



Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 1772

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

Decision

Appellant: C. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (525367) dated September 8, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: In person

Hearing date: August 30, 2023

Hearing participant: Appellant

Decision date: September 1, 2023

File number: GE-23-1361

Decision

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

[2] He didn't follow his employer's mandatory COVID-19 vaccination policy. And his employer suspended him because of that.

[3] The Canada Employment Insurance Commission (Commission) has proven his employer suspended him for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, he did something that caused his employer to suspend him.

[4] This means he wasn't entitled to get Employment Insurance (EI) benefits during his suspension (January 31 to May 30, 2022). So any EI benefits he received during his suspension are an overpayment he has to pay back.

Overview

[5] The Appellant works as an electrician in the auto industry, for X. His workplace was on lay-off from December 2021 to the end of January 2022.

[6] When he was laid off, the Appellant applied for EI regular benefits. And the Commission paid him benefits.

[7] He didn't go back to work when the lay-off ended. He went back to work on May 30, 2022.

[8] Later on the Commission found out the Appellant's employer put him on an unpaid leave of absence effective January 31, 2022.¹ His employer says it suspended him because he didn't comply with its mandatory COVID-19 vaccination policy (vaccination policy).

[9] The Commission accepted what the employer said. So it decided the Appellant was suspended for a reason that counts as misconduct under the EI Act. Because of this, he shouldn't have received EI regular benefits during his suspension (January 31,

¹ In this decision, an unpaid leave of absence means the same things as a suspension.

2022 to May 27, 2022).² The Commission created and overpayment for the benefits he wasn't entitled to get.

[10] The Appellant doesn't agree his employer suspended him for misconduct. He says the Commission hasn't proven he willfully breached a duty he owed his employer. His employer's vaccination policy wasn't a condition of his employment. His employer had no right to impose the vaccination policy unilaterally.

Issue

[11] I have to decide whether the Appellant was suspended from his job for a reason the EI Act considers 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] I have to decide two things:

- the reason the Appellant was suspended
- whether the EI Act considers that reason to be misconduct

² See the Commission's decision letter saying that the Appellant isn't eligible for EI benefits starting January 31, 2022 because his employer suspended him for misconduct, at GD3-25. And see the Commission's representations at GD4-5.

³ See section 30 and 31 of the *Employment Insurance Act* (EI Act). Section 31 says a person who is suspended for misconduct isn't entitled to receive EI benefits for a period of time. They can receive benefits when the period of suspension expires, they lose or voluntarily leave their employment, or they work enough insurable hours for another employer after the suspension began to qualify for benefits.

The reason the Appellant was suspended

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

[15] The Commission and the Appellant agree about this reason.⁴ I have no reason to doubt their evidence about this. And there is no evidence that goes against what they say.

The reason is misconduct under the law

[16] The Appellant's refusal to follow his employer's vaccination policy is misconduct under the EI Act.

- What misconduct means under the EI Act

[17] 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 legal questions I have to consider when I make my decision.

[18] The Commission has to prove it's more likely than not the Appellant lost his job because of misconduct.⁵

[19] I have to focus on what the Appellant did or didn't do, and whether his conduct amounts to misconduct under the EI Act.⁶ I can't consider whether his employer adoption of the policy was reasonable or whether suspension was a reasonable penalty.⁷

⁴ This is what the Commission says in their representations, at GD4-1, GD4-3, and GD4-5. It's what the Appellant's employer told the Commission, according to the Commission's notes at GD3-18. It's what the Appellant told the Commission, according to the Commission's notes at GD3-16, GD3-17, and GD3-33. At the hearing the Appellant acknowledged that his employer placed him on leave of absence, at the time he was supposed to be recalled, because he wasn't vaccinated.

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88 (FCA).

⁶ This is what sections 30 and 31 of the EI Act say.

⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[20] 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.⁸ To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.⁹ And misconduct also includes conduct that is so reckless that it's almost wilful.¹⁰

[21] 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 his employer would suspend him because of that.¹¹

[22] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.¹² In other words, I can't consider employment law, interpret a collective agreement, or apply human rights or constitutional law to the employer's policy or its actions.¹³

[23] The Federal Court has decided two misconduct cases where a person didn't comply with their employer's COVID vaccination policy.¹⁴ In the Cecchetto decision the Court confirmed the "important, but narrow and specific role" of the Tribunal. The Tribunal has to decide two things: the reason the employer dismissed (or suspended) the appellant, and whether that reason is "misconduct" under the EI Act.¹⁵

⁸ See *Attorney General of Canada v Secours*, A-352-94 (FCA).

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96 (FCA).

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. 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.

¹³ The Tribunals appeal division and the Federal Court have said this in appeals where the Commission decided a person's refusal to comply with an employer's COVID vaccination was misconduct. See *CEIC v AL* (SST AD213; LaFontaine, Lew & Nawaz; decided August 1, 2023) (CEIC v AL (AD)); [Cecchetto v Canada \(Attorney General\), 2023 FC 102 \(Cecchetto\)](#); [Milovac v Canada \(Attorney General\), 2023 FC 1120 \(Milovac\)](#).

¹⁴ See Cecchetto and Milovac.

¹⁵ See paragraphs 46 to 48 in Cecchetto.

[24] The Federal Court then said the Tribunal doesn't have the legal power to assess or rule on the merits, legitimacy, or legality of government directives and policies aimed at addressing the COVID pandemic. So the Tribunal doesn't have to deal with these arguments. And the courts will not interfere with Tribunal decisions where they don't.

[25] Finally, the Federal Court confirmed that making an EI appeal to the Social Security Tribunal isn't the proper way for an employee to legally challenge their employer's policy and conduct.¹⁶ It said people in the Appellant's situation have other legal options to do that.

- **What the Commission and the Appellant say**

[26] The Commission says the employer adopted a vaccination policy.¹⁷ It communicated the policy to its employees. It became a condition of the Appellant's employment, even though his original contract didn't require him to be vaccinated. The Appellant was aware of the policy and the consequences if he refused to comply with the policy.

[27] The Commission says it doesn't have to prove the employer's vaccination policy was reasonable or fair.¹⁸ And the employer's conduct isn't relevant. It also says the Tribunal has no power to determine whether the employer acted fairly or reasonably by putting in place its vaccination and attestation policy.

[28] Finally, the Commission says the Appellant chose to disregard his employer's written warnings that it would suspend him if he failed to comply.¹⁹ There is "clear

¹⁶ The Federal Court says in *Cecchetto v Canada (Attorney General)*, at paragraph 46: "... it 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 isn't unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate." Then the Federal Court pointed out (at paragraph 50) there are other types of legal cases, under laws other than the EI Act, appellants can use to challenge COVID vaccination policies and mandates.

¹⁷ See the Commission's representations at GD4-3.

¹⁸ See the Commission's representations at GD4-5.

¹⁹ See GD4-7.

causality” between the Appellant’s refusal to be vaccinated and the suspension. So the Appellant’s refusal is misconduct under the EI Act.

[29] At the hearing the Appellant said he knew about the vaccination policy. He got a handout from his employer that explained the policy. And he knew his employer could suspend him if he didn’t follow the policy. But he didn’t apply for an exemption.

[30] The Appellant testified his employer extended the deadline to get vaccinated to December 31, 2021. He thinks his employer did that so employees who were retiring could finish a full year of service. He explained his employer extended the usual plant shutdown at Christmas to the end of January 2022. He went on lay-off. When the plant reopened January 31, 2022 his employer suspended him because he wasn’t vaccinated. His employer only gave him one record of employment, for the lay-off.

[31] The Appellant says his conduct wasn’t misconduct.²⁰ He made five arguments:

- First, the Commission didn’t prove the vaccination policy became a condition of his employment. So it hasn’t shown he breached an express or implied duty arising out of his employment.
- Second, the vaccination policy wasn’t in his original contract, so he didn’t have to follow it. This type of change could only be made if the contract was opened up and the union and employer bargained and agreed to it.
- Third, the vaccination policy went against his human rights.
- Fourth, an arbitrator found the vaccine requirement was no longer reasonable.²¹
- Fifth, COVID vaccines were proven to be ineffective. This was recognized by the government in March 2022 when it lifted mandatory proof of vaccination at

²⁰ I have summarized the Appellant’s argument from his appeal document (GD2), his reconsideration request (at GD3-31), and what he said at the hearing.

²¹ See the Appellant’s summary of the arbitrator’s findings in his reconsideration request at GD3-31. He didn’t include the arbitrator’s full decision, or the date of that decision.

all businesses in Ontario. And in July 2022 by the Minister of Health, who said the definition of “fully vaccinated” made no sense.

[32] The Appellant included with his appeal a copy of the Tribunal’s General Division decision in *AL v CEIC*.²² At his appeal hearing, he made his arguments based on that decision. He referred me to specific paragraphs in Member Leonard’s reasons.

- **The Commission has proven misconduct under the EI Act**

[33] The Commission has proven the Appellant’s refusal to comply with his employer’s vaccination policy is misconduct under the EI Act.

[34] I accept the Appellant’s evidence about the essential facts the Commission has to prove to show his conduct was misconduct. I have no reason to doubt his evidence. His evidence is consistent. He said the same thing to the Commission and the Tribunal. And his story about what he did, what his employer did, and what he knew at what point in time stayed essentially the same over time. And his evidence is supported by the vaccination policy and what his employer said to the Commission.

[35] I accept the Commission’s evidence because it’s consistent with the Appellant’s evidence. It matches the Appellant’s evidence about what took place and what the Appellant knew. And there is no evidence that goes against the Commission’s evidence.

[36] Based on the evidence I have accepted, I find the Commission has proven:

- the employer had a vaccination policy, which it considered a condition of continuing employment for employees and contractors²³
- under that policy, employees:
 - had to report their vaccination status by November 12, 2021
 - could apply for an exemption (accommodation) by November 12, 2021

²² See *AL v CEIC*, 2022 SST 1428 (*AL v CEIC* (GD)).

²³ The employer’s vaccination policy is at GD3-20 to GD3-23.

- had to be fully vaccinated (or be approved for an exemption) by December 17, 2021, or the employer would immediately place the employee on an unpaid leave of absence until the employee complied with the policy
- the Appellant knew about the policy, what he had to do by the deadlines, and the consequences of not doing it
- the Appellant didn't apply for an accommodation on medical or religious grounds
- the Appellant didn't get fully vaccinated by the deadline, which was a conscious, deliberate, and intentional personal decision
- so his employer placed him on an unpaid leave of absence (in other words, suspended him)

[37] Based on the evidence I have accepted, I find the Appellant's employer suspended him for a reason that counts as misconduct under the EI Act.

[38] I can't accept the Appellant's arguments about why his conduct isn't misconduct.

[39] I don't accept the Appellant's **first, second, and third arguments**. He based those arguments on Member Leonard's reasons in *AL v CEIC (GD)*. At the hearing, I told the Appellant the Tribunal's Appeal Division recently reversed Member Leonard's decision. The Appeal Division decided:

- Member Leonard made an error when he decided even if the Commission had proven an employee deliberately violated employer policy and knew that violation could result in suspension or dismissal, it isn't misconduct if the employer's policy is illegal or inconsistent with their employment contract.
- He made another error when he shifted the focus of his misconduct analysis to the employer, finding the employer unilaterally imposed a new essential condition of employment contrary to the collective agreement.

- He made another error by considering labour, constitutional, and public health law and decided the merits of a grievance between AL and her employer— instead of deciding the misconduct issue under the EI Act.

[40] Then the Appeal Division considered whether AL's refusal to comply with her employer's vaccination policy amounted to misconduct under the EI Act. It decided it was misconduct. So AL was disqualified from getting EI benefits.

[41] I am going to follow the Appeal Division's decision in CEIC v AL (AD). That decision is well reasoned and applies the correct law. It follows the leading cases from the Federal Courts (including Cecchetto), which I also have to follow. This means I can't accept the Appellant's first, second, and third arguments.

[42] I don't accept the Appellant's **fourth argument** because the arbitrator's reasons don't change any of the key facts in his case. Those reasons don't prove the policy:

- was illegal
- went against the collective agreement
- didn't become an essential condition of the Appellant's employment when his employer adopted it in October 2021
- stopped being an essential condition of employment during the Appellant's suspension (from January 31 to May 30, 2022).

[43] I don't accept the Appellant's **fifth argument**. The Tribunal doesn't have the legal power to decide whether the government's COVID mandates or his employer's vaccination policy were reasonable. And it doesn't have the legal power to rule on the safety or effectiveness of COVID vaccines.

[44] In Cecchetto the Federal Court said that appellants who disagree with mandatory COVID vaccination policies have other legal avenues to challenge them. The Appellant said he thinks his union has filed an individual grievance for him. If that's true, he and

his union can use his grievance to challenge his employer's unilateral decision to put in place its vaccination policy.

Conclusion

[45] The Commission has proven the Appellant's employer suspended him because he didn't follow its vaccination policy.

[46] The Commission has also proven his refusal to follow his employer's vaccination policy is misconduct under the EI Act.

[47] Because of this, he wasn't eligible to receive EI benefits during his suspension (January 31 to May 30, 2022).

[48] So I am dismissing his appeal.

[49] This means any EI benefits he received during his suspension are an overpayment he has to pay back.

Glenn Betteridge
Member, General Division – Employment Insurance Section