purchasing vaccines that the long-term effects and efficacy are not currently known.[21] How can the government then assist employers by denying benefits on an unproven vaccine?
- Others were granted benefits. He referenced a Tweet from someone winning n appeal.[22]

[16] See GD02 page 10.
[17] See GD02 page 14.
[18] See GD02 page 15.
[19] See GD02 page 16.
[20] See GD02 page 17.
[21] See RGD02 page 2.
[22] See RGD02 page 2.

- The Appellant also argues that he was dismissed in April 2022 and the employer agreed that it was without cause.

[34] The evidence in this appeal is consistent and straightforward. I believe and accept the Appellant's evidence and the Commission's evidence.

[35] I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his reconsideration request and appeal notice, and his testimony at the hearing). His evidence is consistent. And there is no evidence that contradicts what he said.

[36] I accept the Commission's evidence because it's consistent with the Appellant's evidence. In this case, there is no dispute in the evidence. As a Tribunal member, I must rule on the balance of probabilities. The evidence is clear in this case. The parties agree on the facts. I therefore accept the evidence as provided by both parties.

[37] The test that needs to be met is the EI Act. This legal test is what the Tribunal needs to review. The Commission has proven that the Appellant was advised of the policy, knew the consequences of non-compliance and followed through with his non-compliance knowing it could lead to his suspension and dismissal. His behaviour was wilful. His actions were conscious, deliberate, or intentional.

[38] I find the Appellant had no wrongful intent. Nothing in the evidence suggests this. As mentioned above, for there to be misconduct, the test that needs to be met was wilfulness. There is no need to prove wrongful intent.

[39] There have been more recent court cases which support this. In a recent case called *Parmar*,[23] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[23] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

[40] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[41] Jurisprudence has confirmed the Tribunal's limited jurisdiction as mentioned above. Another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[24] The case started with the Commission then went to the Tribunal's General Division. The Appeal division then upheld the decision. The Federal Court then reviewed the decision. Paragraph 32 has the following:

> [32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[42] The Appellant argued that the government's acknowledgement that vaccines were not proven to be safe or effective should be considered. I do not agree. A recent Federal Court decision addressed this issue.[25] In that case, the applicant put forward that the vaccine was not proven to be safe or efficient.[26] I will call this decision *Cecchetto*.

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[24] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.
[25] See *Cecchetto v. Canada Employment Insurance Commission*, 2023 FC 102,
[26] In *Cecchetto* the Court called the appellant an "applicant."

[43] In *Cecchetto*, the Federal Court confirmed the Appeal Division's decision that, by law, this Tribunal is not permitted to address these questions. The Court agreed that by making a personal and deliberate choice not to follow the employer's vaccination policy, the applicant had breached his duties and had lost his job because of misconduct under the EI Act. The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[44] Another Federal Court decision dealt with an individual who refused to be vaccinated.[27] The applicant in this case worked full time from home and had been denied an exemption under the *Human Rights Code*. This decision has the following to say in paragraph [32]:

> [32] Like in *Cecchetto*, this Applicant was aware of the consequences of non-compliance with the Policy in light of the multiple communications from the UHN explaining as such. The Applicant also had the opportunity to remedy his situation on multiple occasions. The Applicant was aware that his request for an exemption was denied. His voluntary decision not to comply with the Policy constituted voluntary misconduct in this context.

[45] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws.

[46] I agree the Appellant can decline vaccination. That is his own personal decision. This is his right. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace. The employer has a responsibility to provide a safe workplace.

[47] I also cannot consider the fact that the employer says that he was not terminated for cause. The Appellant did not have any ill intent. I found nothing in the evidence before me to suggest otherwise. The test that must be met is the EI Act. According to the EI Act and case law, the Appellant met the criteria for misconduct under the EI Act.

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[27] See *Kuk v. Canada (Attorney General),* 2023 FC 1134.

– **Suspension effective November 1, 2021**

[48] Based on the evidence, I find that the Commission has not proven that the Appellant was suspended because of misconduct. In this case, the Appellant says he was aware of the policy. He knew he could be suspended if he did not comply.

[49] The Appellant, however, says he was still in compliance with the policy. He had submitted an exemption request. He then supplied additional information within the required timeframe.

[50] I reviewed the exemption denial letter.[28] It is dated September 28, 2021. It is clear that his exemption request was denied. The letter, however, mentions that the employer is not able to provide him an exemption **at this time.** The letter also informs the Appellant that he can submit further information within **one week**. The Appellant did submit additional information within one week as offered.[29] This is an email dated October 4, 2021.

[51] The Appellant says that he was then suspended effective November 1, 2021. He testified this was a surprise to him. He was under the impression his request was still under review. He did not know he would be suspended.

[52] I believe the Appellant. As mentioned above, I was given no reason to doubt any of his statements to the Commission. I also have no reason to doubt any of the testimony he provided during the hearing.

[53] For this reason, I find that the element that he knew or ought to have known that he may be suspended is not met. For this reason, I find that the Appellant was not suspended because of misconduct.

[54] Under the EI Act, suspensions may have an end date. Under section 31 of the EI Act, a claimant who is suspended from their employment because of misconduct is not entitled to receive benefits until

[28] See GD02 page 14.
[29] See GD0 page 15.

a) the period of suspension expires;
b) the claimant loses or voluntarily leaves the employment; or
c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required by section 7 or 7.1 to qualify to receive benefits.

[55] For this reason, the disentitlement that may have applied to the Appellant would end with his termination. In other words, section 31(b) of the EI Act would apply. However, in this case, I find that the Appellant would not have been subject to a disentitlement.

– **Termination effective April 22, 2022**

[56] Based on the evidence, I find that the Commission has proven the Appellant's termination was misconduct because it has shown that:

- He knew that his employer could terminate his employment if he didn't comply with the policy.
- He knew that his exemption request had been denied.
- He consciously, deliberately, or intentionally made a personal decision not to comply.
- He was dismissed from his job because he didn't comply with his employer's vaccination policy.

[57] The Appellant is arguing this is not misconduct. He is relying in part on the fact that the employer confirmed there was no cause for the termination. I agree that there was no ill intent on his part. However, the test that needs to be met is the EI Act.

[58] The Appellant testified that he knew he could be dismissed if he did not comply with the policy. He also testified that he had read the November 8, 2021, letter advising him that his exemption request was denied. This letter clearly mentions that termination from employment is a possibility for individuals who do not comply.

[59] Unlike the suspension, I find that for the termination, the Appellant knew or ought to have known that he would be terminated for non-compliance with the policy. It is in the policy that unvaccinated individuals without an exemption may be terminated. This is in the policy, and it is also found in the letter denying the exemption request. This letter is dated November 8, 2021.

[60] I understand the Appellant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fairer for the Appellant.[30]

Conclusion

[61] The Commission has not proven that the Appellant was suspended because of misconduct under the EI Act.

[62] The Commission has proven that the Appellant was terminated because of misconduct effective April 22, 2022. This means the Appellant would be disqualified from this date. However, as the claim started June 5, 2022, the Commission correctly disqualified him from June 5, 2022.

[63] This means the Commission made the correct decision in his EI claim.

[1] So, I am dismissing his appeal.

Marc St-Jules
Member, General Division – Employment Insurance Section

[30] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.