



Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 1874

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

# Decision

**Appellant:** D. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (551264) dated December 12, 2022 (issued by Service Canada)

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**Tribunal member:** Elizabeth Usprich

**Type of hearing:** Teleconference

**Hearing date:** June 21, 2023

**Hearing participant:** Appellant

**Decision date:** June 28, 2023

**File number:** GE-23-251

## 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 be let go from his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant lost his job. The Appellant's employer says that he was let go because he went against the government policy to be vaccinated in order to fly. The Appellant didn't get vaccinated and was unable to fly into the job site which was required for his employment.

[4] The Appellant doesn't dispute this happened. He says it wasn't his choice to leave his employer. He also says that what he did wasn't misconduct. He wanted to comply with what his employer wanted him to do. He feels the employer should have made some accommodations for him such as allowing him to drive to that site or reassign him to another site.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost his job because he made the choice to not comply with the government's vaccine mandate which would allow for him to travel by air. This means the Appellant couldn't get to the employer's job site. The Commission says this means the Appellant voluntarily separated from the employer. In the alternative, the Commission says the Appellant's refusal to be vaccinated resulted in misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

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

## Issue

[6] Did the Appellant voluntarily leave his job or was he let go from his job because of misconduct?

## Analysis: Voluntarily leaving

[7] There is one section of the *Employment Insurance Act (Act)* that sets out two reasons why someone can be disqualified from being paid EI benefits: (1) voluntarily leaving a job without just cause and (2) being dismissed because of misconduct.<sup>2</sup> Sometimes it isn't clear whether a person quit or involuntarily left work. The law says that, in these situations, I am not bound by how the Commission decided it.<sup>3</sup> The disqualification can be based on either of the two reasons, as long as it is supported by the evidence.<sup>4</sup>

[8] In other words, while the Commission decided, originally, that the Appellant voluntarily left, I am able to look at evidence and decide whether it may in fact be a case of misconduct.

[9] While the issue (whether the Appellant is disqualified) is the same, the questions of who has to prove what are different, depending on whether it is a case of voluntarily leaving without just cause or misconduct. So, I will first decide which kind of case it is.

## Did the Appellant voluntarily leave his job or was the Appellant suspended?

[10] If the Appellant had a choice to stay or leave his job, then he voluntarily left.<sup>5</sup>

## The Appellant didn't voluntarily leave his employment

[11] The Appellant has consistently said that he didn't quit. It was his employer's choice to put him on a "lay-off".<sup>6</sup> The Appellant testified at the hearing that he was using

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<sup>2</sup> Section 30 of the *Employment Insurance Act*.

<sup>3</sup> *Canada (Attorney General) v Desson*, 2004 FCA 303.

<sup>4</sup> *Canada (Attorney General) v Desson*, 2004 FCA 303.

<sup>5</sup> *Canada (Attorney General) v Peace*, 2004 FCA 56.

<sup>6</sup> See GD3-19; GD3-23; GD3-26; GD3-33; GD3-36; and GD2-4.

the words “laid off” because those were the words the employer had used.<sup>7</sup> The Appellant agreed that there was no shortage of work. This means he understood that the employer had work available.

[12] The employer told the Commission that there was not a shortage of work. The employer told the Commission that because the Appellant didn’t get vaccinated that he wasn’t allowed to fly and that was how the employer transported workers to the job site.<sup>8</sup>

[13] Since issuing its Notice of Decision,<sup>9</sup> the Commission has noted arguments in their representations that the reason for separation could be considered as a dismissal.<sup>10</sup>

[14] I do not find, based on the facts above, that the Appellant had the choice to stay or go. At the hearing, the Appellant confirmed that it wasn’t his choice and said there was nothing voluntary about the separation from his employer. I find that the Appellant didn’t voluntarily leave his job.

[15] I must now decide if the Appellant was suspended due to misconduct.

## **Analysis: Misconduct**

[16] 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.<sup>11</sup>

[17] 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.

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<sup>7</sup> See GD3-37.

<sup>8</sup> See GD3-25 and GD3-46.

<sup>9</sup> See GD3-50.

<sup>10</sup> See GD4-5.

<sup>11</sup> See sections 30 and 31 of the Act.

## Why did the Appellant lose his job?

[18] I find that the Appellant lost his job because he didn't get vaccinated and then wasn't permitted to be transported, by flight, to the job site.

[19] The Appellant says he made a personal decision not to get vaccinated. He says he wasn't able to get any kind of exemption, although he tried to speak with his doctor about a medical exemption. The Appellant, and the employer, agree that the employer didn't have a specific vaccination policy but they were following the mandate from the federal government. The government's policy required vaccination in order to be able to fly.<sup>12</sup> The Appellant says he wasn't allowed to be on flights because he wasn't vaccinated. The Appellant says he tried to work with his employer to figure out another solution like driving to a site but this wasn't allowed. The Appellant feels he should be entitled to EI benefits.

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

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

[21] The Appellant's employer issued two Records of Employment (ROE). The first gives the reason for issuing as "quit".<sup>13</sup> The Appellant says he contacted his employer about the reason and they issued another ROE. The reason for issuing the second ROE is listed as "other" and in the comments it says, "reason for leaving employment with [employer]: was no longer allowed to fly due to vaccine mandate".<sup>14</sup> I am not bound by how the employer and employee characterize their separation.<sup>15</sup>

[22] 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.

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<sup>12</sup> See GD3-22; GD3-24 and GD3-25.

<sup>13</sup> See GD3-17 ROE issued on January 28, 2022.

<sup>14</sup> See GD3-20 ROE issued August 7, 2022.

<sup>15</sup> See, for example, *Canada (Attorney General) v. Morris*, 1999 CanLII 7853 (FCA).

[23] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>16</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>17</sup> 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.<sup>18</sup>

[24] 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.<sup>19</sup>

[25] The law doesn't say I have to consider how the employer behaved.<sup>20</sup> Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.<sup>21</sup>

[26] 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 means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.<sup>22</sup>

[27] 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.<sup>23</sup> I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[28] 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.<sup>24</sup> He lost his

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<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>17</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>18</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>19</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>20</sup> See section 30 of the Act.

<sup>21</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>22</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>23</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>24</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.

[29] 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.<sup>25</sup>

[30] 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.<sup>26</sup>

[31] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.<sup>27</sup> 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 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.<sup>28</sup>

[32] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.<sup>29</sup> 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.<sup>30</sup>

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<sup>25</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>26</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>27</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>28</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>29</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>30</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[33] 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.

[34] Recently, the Federal Court decided *Cecchetto*.<sup>31</sup> The Tribunal (both the General and Appeal division) had denied benefits to the appellant because he didn't follow his employer's vaccination policy. The Court found that the Tribunal has a "narrow and specific role to play in the legal system".<sup>32</sup> 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**

[35] 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.

[36] The Commission says there was misconduct because:

- the employer required employees of the "fly-in" job sites to be vaccinated against COVID-19 so that they could fly to the job site
- the employer clearly notified the Appellant about its expectations about getting vaccinated so that he could continue to go to the job site
- the employer sent an email to the Appellant to communicate what it expected
- the Appellant knew or should have known what would happen if he didn't get vaccinated

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

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<sup>31</sup> See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>32</sup> See paragraphs 46 and 47.



- the employer should have accommodated him by letting him drive to the site or allowing him to go to a different site that didn't require fly-in

[38] The employer didn't have their own vaccination policy, but they were following the rules of Transport Canada.<sup>33</sup> The employer says that it was mandated that employees be fully vaccinated against COVID-19 so they could be flown to job sites. I find that this still means that the employer had a vaccination policy. The employer communicated to all employees that they had to be vaccinated in order to continue to fly-in to work sites. That was the employer's policy.

[39] On October 6, 2021, the employer wrote to the Appellant to advise that there was a mandatory vaccination policy for air travel made by the Government of Canada.<sup>34</sup> The employer asks all affected employees to be vaccinated against COVID-19 in order to travel by air. The employer required on or before October 30, 2021.

[40] The same email from the employer says "if you are not vaccinated, in order to remain working on this project you will have to get vaccinated. If you choose to not get vaccinated, we unfortunately cannot continue our relationship and you will be laid off as we cannot get you to the site".<sup>35</sup>

### **Medical or other exemption**

[41] The Appellant agreed he was aware that his employer required he get vaccinated so he could continue to travel by air. He says he tried to find out if he could get some type of exemption. The Appellant says his doctor wouldn't provide him with a medical note so he says he wasn't able to get an exemption.

[42] The Appellant agreed that he didn't have an exemption that would allow him to travel by air. There is no evidence to the contrary so I accept that the Appellant's testimony on these points.

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<sup>33</sup> See GD3-44.

<sup>34</sup> See GD3-37.

<sup>35</sup> See GD3-37.

## **Vaccine efficacy or a different accommodation**

[43] The Appellant says it has been proven that the vaccines weren't effective at preventing transmission. He says he is allowed to make his own decision about whether or not to have a vaccine.

[44] The Appellant says he tried to work with his employer to find a way to continue working. For example, he hoped he could drive to the work site, but that wasn't allowed. He also thought that maybe his employer could place him at an alternate work site that didn't require employees to fly in. The employer also said this wasn't possible.

[45] It is not for me to decide the issues of vaccine efficacy or whether the employer should have made an accommodation for the Appellant.

[46] The Appellant may have options to pursue his claims about wrongful dismissal. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.<sup>36</sup>

## **Elements of misconduct?**

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

[48] There is no dispute that the employer required employees to get vaccinated so they could continue to fly-in to work sites. The Appellant knew about the employer's 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 was conscious, deliberate and intentional.

[49] The Appellant didn't have an accommodation or an exemption. The employer's policy requires all employees to get vaccinated so they could continue to fly to work sites. The Appellant didn't get vaccinated and had no exemption that would allow him to continue flying. This means that he was not in compliance with his employer's policy.

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<sup>36</sup> See *Cecchetto v. Attorney General of Canada*, 2023 FC 102.

That means that he could not go to work to carry out his duties owed to his employer. This is misconduct.

[50] The Appellant agreed he was aware that by not getting vaccinated (or having an exemption) that he would be “laid off” and the employment relationship would be at an end. This means that the Appellant knew there was real possibility that he could be dismissed.

[51] By not getting vaccinated, or by not getting an exemption, the misconduct, led to the Appellant losing his employment.

[52] 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.

### **Employment insurance benefits**

[53] The Appellant also believes that because he has paid into employment insurance (EI) for years that he should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find themselves unemployed and unable to find another job. I do not find that this applies in this situation.<sup>37</sup>

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

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

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<sup>37</sup> See *Pannu v Canada (Attorney General)*, 2004 FCA 90, at paragraph 3.

[55] 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**

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

[57] This means that the appeal is dismissed.

Elizabeth Usprich  
Member, General Division – Employment Insurance Section