Citation: *DP v Canada Employment Insurance Commission*, 2023 SST 1858

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (466053) dated May 11, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	In person
Hearing date:	July 19, 2023
Hearing participant:	Appellant
Decision date:	July 25, 2023
File number:	GE-22-2149

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Appellant worked as a property courier and was employed by Toronto Police Service (the employer).

[4] In October 2021, the employer instituted a mandatory Covid-19 vaccination policy that required all employees to be fully vaccinated by November 30, 2021 (the policy). Only those with a valid medical exemption or an exemption under the Ontario *Human Rights Code* could request accommodation. Those who were unvaccinated[2] and did not have an approved exemption by the deadline would be placed on an indefinite unpaid leave of absence (LOA).

[5] The Appellant did not disclose his vaccination status or obtain an approved medical or *Human Rights Code* exemption by the November 30, 2021 deadline in the policy. He worked up until November 29, 2021, and then the employer put him on an unpaid LOA[3].

[6] The Appellant applied for EI benefits. The Respondent (Commission) decided he was disentitled to EI benefits because he was suspended from his job due to his own misconduct. The Appellant asked the Commission to reconsider. He said he was not suspended but was "placed on unpaid leave" by the employer "for not disclosing my

[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] Or deemed to be unvaccinated because they failed to disclose their vaccination status by providing proof of vaccination against Covid-19.
[3] See the Record of Employment at GD3-21.

medical status"[4]. He also said he wasn't comfortable getting a Covid-19 vaccine because he didn't feel there had been enough testing of these vaccines.

[7] The Commission maintained the disentitlement on his claim, and the Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[8] I have to decide whether the Appellant was suspended from his job due to his own misconduct[5]. To do this, I must look at the reason he stopped working, and then determine if the conduct that caused his separation from employment is conduct the law considers to be "misconduct" for purposes of EI benefits.

[9] 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 would be placed on an indefinite unpaid LOA by making this choice – and that's what happened. The Commission says these facts prove the Appellant was suspended from his job due to his own misconduct, which means he cannot receive EI benefits.

[10] The Appellant disagrees. He says he made a valid personal choice not to disclose is vaccination status. He argues that he was an exemplary employee, the policy was arbitrary and unreasonable, and the employer could have accommodated his concerns about the safety and efficacy of the Covid-19 vaccines. He also argues that there was no misconduct on his part because he was reinstated to his job and allowed to buyback his pension[6].

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

Issue

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

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[4] See GD3-28.
[5] This is the decision that was reconsidered, so this is the decision before me on appeal.
[6] A buyback is the purchase of eligible past service to count towards your pension. The Appellant testified that he would not have been allowed to buyback his pension (for the period of his LOA) if the employer had, in fact, suspended him for misconduct.

Analysis

[13] Claimants who lose their job because of misconduct are disqualified from receiving EI benefits[7].

[14] Loss of employment includes a suspension from employment[8].

[15] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits until:

a) the period of suspension expires;

b) they lose or voluntarily leave their employment; or

c) after the suspension starts, they accumulate enough hours of insurable employment in other employment to qualify for benefits[9].

Such claimants are not entitled to receive EI benefits while they are suspended from their employment[10]. During the period of suspension, the consequences are the same as a dismissal for misconduct[11].

[16] Where an employer refuses to allow a claimant to continue working and puts them on an unpaid LOA (in other words, an **involuntary** LOA), the claimant will be considered to have been suspended for purposes of the *Employment Insurance Act* (EI Act). And if the suspension was due to misconduct, the claimant is not entitled to receive EI benefits during the period of the suspension (involuntary LOA)[12].

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[7] Section 30(1) of the EI Act.
[8] Section 29(b) of the EI Act.
[9] Section 31 of the EI Act.
[10] Although you may be entitled to receive EI benefits after your suspension is over.
[11] See *CUB 51820.*
[12] Section 31 of the EI Act.

[17] An employer's characterization of the separation from employment – be it as a layoff, dismissal or a leave of absence – is not determinative[13]. I am not bound by how the employer and the Appellant might characterize the way the employment ended[14].

[18] I must assess the evidence and decide the real reason why the Appellant stopped working after his last paid day on November 29, 2021.

[19] Then I must decide if the reason he stopped working was due to conduct that is considered "misconduct" under the EI Act. If it was, I need to determine whether he is disqualified or disentitled to EI benefits.

Issue 1: Why did the Appellant stop working?

a) My findings

[20] The Appellant stopped working because the employer put him on an unpaid LOA for failing to comply with the policy.

[21] He remained on unpaid LOA from November 30, 2021 until he was reinstated to his job in June 2022[15].

[22] This unpaid LOA is considered a suspension for purposes of the EI Act.

b) The evidence and submissions

[23] The policy required all employees to be fully vaccinated by November 30, 2021. It set out the consequences of non-compliance as follows:

> "Members must comply with the COVID-19 Mandatory Vaccination Requirement as a condition of employment.
>
> Effective 2021 November 30, any members who are not fully vaccinated against COVID-19, or who are deemed to be unvaccinated as a result of having failed to disclose their vaccination status to the Wellness unit, **will have rendered themselves unable to perform their assigned duties and to enter any**

[13] See *Walls v. Canada (Attorney General)*, 2022 FCA 47 (CanLii) at paragraph 41.
[14] See *KJ v. Canada Employment Insurance Commission*, 2023 SST 266, a case where this Tribunal's Appeal Division confirmed I am not bound by a Record of Employment.
[15] At the hearing, the Appellant said he was reinstated to his employment in June 2022 but could not recall the exact date he returned to work.

> **Service facilities, and will accordingly not be paid any wages or salary indefinitely.**
>
> **Members will not be permitted to use their sick, vacation, or any other time banks to maintain their wages or salary as a result of having rendered themselves unable to perform their assigned duties due to non-compliance with the COVID-19 Mandatory Vaccination Requirement."[16]**

[24] The Appellant did not provide proof of vaccination to the employer by the November 30, 2021 deadline[17]. He testified at the hearing that he made a personal decision, in consultation with his doctor, not to get vaccinated against Covid-19.

[25] On December 17, 2021, the employer issued a Record of Employment (ROE) for the Appellant. The ROE said he was paid until November 29, 2021 and was on "leave of absence"[18].

[26] On his application for EI benefits, the Appellant was asked why he was no longer working. He chose the "dismissed or suspended" response rather than the "I am on a leave of absence" response[19]. But he went on to say he was "put on unpaid leave" because he was "considered unfit for duty" due to the "vaccine mandate" and not disclosing his vaccine status[20].

[27] The Appellant told the Commission that:

- Employees had to submit proof of vaccination or they would be placed on an unpaid LOA until they complied[21].
- "For not disclosing my medical status, I was placed on unpaid leave."[22]

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[16] GD3-24.
[17] Nor did he ask the employer for an exemption to the policy.
[18] See GD3-21.
[19] See GD3-8.
[20] See GD3-10 to GD3-12.
[21] See GD3-26.
[22] See GD3-28.

- His employer placed him on an unpaid LOA and coded his ROE that way[23].

[28] In his Notice of Appeal, the Appellant said "I was placed on unpaid leave" and that suspension and misconduct were "never implied or communicated" by the employer[24]. In his additional appeal materials, the Appellant said, "On Nov 30, 2021 I was placed on unpaid leave" because of the employer's vaccine mandate[25].

[29] At the hearing, he testified that he was put on an unpaid LOA – not a suspension – when he did not provide proof of vaccination by the November 30, 2021 deadline in the policy. He also testified that he was reinstated to his employment in June 2022, after the policy was lifted.

[30] All of this evidence shows the employer put the Appellant on an indefinite unpaid LOA because he failed to provide proof of vaccination by the November 30, 2021 deadline in the policy. I find that this failure to comply the policy is the real reason the Appellant stopped working after his last paid day on November 29, 2021.

[31] I further find that the Appellant remained on unpaid LOA from November 30, 2021 until he was reinstated to his employment in June 2022.

[32] The wording in the policy shows that the employer **chose** to put the Appellant on unpaid LOA rather than impose a suspension or termination during this period.

[33] Where an employer chooses to put an employee on an unpaid LOA rather than imposing a suspension or termination, it is considered an involuntary LOA and will be treated as a suspension – regardless of what the ROE says[26].

[34] I therefore conclude that the Appellant was suspended from his job starting on November 30, 2021 because he failed to comply with the policy[27].

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[23] See GD3-34.
[24] See GD2-5.
[25] See GD-24-1.
[26] See footnotes 13 and 14 above.
[27] The Appellant failed to comply with the policy when he did not provide proof of vaccination or obtain an approved exemption by the November 30, 2021 deadline in the policy.

[35] I must now determine if the reason for his suspension, namely his failure to comply with the policy, is considered misconduct.

Issue 2: Is the reason for his suspension misconduct under the law?

a) **My findings**

[36] Yes, it is. The reason for the Appellant's suspension (namely, his failure to comply with the policy) is misconduct for purposes of EI benefits.

b) **The law**

[37] The law says that if you lose your employment (termination or suspension) due to your own misconduct, you cannot be paid EI benefits[28].

[38] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional[29]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[30] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[39] At the hearing, the Appellant argued he was an exemplary employee and did not engage in behaviour that could be considered misconduct – especially given the fact that he was reinstated to his position. But the law says the Appellant doesn't have 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[31].

[40] There is misconduct if the Appellant 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 because of it[32].

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[28] See sections 29 to 32 of the EI Act.
[29] See *Mishibinijima v. Canada (Attorney General),* 2007 FCA 36.
[30] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[31] See *Attorney General of Canada v. Secours*, A-352-94.
[32] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[41] The Commission has to prove the Appellant was suspended from his job due to misconduct[33]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

[42] Under Issue 1 above, I found that the Appellant stopped working because he was placed on an unpaid LOA by the employer for failing to comply with the policy. I also found that this unpaid LOA is considered a suspension for purposes of EI benefits. Now I have to determine if the Appellant's **suspension** from employment was due to his own misconduct[34].

[43] To do this, I must decide whether the conduct that led to the suspension (namely, the Appellant's failure to comply with the policy) was wilful and whether he knew or ought to have known he could be suspended (placed on unpaid LOA) for that conduct.

c) **The evidence and submissions**

[44] The Appellant told the Commission[35] that:

- The employer introduced a mandatory Covid-19 vaccination policy which required all employees to submit proof of vaccination or be placed on unpaid LOA until they complied[36].
- The policy gave employees a deadline of November 30, 2021 to provide proof of vaccination[37].
- He didn't want to disclose his vaccination status.
- He wasn't comfortable getting vaccinated because he feels there has not been enough testing of the Covid-19 vaccines.

[33] 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 his job because of misconduct.
[34] If yes, he is disentitled to EI benefits pursuant to section 31 of the EI Act.
[35] See GD3-26 and GD3-34.
[36] See GD3-26.
[37] See GD3-23.

- He didn't ask for a medical or any other exemption to the policy.
- He knew he would be placed on an unpaid LOA for failing to provide proof of vaccination and willing chose not to do so.
- "For not disclosing my medical status, I was placed on unpaid leave."[38]
- His employer placed him on an unpaid LOA and coded his ROE that way.

[45] At the hearing, the Appellant read out the written submissions he filed with the Tribunal the day before the hearing (GD24). I have considered these submissions.

[46] He also testified that:

- His employment is governed by a collective agreement[39], which is "binding" and cannot be changed during its term[40]. There is no mandatory vaccination requirement in this collective agreement.
- Being vaccinated for Covid-19 was not a condition of his hiring.
- He has been an exemplary employee for over 20 years.
- He works "independently", with "no one else around". He is either in a truck by himself, picking up property and delivering it between various police stations (with little interaction with others) – or he is in a large warehouse where it is easy to maintain social distancing.
- Prior to the policy, the employer had very strict testing requirements and any outbreak was always "monitored".

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[38] See GD3-28.
[39] The Appellant brought a copy of his collective agreement to the hearing and referred to it in his testimony. I admitted it into evidence and a copy was provided to the Commission (GD25), who advised they had no additional representations in response to this evidence.
[40] The collective agreement covers 2019 – 2023 (GD25-1).

- He would have rapid-tested at his own expense in order to continue working while remaining unvaccinated, but that wasn't an option.
- His union asked for accommodations for employees who wanted to avoid vaccination, but the employer "had no flexibility".
- The policy was arbitrary and unreasonable. He did not breach the terms of his employment.
- The Covid-19 vaccines were not effective against transmission of the virus – both manufacturers and public health leaders have admitted that.
- In 1980, the Supreme Court of Canada made a ruling in a "bodily autonomy case" that individuals should be allowed to consent to any medical procedure. Consent must be free from coercion. This means he can't be denied EI benefits to encourage vaccination.
- It wasn't that he didn't want to get vaccinated.
- It was that he had concerns about the safety and efficacy of the Covid-19 vaccines.
- And it turns out he was right to be concerned.
- There is now abundant evidence that the vaccines are not safe for children, caused far more deaths than have been properly recorded by the government, and are not effective against transmission.
- He did exactly as the Prime Minister told Canadians to do. He went to his doctor for advice and made his decision based on that advice.
- The vaccines were never stringently tested. They should never have been mandated because they were based on assumptions that weren't tested and didn't turn out to be true.

- The union grieved the policy and the employer's actions under it, but the union "lost".

- He was put on an unpaid LOA – not a suspension.

- He found temporary work with a school board. How could it be possible for him to be allowed to work with young kids while unvaccinated, but not alone in a warehouse?

- The employer's actions were arbitrary, unreasonable and inconsistent. He should have been accommodated. He knows of other employees who got "concessions and options".

- He was reinstated to his employment in June 2022, when the policy was lifted for existing employees. It remained in effect for new hires for a while, and then the policy was rescinded completely.

- He was allowed to buyback his pension, which he couldn't have been done if he had been suspended for misconduct. "X has very strict rules" about that. The e-mails about his pension buyback refer to him being on "authorized leave".

[47] I acknowledge the Appellant's disappointment at not receiving EI benefits.

[48] The Appellant appears to think that a finding of "misconduct" requires him to have done something "wrong" in connection with the performance of his duties or his conduct in the workplace. But as I explained at the start of the hearing, the term "misconduct" for purposes of EI benefits does not necessarily mean that a claimant did something "wrong". The term "misconduct" does not have the same meaning for EI benefits as it does in other employment contexts, such as discipline and grievance proceedings or labour arbitrations. It simply means that a claimant engaged in wilful (deliberate, intentional) conduct that they knew or ought to have known could cause them to be separated from their employment.

[49] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accommodated the Appellant with rapid testing, or whether the penalty of being placed on an unpaid leave of absence was too severe[41]. 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[42].

[50] The Tribunal must focus on the conduct that caused ***the Appellant*** to be suspended and decide if it constitutes misconduct under the EI Act.

[51] I have already found that the conduct which led to the Appellant's suspension was his failure to provide proof of vaccination by November 30, 2021, as required by the workplace policy the employer instituted in response to the Covid-19 pandemic.

[52] The evidence in the reconsideration file (GD3), as well as the evidence in the Appellant's appeal materials and his testimony at the hearing, allows me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it[43].

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[41] 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.

[42] 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.

[43] The Appellant provided a copy of an e-mail he received from the employer on October 21, 2021 entitled "Mandatory Vaccination Requirement & Unpaid Absence for Unvaccinated Members" (at GD2-9) announcing the implementation of a mandatory vaccination requirement. The appendix to that e-mail (10-14 APPENDIX A "COVID-19 MANDATORY VACCINATION REQUIREMENT" is at GD3-23 to GD3-26. The deadline to become fully vaccinated was November 30, 2021 is at GD3-23 of the appendix. This means the Appellant had from October 21, 2021 to November 30, 2021 to become vaccinated or seek an approved exemption.

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

c) he knew his failure to provide proof of vaccination by the November 30, 2021 deadline in the policy would cause him to be put on unpaid LOA (suspended) from his job.

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

[53] The employer has the right to set policies for workplace health and safety. The Appellant had the right to refuse to comply with the policy. By choosing not to be vaccinated and provide proof of vaccination, he made a personal decision that led to foreseeable consequences for her employment.

[54] This Tribunal's Appeal Division has repeatedly confirmed it doesn't matter if a claimant's personal decision is based on religious beliefs or medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 health and safety policy is considered wilful and will be misconduct for purposes of EI benefits[44].

[55] The Appeal Division decisions are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[45]. And a recent decision from the Federal Court in *Cecchetto* affirmed this principle **in the specific context of a mandatory Covid-19 vaccination policy**[46].

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[44] There are now many cases where the Appeal Division has confirmed this. For a small sample of these cases, see: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.
[45] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.
[46] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.

[56] I therefore find that the Appellant's wilful failure to provide proof of vaccination by November 30, 2021 in accordance with the policy constitutes misconduct under the EI Act.

[57] The Appellant's recourse for his complaints about the policy and/or the employer's actions in connection with the cessation of his employment, as well as the government actions he alleges to be improper, is to pursue these claims in court or before another tribunal that deals with such matters. He remains free to make these arguments before the appropriate adjudicative bodies and seek relief there.

[58] However, none of his arguments about what the employer (or the government) did or didn't do or should have done – change the fact that the Commission has proven on a balance of probabilities that he was suspended because of conduct that constitutes misconduct under the EI Act.

[59] And this means he is not entitled to receive EI benefits while he is suspended[47].

[60] The Appellant has referred to a decision of this Tribunal (which I will refer to as the AL decision[48]), in which a Tribunal member reversed the Commission's finding of misconduct and said the claimant (AL) was not disentitled to EI benefits. I take from the fact that he filed a copy of the AL decision with his appeal materials (at GD16) that he is suggesting I should follow the AL decision[49].

[61] AL worked in a hospital, her employment was subject to a collective agreement, and she was suspended and later dismissed for non-compliance with her employer's mandatory Covid-19 vaccination policy. The Tribunal member found that AL did not lose her job for a reason the EI Act considers to be misconduct for two reasons:

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[47] Since I do not know when the Appellant returned to work after his suspension, I cannot give a specific end date for the disentitlement on his claim. However, the law is clear that he is not entitled to EI benefits during the period of his suspension.
[48] *AL v Canada Employment Insurance Commission,* 2022 SST 1428.
[49] The AL decision is under appeal and I view it as largely overturned by the Federal Court's decision in *Cecchetto, supra*.

a) the member found the employer's mandatory Covid-19 vaccination policy was not an express or implied condition of AL's employment and, therefore, her refusal to get vaccinated was not misconduct; and

b) the member found that AL had a right to bodily integrity and exercised that right when she refused to get vaccinated. The member found that exercising a legal right can't be considered a wrongful act or conduct that should disqualify a claimant from EI benefits.

[62] I am **not** bound by decisions of other Tribunal members, but I can rely on them to guide me where I find them persuasive and helpful[50].

[63] I do not find the AL decision to be persuasive or helpful, and I decline to follow it.

[64] This is because the AL decision goes against binding caselaw from the Federal court about misconduct, which I have discussed above.

[65] Here, as in *Cecchetto*, the only issues are whether the Appellant was suspended for breaching his employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in his suspension (put on unpaid LOA). The answer to all of these questions is yes.

[66] By making a deliberate choice not to get vaccinated and provide proof of vaccination as required by the policy, the Appellant was separated from his employment starting on November 30, 2021 because of conduct that is considered misconduct under the EI Act. And this means he is not entitled to be paid EI benefits during the period of his suspension[51].

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[50] There is a rule called *stare decisis*. It is an important foundation of decision-making in our legal system. It applies to courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I must follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. But I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.
[51] See footnote 47 above.

Conclusions

[67] The Appellant stopped working because his employer put him on an unpaid LOA for failing to comply with its mandatory Covid-19 vaccination policy (by providing proof of vaccination by the November 30, 2021 policy deadline).

[68] He remained on unpaid LOA from November 30, 2021 until June 2022.

[69] The unpaid LOA is considered a suspension for purposes of the EI Act. This means the Appellant was suspended from his employment from November 30, 2021 to June 2022.

[70] The Appellant was suspended due to his own misconduct. This means he is disentitled to EI benefits during the period of the suspension[52].

[71] The appeal is dismissed.

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

[52] Pursuant to section 31 of the EI Act.