Citation: *MZ v Canada Employment Insurance Commission*, 2023 SST 1873

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (546168) dated October 27, 2022 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	May 24, 2023
Hearing participant:	Appellant
Decision date:	June 9, 2023
File number:	GE-22-3835

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost his job. The Appellant's employer says that he was let go because he went against its vaccination policy: he didn't have an exemption and he didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy is not misconduct. The Appellant feels that his employer didn't characterize what happened as misconduct so it isn't right that the Commission is doing so. He has sincerely held religious beliefs and these should not be seen as a choice.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[6] Did the Appellant lose his job because of misconduct?

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[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

Analysis

[7] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[2]

[8] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[9] I find that the Appellant lost his job because he went against his employer's vaccination policy.

[10] The Appellant says he lost his job because of this. The Appellant says because of his religion he didn't want to get vaccinated. The Appellant says that he followed his employer's policy and tried to get a religious exemption, but the employer denied his exemption. The Appellant feels that it is unfair that his employer didn't accommodate him by giving him a religious, or other, exemption. The Appellant doesn't feel it is misconduct for not following the policy. The Appellant says there is caselaw that supports that a religious belief is immutable, they are ingrained in him. He says he was not making a personal choice. The Appellant says his employer didn't call what happened misconduct and therefore the Commission shouldn't either. The Appellant feels he should be entitled to benefits.

Is the reason for the Appellant's dismissal misconduct under the law?

[11] The reason for the Appellant's dismissal is misconduct under the law.

[12] The Appellant's Record of Employment (ROE)[3] indicates that the reason for issuing the ROE is due to "other". The Commission chose to modify the reason for separation at the initial decision stage and considered the separation to be due to

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[2] See sections 30 and 31 of the Act.
[3] See GD3-20.

misconduct.[4] I am not bound by how the employer and employee characterize their separation.[5]

[13] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[14] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[8]

[15] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[9]

[16] The law doesn't say I have to consider how the employer behaved.[10] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[11]

[17] The Commission has to prove that the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This

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[4] See GD3-22.
[5] See, for example, *Canada (Attorney General)* v. *Morris*, 1999 CanLII 7853 (FCA).
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[8] See *Attorney General of Canada v Secours*, A-352-94.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See section 30 of the Act.
[11] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.[12]

[18] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.[13] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[19] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[14] He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[20] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[15]

[21] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[16]

[22] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[17] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

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[12] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[16] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[17] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[18]

[23] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[19] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.[20]

[24] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[25] Recently, the Federal Court decided *Cecchetto*.[21] The Tribunal (both the General and Appeal division) had denied benefits to the appellant because he did not follow his employer's vaccination policy. The Court found that the Tribunal has a "narrow and specific role to play in the legal system".[22] In that case it was to decide why the appellant had been dismissed and if it was "misconduct" under the EI Act.

What the Commission and the Appellant say

[26] The Commission and the Appellant agree on the key facts of the case. The key facts are the facts that the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

[27] The Commission says that there was misconduct because:

- the employer had a vaccination policy

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[18] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[19] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[20] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[21] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[22] See paragraphs 46 and 47.

- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the employer sent communications and spoke to the Appellant several times to communicate what it expected
- the Appellant knew or should have known what would happen if he didn't follow the policy

[28] The Appellant says that there was no misconduct because:

- the employer's vaccination policy was unfair/went against the law
- the employer should have accommodated the Appellant based on his religious grounds
- the Appellant hadn't thought that he could lose his job if he didn't get vaccinated

[29] The employer's vaccination policy was first released in October 2021.[23] The Appellant didn't dispute that he was aware of the policy and that it applies to him.

[30] The policy says that there are "three groups of individuals that are formed as a result of the policy: fully vaccinated; unable to be vaccinated; and unwilling to be vaccinated".[24]

[31] The policy says "the 'unable' group will consist of individuals that cannot be fully vaccinated due to a certified medical contraindication, religious ground, or any other prohibited ground of discrimination as defined in the *Canadian Human Rights Act* (CHRA)".[25]

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[23] See GD7-78.
[24] See GD7-84.
[25] See GD7-84.

[32] The policy also says "the 'unwilling group' will consist of individuals refusing to disclose their vaccination status (whether they are fully vaccinated or not) or for which an accommodated for a certified medical contraindication, religious ground, or another prohibited ground of discrimination is not granted and where the employee is still unwilling to be vaccinated".[26]

Religious exemption

[33] The Appellant was aware his employer required that if he didn't get vaccinated, he had to get an exemption to remain employed.[27] The Appellant submitted a request for a religious-based exemption to his employer around November 9, 2021.[28] On December 6, 2021, his supervisor, on behalf of the employer, refused the Appellant's accommodation/exemption request.[29] On December 7, 2021, the supervisor wrote a longer and detailed memo about the refusal of the exemption request.[30]

[34] The Appellant testified about his genuinely held religious beliefs about vaccinations. I accept that the Appellant is refusing to have the COVID-19 vaccine due to his religious beliefs.

[35] The Appellant agreed he didn't have an exemption under his employer's mandatory policy. There is no evidence to the contrary so I accept that the Appellant's testimony on these points.

Timeline after religious exemption request refusal

[36] The Appellant says he and his supervisor spoke approximately every two weeks after his religious exemption was denied. The Appellant also says he received "boiler-plate" type form letters.

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[26] See GD7-84.
[27] See GD7-92.
[28] See GD3-25.
[29] See GD3-26.
[30] See GD3-24.

[37] After the employer refused his request for religious exemption, the Appellant was informed that he was now considered to be in the “unwilling” to be vaccinated category.

[38] The Appellant disagrees with his employer’s characterization and contends he was still unable to be vaccinated. He says that the employer should have accommodated him. He says there is case law from the Supreme Court of Canada that supports that his employer should have recognized that his religious beliefs weren’t a choice.

[39] The Appellant says he got his first “recorded warning”, from his employer, on November 16, 2021. This was prior to the Appellant’s exemption request being denied. The Appellant argues this was improper of his employer to do so. He says they should have waited until they made a decision on the exemption request. The Appellant has filed a grievance, but says there is no timeline for its resolution.

[40] The Appellant continued to get more progressive warnings from his employer. The Appellant says his employer told him that if he continued to remain unvaccinated that he would be let go.

[41] In mid-January 2022, the Appellant was informed that his supervisor had made a formal recommendation for the Appellant’s release from duty.

[42] In April 2022, the Appellant was informed that the decision was made that the Appellant would be released. On June 13, 2022, he was released from service.

[43] The Appellant testified that he was released on the basis of “5f” which is that he was “unsuitable for further service”.[31] The Appellant pointed out that his employer could have ended his service for failing to get vaccinated[32] or for misconduct.[33]

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[31] See GD8-394.
[32] See GD8-142 National Defence Code of Service Discipline, Service Offences and Punishments.
[33] See GD8-380.

Religious accommodation required

[44] The Appellant referred to numerous cases and maintains that because he was following his religious beliefs it can't be construed as misconduct.[34] The Appellant relies on a Supreme Court of Canada decision that his employer was wrong for what they did.[35]

[45] The Appellant says that due to the decision in *Amselem*, that he should be entitled to EI benefits.

[46] In Canada, there are a number of laws that protect an individual's rights. The *Canadian Charter of Rights and Freedoms* (Charter) is one of those laws. There is also the Canadian Bill of Rights, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[47] These laws are enforced by different courts and tribunals. It is beyond my jurisdiction (authority) to consider whether an action taken by an employer violates the Charter or human rights legislation.

[48] The Appellant argues that because his religion is so ingrained in him, he can't be seen as making a choice. He relies on *Amselem* to support his assertion. First, Amselem is a decision that was made outside of the EI context. Second, the Commission hasn't doubted the Appellant's religious beliefs. Rather, it is the Appellant's choice to not to follow the employer's policy that is at issue.

[49] I understand the Appellant is arguing that he had no choice because it went against his religion. Yet, the Appellant's main argument seems to be that his employer

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[34] The Appellant mentioned many court cases. The ones listed here are not exhaustive. For example, *Canada (Attorney General)* v. *Gagnon* 2002 FCA 460; *Canada (Attorney General)* v. *Bellavance* 2005 FCA 87; *Canada (Attorney General)* v. *Marion* 2002 FCA 185; *Canada (Attorney General)* v. *Wasylka* 2004 FCA 219; *Canada (Attorney General)* v. *Tucker* 1985 FCA A-381-85; *Canada (Attorney General)* v. *Brissette* (1993), 168 N.R. 60 (FCA); *Canada (Attorney General)* v. *Secours* [1995], F.C.J. No. 210 (FCA) A-352-94; *Canada (Attorney General)* v. *Turgeon*, [1999] F.C.J. No. 1861.
[35] See *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] SCR 551 (Amselem).

was wrong for denying him a religious accommodation.[36] Whether or not his employer wrongly refused to give the Appellant an accommodation is not for me to decide.

[50] Despite the Appellant's arguments, I am not allowed to consider whether an action taken by an employer violates an Appellant's Charter rights. I am also not allowed to make rulings on the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Appellant would need to go to a different court or tribunal to address those types of issues.

[51] As noted above, in *McNamara*, *Paradis, Mishibinijima and Cecchetto*[37] these Court cases make it clear that the focus must be on what an appellant has, or has not, done.

[52] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[38] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

[53] I don't accept that the Appellant didn't make a conscious choice because his religion is so ingrained in him. I understand, and appreciate, the Appellant's religious convictions, but I find that he understood what his choices were and made the choice to not get vaccinated due to his religious beliefs. I find that this was his own choice.

[54] The Appellant also argues that his employer shouldn't have considered him unwilling to be vaccinated, but rather that he was unable. The Appellant feels that his employer could have, and should have, taken different actions. Again, I have to focus on what the Appellant did or didn't do.

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[36] See GD2-6.
[37] See paragraphs 19 to 23 above.
[38] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Digest of benefit entitlement[39]

[55] The Appellant says broadly that he should be entitled to benefits based on Employment Insurance Digest of Benefit Entitlement Principles (Digest). He says that he didn't commit misconduct within the meaning of the act.

[56] These digests are the Commission's internal policies. They are tools used by the Commission's staff for interpreting and applying the Act to decide EI claims. That means that it isn't law. I don't find that the Commission's general internal policies are instructive in this case.

Appellant's other arguments

[57] The Appellant's main position is he believes that religion is not a choice. He says that his case is different from many other misconduct court cases. He says in some of the caselaw he reviewed that the facts were based on objectively "bad" behaviour.[40]

[58] The Appellant argued these cases are objectively different because they involved different facts. He is correct, the facts are not the same. Yet, they are instructive about what needs to be examined. As mentioned above, these cases say that the behaviour of the Appellant is what must be looked at.

[59] As well, the Federal Court has made it clear in *Cecchetto,*[41]a case about following a vaccination policy, that the role of the Tribunal is to look at what the employee has or has not done.

[60] It is not for me to decide the issue of the reasonableness of the employer's policy, and whether the employer should have offered the Appellant an accommodation or exemption. The Appellant may have options to pursue his claims. But these matters

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[39] These are found at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html
[40] See paragraphs 19 to 23 above.
[41] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.[42]

[61] The Appellant also argues that section 49(2) of the Act says that the Commission shall give the benefit of the doubt to the claimant if the evidence on each side is balanced. I find that this section of the Act doesn't apply here because the evidence, the key facts of the case aren't in dispute.

Elements of misconduct?

[62] I find that the Commission has proven that there was misconduct for the reasons that follow.

[63] There is no dispute that the employer had a vaccination policy. The Appellant knew about the vaccination policy. I find that the Appellant made his own choice not to get vaccinated. This means that the Appellant's choice to not get vaccinated (or disclose his status) was conscious, deliberate and intentional.

[64] The Appellant didn't have an accommodation exemption. Without an exemption the Appellant's employer made it clear that an unvaccinated employee would be dismissed.

[65] The employer's policy requires all employees to disclose their vaccination status and to either have an exemption or get vaccinated. The Appellant did not get vaccinated and had no exemption. This means that he was not in compliance with his employer's policy. That means that he could not go to work to carry out his duties owed to his employer. This is misconduct.

[66] The Appellant agreed that he was aware that by not getting vaccinated (or having an exemption) that he would be let go. Although the Appellant believed that there would be some other safeguard that would prevent him from being let go, he agreed that his

[42] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

employer repeatedly told him that this would happen. This means that the Appellant knew there was real possibility that he could be dismissed.

[67] By not getting vaccinated, the misconduct, led to the Appellant losing his employment.

[68] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Appellant knew that by not following the policy that he would not be permitted to be at work. This means that he could not carry out his duties to his employer. The Appellant was also aware that there was a real possibility that he could be let go for this reason.

So, did the Appellant lose his job because of misconduct?

[69] Based on my findings above, I find that the Appellant lost his job because of misconduct.

[70] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

Conclusion

[71] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[72] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section