Citation: *JP v Canada Employment Insurance Commission*, 2023 SST 1833

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. P.
Representative:	Philip Cornish
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated May 29, 2023 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	October 11, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	December 21, 2023
File number:	GE-23-1565

Decision

[1] The appeal is dismissed.

[2] The Appellant cannot receive employment insurance (EI) benefits because he lost his job due to his own misconduct[1].

Overview

[3] The Appellant worked as a plant technician and was employed by City of Toronto York (the employer). In September 2021, the employer implemented a mandatory Covid-19 vaccination policy requiring all employees to be fully vaccinated against Covid-19 by October 30, 2021 (the policy). All employees were required to provide proof of vaccination or face discipline up to and including dismissal.

[4] The Appellant didn't want to comply with the policy for privacy and other reasons. He told the employer he didn't consent to disclosing his personal medical information.

[5] On November 8, 2021, the Appellant was suspended without pay because he failed to submit proof of vaccination by the policy deadline. On January 3, 2022, he was dismissed because he remained non-compliant with the policy.

[6] The Appellant applied for EI benefits. The Respondent (Commission) decided that he lost his employment due to his own misconduct[2] and could not be paid any EI benefits[3].

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[1] That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.

[2] See the March 19, 2022 decision letter at GD3-34. Benefits were refused from November 7, 2021, which was the start date of the benefit period established by his application for EI benefits.

[3] Section 30 of the *Employment Insurance Act* (EI Act) says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. Section 29(b) of the EI Act says that loss of employment includes a suspension from employment. Section 31 of the EI Act says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. Since the Commission decided that the reason the Appellant was suspended and subsequently dismissed from his employment was due to his own misconduct, the combined effect of sections 29, 30 and 31 of the EI Act meant he could not be paid EI benefits starting from November 8, 2021 (see the Commission's representations at GD4-6).

[7] The Appellant asked the Commission to reconsider. He confirmed he was suspended and then dismissed for non-compliance with the policy. But said there was no misconduct on his part because the policy breached the collective agreement governing his employment and he was wrongfully dismissed. He also said the employer violated his rights by forcing him to receive an experimental vaccine or lose his job.

[8] The Commission maintained the decision to deny EI benefits on his claim, and the Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[9] I must decide whether the Appellant lost his job due to his own misconduct[4]. To do this, I have to look at the reason for his suspension and dismissal, and then determine if the conduct that caused this job loss is conduct the law considers to be "misconduct" for purposes of EI benefits.

[10] The Commission says the Appellant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with the policy. He knew he could be suspended and then dismissed from his job by making this choice – and that's what happened. The Commission says these facts prove the Appellant lost his job due to his own misconduct, which means he cannot receive EI benefits.

[11] The Appellant disagrees. He says he chose not to comply with the policy because the employer didn't have the right to his personal medical information and because the policy violated his collective agreement and other rights, including his rights to privacy and bodily autonomy[5]. He says there was no misconduct in these circumstances[6]. He also argues there can be no finding of misconduct in this appeal because his union successfully grieved his suspension and dismissal and he was reinstated to his job.

[12] I agree with the Commission. These are my reasons.

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[4] That is, misconduct a**s the term is used for purposes of EI benefits**. See Issue 2 below.
[5] See the Appellant's Notice of Appeal at GD2-10 to GD2-15.
[6] See footnote 5 above.

Preliminary Matter

[13] The Appellant's appeal was first heard by way of questions and answers exchanged in October 2022. On November 29, 2022, the Tribunal issued a decision dismissing his appeal.

[14] The Appellant appealed that decision to the Tribunal's Appeal Division (the AD). The AD decided the Tribunal made a mistake in its decision and returned the appeal to the Tribunal for a new hearing.

[15] The Appellant's new hearing was held by videoconference on October 11, 2023. This is the decision from that new hearing.

Issue

[16] Did the Appellant lose his job due to his own misconduct?

Analysis

[17] To answer this question, I have to decide two things:

- First, I must determine the reason why the Appellant was suspended and subsequently dismissed from his job.
- Then I have to determine whether that reason is considered to be misconduct for purposes of EI benefits.

Issue 1: Why was the Appellant suspended and subsequently dismissed from his job?

[18] The Appellant was suspended – and subsequently dismissed – from his job because he failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[19] The employer told the Commission that[7]:

- The Appellant was advised of the policy when it was announced to all employees on August 19, 2021[8]. The policy came into effect September 7, 2021[9].
- Employees had until October 30, 2021 to provide proof they were fully vaccinated or they could be subject to discipline, up to and including dismissal.
- The policy set out a process for employees to request accommodation for medical reasons or for a reason related to a protected ground set out in the employer's Human Rights and Anti-Harassment Discrimination Policy.
- If an accommodation request didn't meet the requirements for exemption, the employee was expected to comply with the mandatory vaccination requirement and provide proof of vaccination.
- On October 6, 2021, the employer sent an e-mail to all employees advising of the next steps regarding enforcement of the policy. It said that:
  (i) if employees did not provide proof of full vaccination by the October 30, 2021 deadline, they would be suspended for 6 weeks without pay; and
  (ii) after the unpaid suspension, on December 13, 2021, if they still did not provide proof of full vaccination, they would be terminated for cause because they chose not to comply with the policy[10].
- The Appellant did not provide proof of vaccination or obtain an approved exemption by the October 30, 2021 deadline, so he was put on unpaid leave after his last day of work on November 7, 2021.

[7] The information listed here is from the employer's interviews at GD3-26, GD3-27 and GD3-67, and from the policy documents provided to the Commission by both the Appellant and the employer.
[8] The announcement is at GD3-28.
[9] A copy of the policy is at GD3-68 to GD3-72.
[10] The employer's October 6, 2021 e-mail is at GD3-29 to GD3-31.

- He remained non-compliant with the policy and was terminated January 3, 2022.

[20] The Appellant doesn't dispute any of this.

[21] In his application for EI benefits the Appellant said he was suspended and dismissed because he exercised his rights and didn't disclose his vaccination status. He called the policy and the employer's actions in connection with it "illegal" and "not reasonable"[11], and said his union had filed a grievance on his behalf and it was proceeding to arbitration[12]. He later told the Commission that the employer advised him he was suspended and terminated for non-compliance with the policy but said what the employer did to him was unlawful[13]. He also said he didn't request an exemption because the policy was illegal[14]. He provided a copy of his termination letter[15] with his Request for Reconsideration. He also provided copies of E-mails he exchanged with the employer asking questions about the policy[16]. These exchanges show the Appellant was aware of the policy and understood that non-compliance with the policy would result in suspension and then termination of his employment.

[22] The undisputed evidence plainly shows the Appellant was suspended – and subsequently dismissed – from his job because he failed to provide the employer with proof of vaccination as required by the policy and didn't have an approved exemption.

[23] I see nothing in the Appellant's materials that disputes **the reason he was separated from his employment starting on November 8, 2021,** which was because the employer suspended – and subsequently dismissed – him for being non-compliant with the policy.

[24] I therefore find that the Appellant's non-compliance with the policy is the conduct that caused him to lose his job[17].

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[11] See GD3-9.
[12] See GD3-11.
[13] See GD3-27.
[14] See GD3-27.
[15] See GD3-47
[16] See GD3-49 to GD3-62.
[17] During the period of his suspension and termination and continuing until his reinstatement.

Issue 2: Is the reason for the Appellant's suspension and subsequent dismissal misconduct under the law?

[25] Yes, the reason for the Appellant's suspension and subsequent dismissal (namely, his non-compliance with the policy) is misconduct for purposes of EI benefits.

The legal test for misconduct

[26] To be misconduct under the EI Act, the conduct that caused the separation from employment has to be wilful. This means the conduct was conscious, deliberate, or intentional[18]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[19] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[27] The Appellant argues he was originally denied EI benefits because of a finding of misconduct that was based on his suspension and dismissal being his fault. He says the favourable arbitration decision in his grievance[20] and his subsequent reinstatement to his position[21] prove he did nothing wrong when he refused to comply with the policy and that he was wrongfully suspended and dismissed for his non-compliance.

[28] But the law says the Appellant doesn't need to have wrongful intent (in other words, he didn't have to mean to do something wrong) for his behaviour to be considered misconduct for purposes of EI benefits[22].

[29] There is misconduct if he knew or ought to have known his conduct could get in the way of carrying out his duties to the employer and there was a real possibility of being suspended and dismissed because of it[23].

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[18] See *Mishibinijima v. Canada (Attorney General),* 2007 FCA 36.
[19] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[20] See the November 21, 2022 decision of the arbitrator at AD1-3 to AD1-46.
[21] See the December 21, 2022 reinstatement letter at RGD3-2.
[22] See *Attorney General of Canada v. Secours*, A-352-94.
[23] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[30] The Commission must prove the Appellant was suspended and then dismissed from his job due to misconduct[24]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

Evidence from the Employer

[31] The employer's evidence is generally set out in paragraph 19 above.

Evidence from the Appellant

[32] The statements and other evidence the Appellant gave to the Commission are generally set out in paragraph 21 above.

[33] The Appellant provided further evidence with his original Notice of Appeal (GD02), and when he responded to the questions he was asked by the Tribunal member who dismissed his appeal (GD09). He also filed new evidence in connection with his appeal to the AD (AD01 and AD04) and additional documents prior to the new hearing ordered by the AD (RGD03). I have reviewed all of these materials but will not summarize them here.

[34] At the hearing before me, the Appellant testified that:

- He has worked as a plant technician with the employer since May 2010.
- His employment is governed by a collective agreement negotiated by his union, CUPE Local 416, and the employer. It is renewed every 4 years.
- The collective agreement in place at the material time did not have a mandatory vaccination requirement for Covid or otherwise.
- He received notice of the policy by an E-mail directly from the employer. All employees go the same E-mail notification.

[24] The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Appellant lost her job because of misconduct.

- He knew that mandatory vaccination was part of the collective agreement.
- He believed the Covid-19 vaccines were “experimental”.
- He thought this was a “scare tactic” by the employer to make employees get vaccinated by the policy deadline.
- He didn’t believe anyone would lose their job if they didn’t get vaccinated because the collective agreement didn’t provide for mandatory vaccination.
- There was a sentence in the policy about exemptions, but the employer denied all exemptions by the people who applied. The employer wasn’t acting in good faith because no one could get an exemption to vaccination requirement.
- The employer sent out reminder E-mails about the deadlines for doing various things under the policy.
- But he didn’t believe that he or anyone else would lose their job because he was “100% sure” the collective agreement “said nothing” about mandatory vaccination, and because the union was filing a grievance.
- So he “wasn’t worried” about losing his job.
- He was part of the grievance process his union undertook for employees who were suspended and dismissed for non-compliance with the policy.
- He fell into the category of non-compliant employees identified in paragraph 2 of the arbitrator’s “Award”, so he is covered by the arbitrator’s decision.
- He interprets the arbitrator’s decision as saying it wasn’t his “fault” that he was suspended or dismissed.
- “I did nothing wrong,” so the suspension and dismissal were “wrongful” and there can be no misconduct for EI purposes.

- After the arbitrator's decision came out, he was reinstated to the same job with all of his seniority "as if nothing happened" and as if it wasn't his "fault" he lost his job "in the first place". Since he was never "lawfully" suspended or terminated, and was fully restored to his position, he can't be found guilty of any misconduct.

- On December 1, 2022, the employer updated the policy so that mandatory vaccination was no longer required for employees.

- This meant he now was eligible to return to work.

My questions for the Appellant

[35] I had some questions for the Appellant about his understanding of the policy.

[36] I started by asking the Appellant if he was aware of the deadlines in the policy for submitting proof of vaccination?

[37] He responded by saying that my question had already been addressed during the arbitration. He said he understood the policy was "not legal" and therefore "not applicable in my case". He also said: "I understood all the deadlines were not applicable to my case because there was no obligation on myself with regards to this policy and with regards to all those deadlines to keep in mind."[25]

[38] I asked the Appellant if he was aware of the deadlines in the policy but chose to treat those deadlines as not applicable to him?

[39] He responded by saying: "This has already been discussed during arbitration." He also said, "all those topics have been discussed during arbitration" and a binding decision has been issued, so he didn't understand why I was asking him these questions[26].

[25] At 59:36 of the recording of the hearing.
[26] At 1:00:15 of the recording of the hearing.

[40] I explained to the Appellant that I was asking these questions to understand what the policy required.

[41] He responded by saying that all of the issues with respect to the policy were discussed during the arbitration and a binding decision was issued by the arbitrator "that I was wrongfully terminated and wrongfully suspended", so all those issues were already discussed between the union and the employer[27].

[42] The Appellant's legal representative expressed his "objection" to my questions[28].

[43] The legal representative said my questions went to "the very narrow definition" for misconduct that is based on a failure to comply with a workplace policy. He also said the Appellant would not be addressing these issues today because they are "not relevant" in light of the arbitrator's ruling that the disciplinary provisions in the policy are not legally enforceable.

Submissions by the Appellant's representative

[44] The Appellant's legal representative made the following submissions[29]:

a) The employer relied on the policy to suspend and terminate the Appellant's employment. The Appellant's union challenged the policy by way of a grievance. This is a step the Tribunal has told other claimants to take, namely go to the appropriate forum for your complaints against the employer's actions.

b) The grievance went to binding arbitration and the arbitrator ruled in favour of the union.

c) The arbitrator found the employer's suspensions and terminations were wrongful and "effectively declared the discipline section of the policy voidable".

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[27] At 1:01:00 of the recording of the hearing.
[28] At 1:01:23 of the recording of the hearing.
[29] The submissions immediately followed the objection referred to in paragraphs 42 and 43 above. **Where I use quotations in paragraph 44 (and onward in this decision), I am quoting the legal representative's statements at the hearing, and not from the arbitrator's decision.**

d) The arbitrator's ruling is a "legal precedent" and "legally binding on the SST".

e) It is understood that the Tribunal is not permitted to weigh in on the reasonableness of the policy. But that's not relevant here because the arbitrator "excised those portions of the policy that were not legally enforceable", namely the disciplinary section imposing suspension and termination for non-compliance with the policy.

f) The arbitrator said those sections cannot stand. This "equates to being voidable". And this means the disciplinary sections "were effectively struck down" and, therefore, "become not legally enforceable".

g) The arbitrator declared the suspensions and terminations to be "wrongful".

h) "Wrongful" means the same thing as "unlawful".

i) The "net effect" of the arbitrator's decision is that the termination of the Appellant "for any notion of misconduct" was ruled to be "invalid".

j) Even if the Appellant was not permitted to go back to active service immediately[30], he was on an "involuntary suspension" and therefore becomes "entitled to and qualified for EI benefits".

k) The Supreme Court of Canada has said benefits conferring legislation, such as the EI Act, is to be interpreted in the most broad and favourable fashion to the claimant[31]. This means misconduct is to be construed in the most broad and favourable fashion to the Appellant.

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[30] The arbitrator's decision was issued on November 21, 2022, and the employer lifted the policy effective December 1, 2022. This was communicated to the Appellant in the December 21, 2022 reinstatement letter (RGD3-2). The Appellant testified he was not eligible to return to work until the mandatory vaccination requirement was no longer in effect.

[31] The representative cited the decision of *Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 SCR 27.

l) The "KVP test"[32] applies here, too. It says all employer rules with disciplinary consequences must be reasonable. This means the employer can't just unilaterally impose a brand new, novel policy "out of thin air" in the face of a collective agreement that doesn't support doing so and is inconsistent with the collective agreement.

m) The Appellant also received a reinstatement letter from the employer who "effectively agrees the disciplinary provisions are voidable" because it followed the arbitration decision "on a voidable basis" by restoring the Appellant's position and seniority. And the Appellant's policy violations were "deleted" and "removed" from his employment file.

n) So, there is "no evidentiary basis" for a finding of misconduct in this case.

o) The Appellant is entitled to EI benefits retroactively on the basis of "the correction to the employment record made by the employer", which deleted any allegation of violations of the policy from his file.

p) If the employer is no longer alleging a policy violation, there can be no basis for a finding of misconduct in this case. So, the Tribunal must order the Commission to pay EI benefits to the Appellant.

Analysis and Findings

[45] The Appellant's legal representative submits the Tribunal must follow the arbitrator's ruling. He says the arbitrator ruled that the Appellant's suspension and termination were "not lawful" and that the arbitrator "effectively excised" those disciplinary sections, "retroactively", from the policy. He says this means I cannot find that the Appellant lost his job due to his own misconduct for purposes of EI benefits.

[46] I don't agree that the Tribunal is bound by the arbitrator's decision.

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[32] The KVP test (from *Re Lumber and Sawmill Workers Union, Local 2537 and KVP Co.*, (1965), 16 LAC 73) is generally applied by arbitrators to determine whether an employer can rely on a policy that the unilaterally imposed.

[47] The Appellant's legal representative also submits that the issues in this appeal are "not applicable to the caselaw" on the issue of misconduct. He wants me to follow the arbitrator's ruling instead of applying the legal test for misconduct set out in paragraphs 26 to 30 above.

[48] I can't do that. I must apply the legal test established by the cases that have considered misconduct for purposes of EI benefits.

[49] The Appellant's legal representative also wants me to pretend that the Appellant was never suspended or terminated for non-compliance with the policy because the employer reinstated him and removed his policy violations from his file. He says this means there is no longer any evidence to prove misconduct, so I must allow the appeal.

[50] But I can't do that, either. The employer and the Appellant's union may have reached an agreement to, amongst other things, remove the discipline related to violation of the policy from employee files[33]. But I'm not required to be blind to what occurred. I have to look at the period of time the Appellant was separated from his employment (and for which he is seeking EI benefits) and decide if the reason he wasn't working constitutes misconduct for purposes of EI benefits.

A) Is the Tribunal bound by the arbitration decision?

[51] No, it is not.

[52] The court has decided this question. In *Attorney General of Canada v. Perusse*[34], the Federal Court of Appeal (FCA) found that the outcome of a grievance had no impact on whether or not an EI claimant lost their employment due to their own misconduct[35]. Decisions of the FCA are binding on the Tribunal.

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[33] See RGD3-2.
[34] See Federal Court Decision *A-309-81, The Attorney General of Canada v. Perusse, Serge*
[35] This case is similar to the Appellant's situation in that Mr. Perusse had been successful with his grievance and been reinstated.

[53] This means the Appellant's arbitration decision is **not** binding on me, and I must conduct my own analysis and come to my own conclusion.

B) What legal test do I use for my analysis?

[54] In the *Perusse* decision, the FCA said it was "wrong" to assume that an award allowing a grievance proved the claimant did not lose their job due to their own misconduct[36].

[55] This means I cannot simply assume that because the Appellant succeeded on his grievance and was reinstated to his position – there was no misconduct involved in his separation from employment.

[56] The Tribunal also does not have jurisdiction to interpret or apply a collective agreement or employment contract[37]. Nor does the Tribunal have legal authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act[38].

[57] Said differently, it is not the Tribunal's role to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal decide whether the penalty of being suspended or placed on an unpaid leave of absence and /or dismissed on was too severe. The Tribunal must focus on the reason

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[36] See *Perusse, supra*.

[37] See *Fakhari v. Canada (Attorney General),* 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits. The Tribunal's legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and applying a collective agreement. This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

[38] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107; and *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 a claimant 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 Claimant isn't.

the Appellant was separated from his employment and decide if the conduct that caused him to be suspended constitutes misconduct under the EI Act.

[58] So, I must apply the legal test established by the cases that have considered misconduct for purposes of EI benefits. These cases say that misconduct is any conduct that is intentional and likely to result in the loss of employment[39].

C) Is there any evidence to prove misconduct in the Appellant's case?

[59] Yes, there is.

[60] I have already found that the conduct which led to the Appellant's suspension and dismissal was his refusal to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[61] The uncontested evidence obtained from the employer, together with the Appellant's evidence and his testimony at the hearing, allow me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it.

b) his failure to comply with the policy was intentional – he made a **deliberate personal decision** not to be vaccinated.

c) he knew his refusal to provide proof of vaccination in the absence of an approved exemption could cause him to be suspended and subsequently dismissed from his employment.

The Appellant may not have been "worried" about losing his job because of his opinions and assumptions about the validity of the policy and the likely outcome of the grievance process[40]. But these opinions and assumptions don't change

[39] See paragraphs 26 to 30 above.
[40] See the Appellant's evidence and testimony under Issue 2 above.

the fact that the Appellant was clearly aware he **could** be suspended and eventually dismissed from his job for non-compliance with the policy[41].

(These 3 factors made his refusal to comply with the policy wilful.)

d) his failure to comply with the policy was the direct cause of his suspension and subsequent dismissal.

The policy violations may have been removed from the Appellant's employee file. But that doesn't change the fact that the Appellant was suspended after his last paid day on November 7, 2021 and separated from his employment **in real time** for over a year. The policy was in effect when he was suspended and subsequently dismissed. Nothing changes the fact that the reason for his separation from employment was because he was non-compliant with the policy.

Similarly, reinstatement does not change the nature of the misconduct that initially led to the Appellant's suspension and subsequent dismissal[42].

[62] **This** is the test for misconduct under the EI Act, and the evidence shows the Appellant's conduct meets the test.

[63] The employer has the right to set policies for workplace safety. The Appellant had the right to refuse to comply with the policy. By choosing not to provide proof of vaccination (in the absence of an approved exemption), he made a personal decision that led to foreseeable consequences for his employment.

[64] The FCA has said that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[43]. And the Federal Court's

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[41] See the E-mails the Appellant exchanged with the employer at GD3-49 to GD3-63.
[42] The FCA decisions in *Canada (Attorney General) v. Boulton*, 1996 FCA 1682 and *Canada (Attorney General) v. Morrow*, 1999 FCA 193.
[43] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

decision in *Cecchetto* affirmed this principle **in the specific context of a mandatory Covid-19 vaccination policy**[44].

[65] The AD has repeatedly applied this principle and confirmed it doesn't matter if a claimant's decision is based on religious beliefs, privacy concerns, medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits[45].

[66] Here, as in *Cecchetto*, the only issues are whether the Appellant was suspended and dismissed for breaching his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in his suspension and dismissal.

[67] The answer to all of these questions is yes.

[68] I therefore find the Appellant's wilful refusal to provide proof of vaccination in accordance with the policy – in the absence of an approved exemption – constitutes misconduct under the EI Act.

[69] This means the Appellant was suspended and dismissed from his employment because of conduct (his wilful non-compliance with the policy) that constitutes misconduct for purposes of EI benefits.

[70] The Appellant also argues his conduct was not misconduct because there was no provision for mandatory vaccination in the collective agreement governing his employment. This is not a persuasive argument. The employer is entitled to set

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[44] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102. The *Cecchetto* decision has since been followed in a number of other Federal Court decisions, including *Milovac v. Canada (Attorney General)*, 2023 FC 1120, *Kuk v. Canada (Attorney General)*, 2023 FC 1134 and *Matti v. Canada (Attorney General)* 2023 FC 1527. These decisions found it reasonable for the Tribunal to conclude the claimants lost their employment because of misconduct because they were aware of their employer's vaccination policies and the consequences that would result for refusing to comply.

[45] There are now many cases where the Appeal Division has confirmed this. For a small sample of these cases, see: *NL v. CEIC*, 2023 SST 143, *DM v. CEIC*, 2023 SST 256, *KW v. CEIC*, 2023 SST 271, *CEIC v. RB*, 2023 SST 1249, *JP v. CEIC*, 2023 SST 925, *MJ v. CEIC*, 2023 SST 799, *CD v. CEIC*, 2023 SST 887 and *SC v. CEIC*, 2023 SST 1077.

workplace health and safety policies as changing circumstances (such as a global pandemic) may require.

[71] As stated above, I have no authority to decide whether the employer breached the Appellant's collective agreement or whether he was wrongfully suspended and dismissed. The Appellant's recourse for his complaints against the employer was to pursue his claims in court or before another adjudicative body that deals with such matters.

[72] He has already done this through the grievance process. And he has received his remedy, namely a declaration that his disciplinary suspension and termination for non-compliance with the policy were wrongful and "cannot stand[46].

[73] However, none of the Appellant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that he was suspended and subsequently dismissed from his employment because of conduct that is considered misconduct under the EI Act.

[74] And this means he cannot be paid EI benefits.

[46] See paragraph 119 of the arbitrator's decision (at AD1-46). In paragraph 120, the arbitrator declined to make any orders that employees be reinstated to active employment, with or without back pay and benefits.

Conclusion

[75] The Commission has proven the Appellant was suspended and subsequently dismissed from his employment because of his own misconduct.

[76] The Appellant is **disentitled** to EI benefits from November 8, 2021 to January 1, 2022 because **during this period of time** he was suspended from his employment due to his own misconduct[47].

[77] He is **disqualified** from EI benefits from January 2, 2022 until the date he was reinstated to his job because **during this period of time** he was dismissed from his employment due to his own misconduct[48].

[78] The outcome of this appeal doesn't change anything for the Appellant. He still cannot receive EI benefits on the application he filed November 28, 2021.

[79] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section

[47] Pursuant to sections 29(b) and 31 of the EI Act.
[48] Pursuant to section 30 of the EI Act.