Citation: *BA v Canada Employment Insurance Commission*, 2024 SST 387

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated December 14, 2023 (issued by Service Canada)

Tribunal member:	Teresa Day
Type of hearing:	Videoconference
Hearing date:	February 28, 2024 and March 11, 2024
Hearing participant:	Appellant
Decision date:	April 17, 2024
File number:	GE-23-3558

Decision

[1] The appeal is dismissed.

[2] The Appellant is disqualified from receiving regular employment insurance (EI) benefits because his employment was terminated due to misconduct[1].

Overview

[3] The Appellant works as a nurse and was employed by Interior Health Authority in British Columbia (the employer).

[4] The employer instituted a mandatory Covid-19 vaccination policy that required all employees to be fully vaccinated by October 26, 2021 (the policy). Those who were unvaccinated (or failed to provide proof of vaccination) and didn't have an approved exemption by this deadline could face discipline up to and including termination.

[5] The Appellant didn't want to comply with the policy by being vaccinated. But he didn't have an approved medical or human rights-based exemption.

[6] His last paid day of work was October 24, 2021. On October 25, 2021, he was suspended from his employment and placed on an unpaid leave of absence for failing to comply with the policy[2].

[7] Also on October 25, 2021, the Appellant sent an E-mail to his manager with a note from his doctor saying he was "unable to attend work due to "illness/injury" for 2 weeks[3]. Two weeks later, on November 8, 2021, he sent in a second medical note saying he was unable to work for a month[4]; and a month after that, on December 8, 2021, he sent in a third medical note saying he was unable to work for another 6 weeks[5].

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[1] That is, misconduct a**s the term is used for purposes of EI benefits**. See Issue 2 below.
[2] See also the discussion re My jurisdiction (starting at paragraph 14 below).
[3] A copy of this doctor's note is at RGD4-8.
[4] A copy of this doctor's note is at RGD4-6.
[5] A copy of this doctor's note is at RGD4-7.

[8] On December 10, 2021, he was terminated for non-compliance with the policy[6].

[9] The Appellant applied for EI sickness benefits the same day[7].

[10] He received 15 weeks of sickness benefits[8] and then, on April 25, 2022, he asked for regular EI benefits[9]. But the Respondent (Commission) decided he couldn't be paid regular EI benefits because he lost his job due to his own misconduct[10].

[11] The Appellant asked the Commission to reconsider. He said he had valid medical reasons for not complying with the policy. He also said it was unfair that British Columbia (BC) was the only province that wouldn't allow unvaccinated nurses to return to work.

[12] The Commission maintained it's decision not to pay the Appellant. It said he was **disentitled** to regular EI benefits during the period of his suspension[11] and **disqualified** from EI benefits after his dismissal[12]. This meant the Appellant couldn't be paid any regular EI benefits on his claim[13].

[13] The Appellant appealed the disentitlement and the disqualification to the Social Security Tribunal (Tribunal).

Preliminary Matters

A) My jurisdiction

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[6] See the employer's statement to the Commission at GD3-17. See also the Appellant's statement at GD3-25. At the hearing, the Appellant testified he was terminated at a meeting held on December 10, 2021 with himself, his manager, his union representative and a representative of the employer in attendance.
[7] The application for sickness benefits submitted on December 10, 2021 is at RGD2-4 to RGD2-20.
[8] This was the maximum entitlement to sickness benefits a claimant could receive at the time.
[9] The application for regular EI benefits submitted on April 25, 2022 is at GD3-3 to GD3-14.
[10] See the October 7, 2022 decision letter at GD3-26.
[11] Section 31 of the *Employment Insurance Act* (EI Act) says claimants who are suspended from their employment because of misconduct are **disentitled** to EI benefits during the period of their suspension.
[12] Section 30 of the EI Act says that claimants who lose their job because of misconduct are **disqualified** from receiving EI benefits.
[13] See the Supplementary Record of Claim at GD3-41 and the December 7, 2022 reconsideration decision letter at GD3-42.

[14] The Appellant's appeal was first heard on May 29, 2023.

[15] On August 24, 2023, the Tribunal issued a decision dismissing his appeal. The Tribunal Member decided the Appellant couldn't be paid EI benefits because:

a) the Commission proved the Appellant was suspended from his employment from October 25, 2021 to December 9, 2021 due to his own misconduct, so he was disentitled to EI benefits during this period; and

b) the Commission proved the Appellant was dismissed from his employment on December 10, 2021 due to his own misconduct, so he was disqualified from EI benefits from that date.

[16] The Appellant appealed that decision to the Tribunal's Appeal Division (the AD). He said he was dismissed while on medical leave, which is "unlawful"[14].

[17] The AD allowed his appeal in part.

[18] The AD found that:

a) The Tribunal Member did not misinterpret what misconduct means for purposes of EI benefits.

b) The Tribunal Member did not fail to consider the reasonableness of the employer's vaccination policy.

c) The Tribunal Member did not overlook any evidence regarding the Appellant's suspension from his employment.

d) The Appellant is **disentitled** to regular EI benefits between October 25, and December 9, 2021 because he was suspended from his employment due to his own misconduct.

[14] See AD1-6.

e) But the Tribunal Member didn't address all of the relevant evidence on the **disqualification** issue, specifically ***whether*** the Appellant was on a medical leave absence when he was dismissed on December 10, 2021 and didn't know he could be dismissed.

[19] So the AD returned the Appellant's appeal to a new Tribunal Member to make a decision on the **disqualification issue only**.

[20] This means that all of the findings in connection with the disentitlement imposed on the Appellant's claim because he was suspended from his employment due to his own misconduct – and the disentitlement itself (from October 25, 2021 to December 9, 2021) were confirmed and, therefore, remain in effect.

[21] My jurisdiction is limited to considering whether the Appellant is disqualified from EI benefits starting from December 10, 2021 because he was *terminated* from his employment due to his own misconduct.

[22] The AD also said that if the Appellant has documents showing when his employer approved his medical leave of absence, he should file this evidence with the Tribunal[15]. I gave the Appellant 2 opportunities to file his additional evidence and he filed the materials at RGD04 and RGD06. This evidence was shared with the Commission, and it confirmed it had no additional representations in response[16].

[23] The Appellant's new hearing on the disqualification issue only was held by videoconference on February 28, 2024 and March 11, 2024. This is the decision from that new hearing.

B) The Appellant continued to be unable to work due to illness

[15] See paragraph 37 of the AD decision.
[16] The Commission relies on the materials at RGD02, which it filed with the Tribunal after the AD decision was issued.

[24] The Appellant submitted a doctor's note that said he "was/is unable to work due to illness/injury" for 3 months starting from January 17, 2022[17].

[25] Since the Appellant received the maximum 15-week entitlement to EI sickness benefits starting from October 25, 2021, his sickness benefits would be exhausted the week ending February 5, 2022[18].

[26] If he was unable to work for medical reasons for 3 months starting from January 17, 2022, he wouldn't be entitled to regular EI benefits until April 17, 2022. This is why the Commission renewed the Appellant's claim starting April 17, 2022[19].

[27] The law says a disqualification imposed for losing your job due to misconduct will start on the Sunday of the week in which you are terminated. So the Appellant's disqualification would start on Sunday, December 5, 2021 because he was terminated on December 10, 2021. But if there is a period of suspension prior to the termination (as in the Appellant's case), the disqualification starts as of the date of the termination itself[20].

[28] So, since the Appellant is disentitled to EI benefits from October 25, 2021 to December 9, 2021 because he was suspended due to his own misconduct, I must decide if the Appellant is disqualified from receiving regular EI benefits starting from December 10, 2021[21].

Issue

[29] Is the Appellant is disqualified from EI benefits starting on December 10, 2021 because he lost his job at Interior Health Authority due to his own misconduct[22].

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[17] See AD3-8.
[18] See paragraph 31 of the AD decision.
[19] See the October 7, 2022 decision letter at GD3-26.
[20] And the disqualification for misconduct will remain in place until the end of the benefit period for the claim unless the claimant works enough hours of insurable employment since losing their job due to misconduct to qualify for benefits again.
[21] Which I find is the date the Appellant's employment was terminated (see Issue 1 A below).
[22] That is, misconduct a**s the term is used for purposes of EI benefits**. See Issue 2 below.

[30] To decide this issue, I must look at the reason for the Appellant's termination and then determine if the conduct that caused his termination is conduct the law considers to be "misconduct" for purposes of EI benefits.

Analysis

Issue 1: Why did the Appellant lose his job?

A) ***When*** was the Appellant's employment terminated?

[31] The Appellant told the Commission that his employment was terminated at an official meeting on December 10, 2021[23].

[32] At the hearing, he testified that:

- On October 25, 2021, he E-mailed his manager a medical note saying he was unable to attend work due to illness/injury for 2 weeks[24].
- On November 8, 2021, he E-mailed his manager a second medical note saying he was unable to attend work due to illness/injury for another 1 month[25].
- His manager responded the same day (November 8, 2021) and said the employer needed his doctor to complete a proof of illness form giving further details about his illness[26]. The form had to be submitted by November 15, 2021[27].
- On November 15, 2021, he E-mailed his manager the completed proof of illness form, as requested[28].
- On November 18, 2021, he received an E-mail from his manager saying, "we need to set up a meeting to give you notice of termination".

[23] See GD3-31.
[24] See RGD6-13.
[25] See RGD6-10.
[26] See RGD6-10.
[27] See RGD6-11.
[28] See RGD6-15.

- He didn't respond to that E-mail because he was still on "stress leave".
- On December 8, 2021, he E-mailed his manager a third medical note saying he was unable to attend work due to illness/injury for another 6 weeks[29].
- On December 9, 2021, he received an E-mail from the employer's Human Resources (HR) representative saying that there was going to be a meeting about the termination of his employment, and advising he should have his union representative attend the meeting with him.
- There were other E-mails on December 9, 2021 to set a time for the meeting with him, his union representative, his manager, and the HR representative.
- The meeting took place on December 10, 2021, and that was when he was told his employment was terminated.

[33] The Commission agrees the Appellant's employment was terminated on December 10, 2021, and I see no evidence or reason to disagree.

[34] I therefore find the employer terminated the Appellant's employment on December 10, 2021.

B) Was the Appellant on approved leave of absence on December 10, 2021?

[35] No, he wasn't. The employer **never** authorized a leave of absence (LOA) for the Appellant.

[36] The Appellant's last paid day was October 24, 2021[30].

[37] The policy deadline to provide proof of vaccination or obtain an approved exemption to the vaccination requirement was October 26, 2021. Instead of doing either of these things, on October 25, 2021 the Appellant sent his manager an E-mail

[29] See RGD6-6.
[30] See his Record of Employment at GD3-15.

attaching a doctor's note that said he was unable to attend work due to illness/injury for 2 weeks.

[38] This was a unilateral act by the Appellant. He didn't ask the employer if he could take a medical LOA from his employment, nor did the employer authorize him to take one.

[39] Exactly 2 weeks later, on November 8, 2021, the Appellant submitted a second doctor's note saying he was unable to attend work due to illness/injury for an additional month.

[40] This was a further unilateral act by the Appellant, presumably timed to explain that his continued absence from work was due to medical reasons.

[41] This time, the Appellant's manager responded immediately by sending the Appellant the proof of illness form he needed to have his doctor complete and submit by November 15, 2021.

[42] Three days after the Appellant submitted the completed form, his manager E-mailed him **to set up a meeting to give him notice of termination**.

[43] The Appellant chose not to respond to this E-mail from his manager. Instead, on December 8, 2021, he submitted a third doctor's note saying he'd need to be off work for another 6 weeks.

[44] This was yet another unilateral act by the Appellant.

[45] This time, the employer's HR representative immediately scheduled a termination meeting and the Appellant's employment was terminated on December 10, 2021.

[46] The evidence shows the employer did **not** approve or authorize a LOA for the Appellant – medical or otherwise. Rather, the evidence shows the opposite occurred.

[47] **While the Appellant was suspended from his employment for non-compliance with the policy**[31], he submitted 2 doctor's notes to his manager. His manager responded by asking him to submit the specific form the employer required so it could consider his limitations and ability to return to work. After receiving the completed form, his manager advised him that his employment would be terminated.

[48] At the hearing, the Appellant said he didn't need the employer to authorize him to take a medical LOA. He said the employer doesn't have the right to say 'NO' to a medical LOA as long as he sent in his doctor's notes, which he did. To support this argument, he pointed out that the employer didn't need to approve his claim for EI sickness benefits.

[49] I disagree.

[50] It's true that the Commission doesn't need or seek input from an employer to determine a claimant's eligibility for EI sickness benefits. But that's very different from a LOA from employment, which occurs when an employer gives permission to an employee to be away from their duties for a period of time with a right of reinstatement.

[51] An employee cannot force their employer to accept an on-going absence from work (and hold their position open for them to return to) merely by submitting a series of consecutively timed doctor's notes.

[52] There needs to be a process for an employer to consider and approve (or not) a medical LOA on the basis of detailed information about the nature and anticipated duration of an employee's illness or injury.

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[31] The first Tribunal Member found the Appellant was suspended from his employment on October 25, 2021, and this was confirmed by the AD decision.

I note that even if the suspension occurred on October 26, 2021 (upon expiry of the policy deadline), the fact remains that the suspension occurred by not later than October 26, 2021 and was in effect when the Appellant sent his second doctor's note (on Nov. 8, 2021), which caused his manager to send him the proof of illness form the employer required to assess any request for a medical LOA. There could be no request for a medical LOA without a completed proof of illness form. So, the earliest the Appellant could be seen to have asked the employer for a medical LOA would have been when he submitted his completed proof of illness form on November 15, 2021. And this was after he was suspended from his employment – regardless of whether the suspension occurred on Oct. 25th or 26th, 2021.

[53] And that's what happened here.

[54] After the Appellant sent in his second doctor's note, **the employer sent him the form** it needed his doctor to complete so it could consider his request for a medical LOA.

[55] The employer's form[32] asked the doctor to provide information about the nature of the illness impacting the Appellant's ability to work and whether the prescribed treatment was likely to impair performance or safety. The form also asked the doctor to describe the temporary physical and psychological limitations preventing the Appellant from performing his work duties; and opine on whether the Appellant was fit to participate in meetings to resolve workplace issues and, if those issues were resolved, could return to work.

[56] After the completed form was submitted by the Appellant on November 15, 2021, the employer reviewed it and decided to terminate his employment. The employer's response was communicated to the Appellant on November 18, 2021, when his manager E-mailed him and asked for a meeting to give him notice of termination.

[57] The fact the Appellant chose to ignore this E-mail (and instead submit a third doctor's note on December 8, 2021) didn't change the employer's decision to deny the Appellant's request for a medical LOA. It only delayed the termination of his employment to December 10, 2021.

[58] The Appellant told the Commission he was off on stress leave when the employer dismissed him[33]. I give no weight to this statement. This is because there is no evidence showing the employer ever authorized or approved a LOA for the Appellant – medical or otherwise, anytime after his last paid day on October 24, 2021.

[59] I therefore find the Appellant was **not** on an approved LOA when his employment was terminated on December 10, 2021.

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[32] A larger print copy of the form is at AD05.
[33] See GD3-31 to GD3-32.

C) ***Why*** **was the Appellant's employment terminated?**

[60] The Appellant lost his job because he failed to comply with the policy by providing proof of his Covid-19 vaccination status by the October 26, 2021 deadline.

[61] The employer told the Commission the Appellant was dismissed for non-compliance with the policy[34]. The Commission accepts this as the reason for the Appellant's termination, and I see no evidence or reason to disagree.

[62] The Appellant agrees that his employment was terminated because he didn't provide the employer with proof of vaccination by the October 26, 2021 deadline[35]. He told the Commission he knew that by not complying, he was in jeopardy of losing his job[36]. But he argues his termination was wrongful and there was no misconduct on his part. I will deal with this argument under Issue 2 below.

[63] I find the Appellant's employment was terminated because he failed to provide proof of vaccination as required by the policy[37].

Issue 2: Is this reason considered misconduct for purposes of EI benefits?

[64] Yes. The reason for the Appellant's dismissal is misconduct for purposes of EI benefits.

The law

[65] The law says that if you lose your employment due to misconduct, you are disqualified from receiving EI benefits[38].

[66] To be misconduct under the law, the conduct that led to the separation from employment has to be wilful. This means the conduct was conscious, deliberate, or

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[34] See GD3-17.
[35] See GD3-25 and GD3-31.
[36] See GD3-25.
[37] And did not have an approved exemption (see GD3-31).
[38] Section 30(1) of the EI Act.

intentional[39]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[40] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[67] 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 under the law[41].

[68] There is misconduct if the Appellant knew or ***ought to have known*** his conduct could get in the way of carrying out his duties towards the employer and there was a real possibility of being terminated because of it[42].

[69] The Commission has to prove the Appellant was dismissed from his job due to misconduct[43]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

The evidence

[70] The Appellant himself provided the Commission with a copy of the policy in effect as of December 1, 2021[44].

[71] It says that employees who were not vaccinated by the deadline (or did not have an approved exemption) "will be placed on leave without pay and may be subject to discipline up to and including termination"[45]. It also says that continued non-compliance could result in "disciplinary action up to and including termination of employment"[46].

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[39] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[40] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[41] See *Attorney General of Canada v. Secours*, A-352-94.
[42] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[43] 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 Claimant lost her job because of misconduct.
[44] The Commission says this at RGD2-2. See the employer's Covid-19 Immunization Requirement Policy in the reconsideration file at GD3-33 to GD3-38.
[45] See GD3-37
[46] See GD3-37.

[72] The Appellant initially told the Commission he knew that by not complying with the policy, he was in jeopardy of losing his job[47].

[73] After his claim for regular EI benefits was denied, the Appellant told the Commission that[48]:

- The employer communicated the vaccination requirements and said he had to provide proof of vaccination by October 26, 2021 to continue working.
- If not, he would be placed on unpaid leave.
- But the employer never really formally said anyone would be terminated after that.
- He didn't want to get vaccinated because of medical concerns and because he believes in bodily autonomy[49].
- He went off on stress leave and then he was fired while on leave[50].

[74] At the hearing, the Appellant testified:

- It doesn't matter if he was aware he could be fired for not complying with the policy.
- The PHO – not the policy – should govern his situation[51].
- There was nothing in the PHO that required the employer to terminate him for not providing proof of vaccination.

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[47] See GD3-25.
[48] See the Appellant's reconsideration interview at GD3-31 to GD3-32.
[49] See GD3-31 to GD3-32.
[50] Under Issue 1 above, I have found this was not the case.
[51] During his reconsideration interview, the Appellant expressed the view that the employer was acting in accordance with the public health order (PHO) rather than under a policy of its own (see GD3-31).

- The PHO only said he'd be ineligible to work if he remained unvaccinated. This means he could have remained on unpaid leave or paid leave.

- But the employer fired him instead, "for no just cause".

- He was wrongfully terminated because the loss of his job had nothing to do with his ability or performance.

- He wasn't allowed to ask questions about the safety and efficacy of the Covid-19 vaccines. It turns out that these vaccines cause cancer and potentially also heart disease and autoimmune conditions. He made the right decision not to get vaccinated.

- It was "unethical and wrong" for the employer to force people to get vaccinated.

My findings

[75] I have no doubt the Appellant was a dedicated employee. But a finding of "misconduct" doesn't require him to have done something "wrong" in connection with the performance of his duties or his conduct in the workplace.

[76] As I explained at the hearing, the term "misconduct" for purposes of EI benefits doesn't necessarily mean that a claimant did something "wrong". And it doesn't have the same meaning for EI benefits as it does in other employment contexts, such as discipline and grievance proceedings or labour arbitrations.

[77] The term "misconduct" in the EI context 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.

[78] The Appellant urged me to consider that the PHO didn't require the termination of his employment, and that he had valid personal reasons for not getting vaccinated – especially in the absence of "evidence-based science" that the vaccines were safe.

[79] But these considerations don't address the test for misconduct for purposes of EI benefits.

[80] It's not the Tribunal's role to decide if the employer's policy was reasonable or whether the penalty of being terminated was too severe[52].

[81] 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 made under the EI Act[53].

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

[83] I have already found that the conduct which led to termination of the Appellant's employment was his failure to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[84] The evidence obtained by the Commission and the Appellant's 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[54].

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[52] 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.

[53] 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 Appellant isn't.

[54] The Appellant told the Commission the employer communicated the vaccination requirements (see GD3-31). I also agree with the Commission's submission at RGD2-2 that the Appellant had knowledge of the policy and the vaccination timeline requirements based on the various PHOs, including those in effect prior to October 26, 2021. Finally, I note the AD confirmed this when it confirmed the disentitlement decision by the original Tribunal Member, who found the Appellant "knew what was required and he knew that he would be suspended if he didn't comply with the policy" (see paragraph 14 of the first Tribunal Member's decision).

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 could cause his employment to be terminated.

- When he was before the AD, the Appellant said he was on a medical LOA when he was dismissed[55]. He also denied he was aware he had to comply with the policy or that he faced dismissal while on a medical LOA[56].

- I don't find this to be credible or persuasive.

- First, there is no evidence the employer ever approved the Appellant for a LOA. And without authorization from the employer, there is no credible reason for the Appellant to think he would escape the consequences of failing to comply with the policy. The fact the Appellant continued to submit doctor's notes is not evidence the employer approved him for a medical LOA.

- Second, there was a process to request a medical LOA, and it required the Appellant to submit the proof of illness form his manager sent him by November 15, 2021. The result of that process was termination of the Appellant's employment – not authorization to take a medical LOA. When the Appellant's manager E-mailed him on November 18, 2021 to set up a meeting to give him notice of termination, the Appellant knew his dismissal was coming. The fact he chose to ignore his manager's E-mail and submit yet another doctor's note (on December 8, 2021) is not evidence the employer approved him for a medical LOA. The Appellant knew by November 18, 2021 that his employment was to be terminated, so he can't

[55] I have already dealt with this under Issue 1 above and found that was not the case.
[56] See paragraph 4 and 36 of the AD decision.

say he was unaware he had to comply with the policy or that there would be consequences for non-compliance while he was allegedly on a medical LOA.

- Third, the Appellant knew the policy was being enforced. He testified that he saw a doctor on October 25, 2021 because he was so stressed out knowing he would be prevented from working as of October 26, 2021 unless he was vaccinated. The same policy that prevented him from working as of October 26, 2021 also provided for disciplinary action up to and including termination for non-compliance. And, as the Appellant told the Commission, he knew that by not complying with the policy, he was in jeopardy of losing his job[57]

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

[85] **This** (the 4 elements in paragraph 83 above) is the test for misconduct under the EI Act, and the Appellant's conduct meets the test.

[86] 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 his employment.

[87] 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[58].

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[57] See GD3-25. I give significant weight to this statement because it was made spontaneously and before any negative decision on the Appellant's claim.
[58] There are now many cases where the Appeal Division has confirmed this. For a small sampling 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.

[88] 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[59]. There is also a line of cases from the Federal Court, starting with the decision in *Cecchetto*, that have affirmed this principle **in the specific context of a mandatory Covid-19 vaccination policy**[60].

[89] I therefore find that the Appellant's wilful failure to provide proof of vaccination in accordance with the policy constitutes misconduct under the EI Act.

[90] At the hearing, the Appellant talked about a labour action that has been commenced by a group of healthcare employees who are challenging their termination as beyond the requirements of the PHOs.

[91] The Appellant's recourse for his complaints about the policy and/or the employer's actions in connection with the termination of his employment 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.

[92] However, none of his arguments about what the employer did or didn't do change the analysis in this appeal.

[93] Here, as in *Cecchetto*[61], the only issues are whether the Appellant was terminated for failing to comply with his employer's vaccination policy and, if so, whether that failure was deliberate and foreseeably likely to result in his dismissal. The answer to all these questions is yes.

[94] By making a deliberate choice not to get vaccinated as required by the policy, the Appellant was dismissed from his employment because of conduct that is considered misconduct under the EI Act.

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[59] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.
[60] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.
[61] Cited in paragraph 88 above.

[95] I find the Commission has proven on a balance of probabilities that the Appellant was terminated on December 10, 2021 because of conduct that constitutes misconduct under the EI Act. And this means he cannot be paid regular EI benefits on his claim.

Issue 3: What about the Appellant's other submissions?

[96] The Appellant made a number of other submissions at the new hearing, including that the public health officer for the region was corrupt, that the PHOs violated the core values of the nursing profession, and that there is no evidence-based science to support the PHOs that were issued in BC or the province's decision to maintain them for so long.

[97] The Federal Court and the AD have said I have no mandate or jurisdiction to assess the merits, legitimacy, or legality of PHOs[62]. This means arguments based on the Appellant's other submissions are irrelevant to the misconduct issue before me on this appeal and I cannot consider them.

Conclusion

[98] The Commission has proven the Appellant's employment was terminated on December 10, 2021 because of his own misconduct[63]. This means he is **disqualified** from EI benefits starting from December 10, 2021[64].

[99] The appeal is dismissed.

Teresa M. Day

Member, General Division – Employment Insurance Section

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[62] This was discussed by the AD in paragraph 18 of its decision (and see the quote from *Cecchetto*).
[63] That is, misconduct **as the term is used for purposes of EI benefits.**
[64] Pursuant to section 30(1) of the EI Act. The disqualification starts immediately after the disentitlement already imposed so that the Appellant cannot receive regular EI benefits on this claim.