



Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1979

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (528295) dated September 22, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: In person

Hearing date: April 5, 2023

Hearing participant: Appellant

Decision date: May 12, 2023

File number: GE-22-3512

Decision

[1] I am dismissing M. M.'s appeal.

[2] The Canada Employment Insurance Commission (Commission) has proven that she was suspended then lost her job for a reason the *Employment Insurance Act* (EI Act) considers misconduct. In other words, she did something that caused her to be suspended and lose her job.

[3] This means she doesn't qualify for Employment Insurance (EI) benefits.¹

[4] So the Commission made the correct decision in her EI claim.

Overview

[5] M. M. (the Appellant) is a certified public health inspector. She lost her job working for a regional municipality (employer). Her employer put her on an unpaid leave of absence, then dismissed her.²

[6] Her employer said that it suspended then dismissed her because she didn't comply with its mandatory COVID vaccination policy (vaccination policy).

[7] The Appellant disagrees. She says the real reason her employer dismissed her was because she created too many problems by taking a medical leave.

[8] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost her job because of misconduct. Because of this, the Commission didn't pay her EI benefits.

[9] The Appellant says her conduct wasn't misconduct. Her employer didn't properly review and understand her doctor's notes saying she wasn't fit to return to work. So it told her to return to work. And wanted proof of her COVID vaccination status. She says

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.

² In this decision, and under the EI Act, a suspension means the same thing as a leave of absence, a leave of absence without pay, and an unpaid leave of absence.

there was a communication breakdown with her employer, and she was confused. So she didn't deliberately or recklessly go against her employer's vaccination policy.

[10] I have to decide the reason the Appellant lost her job. And whether that reason is misconduct under the EI Act.

Matter I have to consider first

Documents sent to the Tribunal after the hearing

[11] The Appellant sent documents to the Tribunal. She wrote about minutes of settlement (settlement) in a grievance her union brought challenging the employer's vaccination policy. She said her employer's vaccination policy had changed as a result of the settlement. But she didn't send the Tribunal the settlement or her employer's new policy.

[12] At the hearing I told the Appellant I could consider the settlement and the employer's new vaccination policy. But only if I could review copies of these documents. I needed to see what they said.

[13] So I set a deadline for her to send the documents to the Tribunal. And told her she could refer to the settlement and the employer's new vaccination policy during the hearing.

[14] She sent the Tribunal the settlement and the emails she exchanged with her union asking for the documents.³

[15] The Tribunal sent the settlement and emails to the Commission. And gave it a deadline to respond.

[16] I will accept the settlement into evidence, for three reasons:

- I told the Appellant she could send it in after the hearing

³ See GD17.

- it might be relevant to a legal issue I have to decide—whether her conduct went against her employer’s vaccination policy and was misconduct
- it would not be unfair to the Commission because I gave the Commission an opportunity to respond

[17] So I will consider the settlement when I make my decision.

Issue

[18] Did the Appellant lose her job because of misconduct?

Analysis

[19] The law says that you can’t get EI benefits if you lose your job because of misconduct.

[20] I have to decide two things.

- the reason the Appellant lost her job
- whether the EI Act considers that reason to be misconduct

The reason the Appellant lost her job

[21] I find the Appellant’s employer suspended then dismissed her because she didn’t comply with its vaccination policy.

[22] That’s what the Commission says. Her employer issued two records of employment. The first says she was on leave of absence (Code N). And in the comments box her employer wrote, “Refuse to comply with mandatory vaccination policy.”⁴ The second says dismissal or suspension (Code M).⁵ And in the comments box her employer wrote, “Refuse to comply with mandatory vaccination policy. Employee went on LOA from Jan 15, 2022 and Terminated effective Mar 21, 2022.”

⁴ See GD3-15.

⁵ See GD3-17.

[23] In the termination letter the employer says the Appellant's refusal to give proof of COVID vaccination by the deadline was insubordination.⁶ And it amounted to a fundamental breach of the employment relationship. The employer told the Commission the same reasons.⁷

[24] The Appellant disagrees.⁸ She says the real reason her employer dismissed her was because she created too many problems for her employer by taking a medical leave. Her employer demanded she return to work. Her employer misunderstood or refused to accept the evidence she wasn't fit to return. Her employer thought she was faking her illness because she didn't want to get vaccinated. So it placed her on a disciplinary leave of absence as punishment for that.

[25] She says her vaccination status was irrelevant because her employer had no right to make her return to work. Her employer wrongfully terminated her, discriminated against her, and breached the collective bargaining agreement. The Appellant has filed grievances and an application to the Human Rights Tribunal of Ontario.

[26] I accept the Commission's evidence about the reason her employer suspended then dismissed her. I prefer it to what the Appellant says. The Commission's evidence is clear, consistent, and detailed. And I have no reason to doubt it.

[27] The Appellant didn't give the Tribunal evidence to support what she says is the real reason. I have reviewed the communications back-and-forth between her and employer. There is no question they disagreed about whether she was fit to return to work. And maybe even some miscommunication. But her employer consistently took the

⁶ See GD3-33. Here is the relevant part of the termination letter: "To date, you have received several reminders to comply with the Region's COVID-19 Vaccination Policy by November 1, 2021. Subsequently, you were placed on a disciplinary unpaid leave of absence for continued failure to comply with the Policy and advised that your employment would be terminated if you did not provide proof of vaccination by March 14, 2022. Despite allowing you additional time to submit proof of a full COVID-19 vaccine series beyond the deadline date of November 1, 2021, you continue to be non-compliant with the Policy as of the date of this letter. The Region views this as insubordination and a fundamental breach of the employment relationship. As a result, your employment with the Region is terminated"

⁷ See the Commission's notes of its calls with the employer at GD-18

⁸ This is a summary of her arguments, based on what she says in GD2, GD6, GD7, GD8, GD10 and GD15.

position that she was fit to return to work. And consistently told her she needed to comply with its vaccination policy to do that.

[28] She disagreed and didn't do that. And the Commission's evidence shows me her employer suspended then dismissed her as a result—and did that in a stepwise way, in writing.

[29] Based on the evidence I have accepted, I find it is more likely than not the reason the Appellant's employer suspended then dismissed her is because she didn't follow its vaccination policy.

The reason is misconduct under the law

[30] I find the Appellant's refusal to comply with her employer's vaccination policy is misconduct under the EI Act. Here are my reasons.

– What misconduct means under the EI Act

[31] 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 legal questions I must consider when I make my decision.

[32] The Commission has to prove that it is more likely than not she lost her job because of misconduct.⁹

[33] I have to focus on what the Appellant did or didn't do, and whether that conduct amounts to misconduct under the EI Act.¹⁰ I can't consider whether the employer's policy is reasonable, or whether suspension and dismissal were reasonable penalties.¹¹

[34] The Appellant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct.¹² To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ This is what sections 30 and 31 of the EI Act say.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Attorney General of Canada v Secours*, A-352-94.

intentional.¹³ And misconduct also includes conduct that is so reckless that it is almost wilful.¹⁴

[35] There is misconduct if the Appellant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and knew or should have known there was a real possibility of being let go because of that.¹⁵

[36] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.¹⁶ So, for example, I can't decide whether her employer breached a collective agreement.¹⁷ I can't decide whether her employer discriminated against her or should have accommodated her under human rights law.¹⁸

[37] The Federal Court recently released its first EI decision about misconduct where an appellant didn't follow their employer's COVID vaccination policy.¹⁹ In *Cecchetto* the Court confirmed:²⁰

- the legal test for misconduct set by earlier Federal Court decisions²¹
- the Tribunal has an “important, but narrow and specific role” in vaccine misconduct cases
- the Tribunal has to decide two things: why the appellant was dismissed and whether that reason is “misconduct” under the EI Act
- its not an error for the Tribunal to refuse to consider things it doesn't have to

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ 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.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁹ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 (*Cecchetto*).

²⁰ See *Cecchetto* at paragraphs 46 to 48.

²¹ See paragraph 39 in *Cecchetto*, where the Court states the test: “There will be misconduct where the appellant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility.”

– **What the Appellant and the Commission say**

[38] The Appellant says there was no misconduct. She didn't deliberately or recklessly go against her employer's vaccination policy.

[39] The Appellant testified:

- it was mind-boggling to her that her employer wanted her to return to work because the medical forms she gave her employer showed she was impaired—her employer completely ignored those forms
- her employer thought she was faking her sickness to avoid vaccination, because her doctor had written she was under care for a mental health condition and had severe anxiety about the vaccination²²
- she says this is wrong, COVID vaccination just added to her stress, and gave the employer evidence from her doctor saying that her mental health condition and absence from work wasn't based on COVID vaccination
- she didn't want to discuss the COVID vaccination requirement with her employer because it was "completely irrelevant"
- she knew her employer had refused her religious accommodation request
- she knew her employment was at risk if she didn't comply with her employer's vaccination policy, based on the emails her employer sent her
- her conduct wasn't willful, deliberate, or reckless because she was sick and incapable of returning to work so her employer shouldn't have asked her about her vaccination status
- she didn't follow the policy because her employer wouldn't discuss return to work and the doctor's notes with her after it had made its decision, which led

to her confusion and misunderstanding, and this goes to the issue of whether she intentionally or wilfully didn't follow the vaccination policy²³

[40] The Commission says the Appellant failed to adhere to the employer's vaccination policy²⁴. Her employer made her aware of the vaccination policy, including the consequences of non-compliance, well in advance of the deadline. She lost her job when she didn't comply with the policy. The Commission concluded that her dismissal from employment is misconduct under the EI Act.

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

[41] I believe and accept the Appellant's evidence and the Commission's evidence for the following reasons.

[42] I have no reason to doubt the Appellant's evidence about what she did, what she said, what she knew, and what she believed. Her story stayed essentially the same from her EI application through the hearing. And what she said is consistent with what the vaccination policy says, and what her employer wrote in the termination letter and on her records of employment.

[43] I accept the Commission's evidence because it's consistent with the Appellant's evidence. And there is no evidence that contradicts the Commission's evidence.

[44] Based on the evidence I have accepted, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown the Appellant:

- knew about the vaccination policy²⁵
- knew **or should have known** about her duty to get fully vaccinated and give proof (or get an exemption) by the deadline

²³ In an email to her employer, at GD3-77, she writes: "The reason why I haven't submitted my vaccination status by Jan 7, 2022 is because I have been confused by the letter I received from you in December and I have been waiting for clarification (that I received yesterday evening, January 12, 2022)."

²⁴ See the Commission's representation at GD4-7.

²⁵ See the employer's vaccination policy and its communication it sent about that policy to its staff at GD3-105 to GD3-122.

- knew **or should have known** that her employer could dismiss her if she didn't get vaccinated
- applied for a religious exemption, but her employer denied her an exemption, which she knew²⁶
- consciously, deliberately, and intentionally made the decision not to get vaccinated by the deadline
- was suspended then dismissed from her job because she didn't comply with the vaccination policy

[45] I don't accept the Appellant's argument that her conduct wasn't wilful—conscious, deliberate, intentional, or reckless to the point of being wilful. Her argument confuses what she **knew** with what she **believed**. In other words, it mixes up facts with argument. Under the legal test for misconduct I have to figure out what **she knew or should have known**. I have to make findings of fact about this.

[46] I accept that she has a strong and unwavering **belief** that her employer had no right to ask her about her vaccination status. She believes in that argument. I have no reason to doubt this.

[47] I find that this belief led to her misunderstanding and confusion in the beginning of January 2022. But on January 17, 2022, her employer clearly communicated what it expected of her.²⁷ So her belief isn't supported by the facts. And her belief (in other words her disagreement) doesn't change what she knew or **should have known** about what would probably happen if she refused to get vaccinated.

²⁶ She submitted her exemption request on March 14, 2022. See GD3-137.

²⁷ In an email dated January 17, 2022 (at GD3-75), her employer wrote: "As indicated in the email sent to you on January 12, 2022, your medical has been deemed insufficient to support your continued short-term disability. The information used to make this determination involved the doctor-to-doctor consult with your physician and the Fit to Work Form provided. As your absence is no longer medically supported, you are required to be compliant with the Mandatory Vaccination Policy. You do not have an approved Human Rights exemption nor have you provided proof of vaccination, and consequently you have been placed on an Unpaid LOA. I encourage you to contact your union regarding any concerns you may have with your Leave of Absence."

[48] Based on the Commission's evidence and the Appellant's testimony, I find **she knew or should have known** her employer would suspended then dismiss her if she didn't follow its vaccination policy. And she chose not to follow it. So her conduct was wilful.

[49] The Appellant's argument that her employer had no right to require her to follow its vaccination policy when it did might ultimately succeed. That argument is based entirely on her argument her employer had no right—under human rights law and her collective agreement—to force her to return to work.

[50] But the law about misconduct under the EI Act is clear. I can't focus on her employer's conduct. Or make my decision based on human rights law or her collective agreement. A human rights tribunal or labour arbitrator has the power to do that.

– **Minutes of Settlement don't make a difference in this appeal**²⁸

[51] I have reviewed the settlement the Appellant sent to the Tribunal after the hearing.²⁹ It settles the union's policy grievance about the employer's vaccination policy. The settlement isn't based on the specific facts of the Appellant's grievance against her employer.

[52] The settlement doesn't change my decision.

[53] The settlement says the employer's vaccination policy "is an continues to be reasonable up until March 1, 2023."³⁰ The vaccination policy was "reasonable" the time it made decisions about the Appellant's employment. In other words, employer had a right to have its vaccination policy and make decisions under it.

²⁸ A settlement agreement in itself doesn't tell me whether an employee was dismissed for misconduct under the EI Act. I have to assess the evidence—including what the settlement agreement says—and come to a decision. I'm not bound by how the employer and the appellant (or their union) might frame the reason the employer dismissed an appellant (*Canada (Attorney General) v Morris*, A-291-98, leave to SCC refused, [1999] SCCA No 304; *Canada (Attorney General) v Boulton*, A-45-96; *Canada (Attorney General) v Perusse*, A-309-81).

²⁹ See GD-17.

³⁰ See GD-17 at paragraph 1.

[54] The settlement changes some of the legal and practical consequences—under the collective agreement—of the decisions her employer made when it applied the policy to some employees.

[55] Under the settlement, employees who were terminated who now have active grievances were offered two options: (a) reinstatement effective March 1, 2023 and all discipline will be removed from their employment records, or (b) a lump sum severance payment.³¹ The Appellant might not be offered option (a), but I don't have to decide that.³²

[56] I find the settlement doesn't show me the Appellant's conduct wasn't misconduct under the EI Act. The terms of the settlement don't change any of my findings of fact in this case. And they don't change how I applied the law to those facts.

– **AL v CEIC**³³

[57] The Appellant argues I should follow *AL v CEIC*, a decision of our Tribunal.³⁴ Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job for a reason the EI Act considers misconduct.³⁵

[58] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.³⁶

³¹ See GD-17 paragraph 5.

³² GD-17 paragraph 6 says: "Option A will not be offered to terminate employees with grievances related to sick leave denial and/or whose absences the Employer deemed suspicious (a list having been provided to the Union). Grievors in this category may choose to elect Option B or continue to pursue their sick leave denial grievance through arbitration."

³³ See *AL v Canada Employment Insurance Commission*, 2022 SST 1428 (AL v CEIC).

³⁴ In *AL v CEIC*, AL worked in hospital administration. The hospital suspended and later dismissed her because she didn't comply with its mandatory COVID-19 vaccination policy.

³⁵ The Tribunal made this decision for two reasons: First, the collective agreement didn't include COVID-19 vaccination when it was signed, and the employer had not bargained with the union to include one. Second, AL had a "right to bodily integrity". It was her right to choose whether to accept medical treatment—in this case, the COVID-19 vaccine.

³⁶ This rule (called *stare decisis*) 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 have to 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. I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[59] I am not going to follow *AL v CEIC*. With the respect owed to my colleague who decided that appeal, I am not persuaded by his findings and the reasoning he relied on to arrive at those findings. In my opinion, his decision break the rules the Federal Courts have set out in their decisions about misconduct.³⁷

Conclusion

[60] The Commission has proven that the Appellant was suspend then lost her job because of misconduct under the EI Act.

[61] Because of this, the Appellant is disentitled and disqualified from receiving EI benefits.

[62] This means the Commission made the correct decision.

[63] So I have to dismiss her appeal.

Glenn Betteridge

Member, General Division – Employment Insurance Section

³⁷ First, he should not have interpreted and applied the collective agreement to find the employer had no authority to mandate that employees get vaccinated against COVID-19. Second, he should not have found that the appellant had a right—in the employment context—to refuse to comply with the employer's vaccination policy based on the law of informed consent to medical treatment. In other words, he had no legal authority to add to the collective agreement an absolute right for a worker to choose to ignore the employer's vaccination policy based on a rule imported from a distinct area of law. 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 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.