Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 2038

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. S.
Representative:	L. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (603513) dated October 5, 2023 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	In person
Hearing date:	December 8, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	December 19, 2023
File number:	GE-23-3084

Decision

[1] M. S. is the Appellant. I am dismissing her appeal.

[2] The Appellant lost her job because of misconduct (in other words, because she did something that caused her to be suspended and then dismissed). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was working simultaneously for two different provincial health authorities. She was employed as a casual registered nurse. She quit her job at the X Authority in September 2021, and moved to be with her spouse. She continued working as a casual employee with the Y Authority until she was put on unpaid leave (suspended) and then dismissed from her job.

[4] In the termination letter, the employer states the Appellant was repeatedly advised of the requirements to be vaccinated against COIVD-19 to work from October 26, 2021, onward; based on the Provincial Health Order (PHO). When she failed to disclose that she was fully vaccinated against COVID-19, the employer suspended and then let her go. Even though the Appellant does not dispute this happened, she says that going against the PHO is not misconduct.

[5] The Commission accepted the employer's reason for the suspension and dismissal, as set out in the termination letter. The Commission decided the Appellant was suspended and lost her job because of misconduct. Because of this, the Commission decided the Appellant was not entitled to receive EI benefits.

[6] The Appellant disagrees with the Commission's decision to deny her EI benefits. She appealed to the Social Security Tribunal (Tribunal) General Division. She says her

[1] See sections 30 and 31 of the *Employment Insurance Act* (Act).

employer did not have a policy. She argued that her refusal to get vaccinated against COVID-19 is not misconduct.

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Late documents

[8] In the interest of justice, I have accepted the documents and submissions received after the December 8, 2023, hearing.[2]

[9] During the hearing, the representative requested permission to submit a copy of the PHO. In addition, I heard arguments that may have been interpreted to mean the Appellant reduced her availability to work. Specifically, the Appellant argued that she did not breach the PHO because, as a casual employee, she did not have to accept shifts and the employer was not obligated to offer her shifts.

[10] I briefly explained that case law provides how I must determine whether the issue is one of voluntary leaving versus misconduct. So, to uphold the principles of natural justice and procedural fairness, I gave the Appellant leave to submit a copy of the PHO and to make final submissions on the issues to be determined, no later than December 15, 2023.

[2] Section 42 of the *Social Security Rules of Procedures* state that after considering any relevant factor, the Tribunal may give a party permission to file documents after the filing deadline.

[11] The Tribunal received the additional documents on December 12, 2023. The Commission was provided copies of those submissions but did not respond. So, I find there would be no prejudice to either party if the late documents were accepted.

Issue

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

Analysis

[13] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.[3]

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

Why did the Appellant stop working?

[15] I find the Appellant was suspended and then dismissed because she failed to comply with the employer's COVID-19 requirements "policy" that were established in response to the PHO. I agree the Appellant was not on a voluntary leave of absence, and she did not voluntarily leave (quit). This is because she did not have the choice to stay or to leave."[4]

[16] The documents on file show that the employer suspended and then dismissed the Appellant because she refused to be vaccinated against COVID-19 by the deadlines set out by the employer.

[17] At the hearing, the Appellant confirmed she was aware of the PHO and that she had discussions with her manager about the employer deadlines (policy) requiring her to disclose she was fully vaccinated against COVID-19. In her appeal documents she

[3] See sections 30 and 31 of the Act.
[4] See *Canada (Attorney General) v Peace,* 2004 FCA 56.

clearly states that she chose not to apply for any of the full-time lines (jobs) that were available at Y Authority because she was informed that she may be placed on leave by October 26, 2021, for not being vaccinated against COVID-19.[5]

[18] The Appellant was aware that the PHO applied to all persons employed by a regional health board, the Provincial Health Services Authority, British Columbia emergency health services, the Providence Health Care Society, or a provincial mental health facility.[6] That PHO states that the employer must not permit an unvaccinated staff member to work after October 25, 2021, unless they are in compliance with subsection 2 (a) to (d), or has an exemption.

[19] Accordingly, I find the Appellant was suspended and then dismissed from her job because she refused to be vaccinated against COVID-19, as required by the employer's policy, in response to the PHO.

Misconduct under EI Law

[20] The Commission has to prove the Appellant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Appellant lost her job because of misconduct.[7]

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

[22] Case law says that to be misconduct, the conduct has to be wilful. This means the Appellant's conduct was conscious, deliberate, or intentional.[8] Misconduct also

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[5] See item 5 on pages GD2-16 and GD2-17.
[6] See the PHO at pages GD10-9 to GD10-11.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

includes conduct that is so reckless that it is almost wilful.[9] The Appellant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[10]

[23] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.[11]

[24] The law does not say I have to consider how the employer behaved.[12] I cannot consider whether the PHO or the employer's actions or setting out policies in emails are reasonable. Nor can I consider whether suspension and dismissal were reasonable penalties.[13] Instead, I have to focus on what the Appellant did or failed to do, and whether that amounts to misconduct under the EI Act.[14]

[25] I can only decide whether there was misconduct under the EI law. I cannot make my decision based on whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant are not for me to decide.[15] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the EI Act.

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[9] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[10] See *Attorney General of Canada v Secours*, A-352-94.
[11] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[12] See section 30 of the EI Act.
[13] See *Paradis v Canada (Attorney General),* 2016 FC 1282; *Canada (Attorney General) v McNamara,* 2007 FCA 107.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

[26] Yes. I find the evidence before me shows there was misconduct. I have set out my reasons below.

[27] The Appellant worked for a provincial health authority as a registered nurse. She had direct contact with patients, visitors, and other employees. She was a casual, unionized employee who chose not to apply for any of the full-time lines (jobs) that were available at Y Authority because she was informed that she may be placed on leave by October 26, 2021, for not being vaccinated against COVID-19.[16]

[28] The Appellant knew that her employer, a regional public health authority, was governed by the province. She also knew that the province issued a Public Health Order (PHO) stating all persons employed by the Provincial Health Services Authority, who were hired before October 26, 2021, must be vaccinated or have an exemption to work.[17]

[29] The Appellant did not dispute that the employer informed the employees by email that they had to comply with the PHO by providing proof of vaccination or they would be placed on unpaid leave and then terminated. I acknowledge that the Appellant disputed the Commission's submissions of what was said during telephone conversations. However, she did not dispute the contents of the dismissal letter which clearly sets out that the employer repeatedly told her of the requirement to be vaccinated against COVID-19 in order to continue working.

[30] The Commission says there was misconduct because the Appellant was aware of the employer's requirement that she get vaccinated against COVID-19, and that vaccinations were required for continued employment.

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[16] See item 5 on pages GD2-16 and GD2-17.
[17] See the PHO at pages GD10-9 to GD10-11.

– **Did the employer have a policy?**

[31] Yes. Although the employer did not send the Appellant a copy of a formal written policy, I find that it is more likely than not that the employer established a "policy" in response to the PHO. This is because there is no dispute that the employer clearly set out the requirements (policy) in response to the PHO. Namely, the Appellant was aware that all employees must be fully vaccinated against COVID-19 (the expressed or implied duty), and it is more likely than not that she knew the consequences for non-compliance.

[32] On May 17, 2023, the Commission documented that the Appellant said the employer communicated the policy to her in writing on September 13, 2022 (this was later clarified to be a typing error and should be written as September 13, 2021). Although the Appellant disputes saying there was a policy, I find it is more likely than not that she was told about the employer's requirements (policy) and knew she could be suspended and terminated if she did not comply by the deadlines. As stated above, the Appellant readily admits that she knew about the PHO and chose not to accept a full-time line (job) because she was told she may be placed on leave by October 26, 2021.

[33] I agree with the Appellant that the Federal Court states a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation and suppositions. The Commission bears the burden to prove the presence of such evidence irrespective of the opinion of the employer.[18]

[34] The Commission how the employer failed to return its calls. So the Commission did not rely entirely on the employer's statements or opinion. Rather, the documents on file show the Commission relied on evidence from the Appellant. That evidence includes the Appellant's statements that confirm her knowledge of the PHO, deadlines set out by the employer (the employer's policy), and her termination letter.

[18] See *Crichlow v Canada (Attorney General),* A-562-97.

[35] Further, I acknowledge that it was the Appellant who submitted a copy of the correct PHO into evidence. This said, hearings before the Tribunal are *de novo,* which means I must consider all relevant evidence that is before me.

[36] After consideration of the foregoing, I find sufficient evidence that the employer established a COVID-19 policy, in response to the PHO. That policy set out that failure to be vaccinated against COVID-19 by the set deadlines would result in suspension and termination.

– **Did the Appellant know about the employer's policy?**

[37] Yes. I find that it is more likely than not that the Appellant knew the employer's requirement (policy) that all employees had to be vaccinated against COVID-19 to continue working. She also knew, or ought to have known, that failure to show proof of vaccination against COVID-19, on or before October 25, 2021, would result in her suspension and subsequent termination.

[38] The Appellant explained how she had conversations with her manager about the employer's COVID-19 vaccination requirements (policy), deadlines, and the PHO. I accept this as evidence that the Appellant knew the consequences of non-compliance.

– **Did the Appellant refuse to comply with the policy?**

[39] Yes. I find the Appellant refused to comply with the policy. She readily admits that she chose not to get the COVID-19 vaccination.

– **Did the Appellant know the consequences of not complying with the policy?**

[40] Yes. As set out above, I found it was more likely than not that the Appellant knew the consequences of not complying with the policy, which included suspension and then termination. Despite knowing these were the consequences, the Appellant made the wilful and deliberate decision to not comply with the employer's policy. This wilful act of non-compliance constitutes misconduct as it led to the loss of her employment.

[41] I acknowledge the Appellant has a right to decide whether to be vaccinated or disclose her vaccination status. But she knew there were consequences if she refused

to follow the employer's policy, in response to the PHO. In this case the consequences were suspension and dismissal from her employment.

– **Additional arguments**

[42] The Appellant argued that she did not breach the PHO because she did not work and did not go to any of the employer's facilities. But she did breach the employer's policy by failing to be fully vaccinated against COVID-19 by the deadlines (October 25, 2021, and November 15, 2021) set out by the employer.

[43] The Appellant said she was a casual employee, so she did not have to accept shifts and the employer was under no obligation to offer her any shifts. But the employer's policy and the PHO applied to all employees, regardless of their classification or casual status.

[44] The Appellant disclosed her religious convictions and concerns regarding the COVID-19 vaccine. She did not apply for a religious exemption, because she knew the Public Health Officer was not granting exemptions based on religion. She insisted that she wanted to work and was willing to use other precautions against COVID-19, but her employer refused to consider those options.

[45] The Appellant argued that her collective agreement does not require her to be vaccinated against COVID-19. She filed a grievance through her union.

[46] I acknowledge that the use of the word "misconduct" is upsetting to the Appellant. Even though the employer may not have used the word misconduct in its communications to her, it does not change a finding of misconduct under the EI Act. This is because "misconduct" has a specific meaning for EI purposes that does not necessarily correspond to its everyday usage. An employee may be disentitled and disqualified from receiving EI benefits because of misconduct, but that does not necessarily mean that they have done something "wrong" or "bad."

[47] I accept that the provincial health officer and employer have a right to manage their day-to-day operations, which includes the authority to develop and impose

practices and policies at the workplace, to ensure the health and safety of all employees and patients. The duty the Appellant owed to her employer was to comply with the employer's policy, which set out the requirements that vaccination against COVID-19 was a condition of continued employment, as required by the PHO.[19]

[48] I acknowledge the Appellant argued that several decisions issued by my colleagues from this Tribunal, supported that her appeal should be allowed.[20] But I am not bound by other decisions made by this Tribunal.[21] This means I do not have to follow those decisions.

[49] Further, I am not persuaded by the Appellant's arguments that her appeal should be allowed because some of the facts of her case are distinguishable from those of the claimants' in *Cecchetto v Canada (Attorney General),* 2023 FC 102, and *Kuk v Canada (Attorney General)*, 2023 FC 1134. As stated above, I found the Appellant was aware of the employer's policy requirements, in response to the PHO, and that they applied to all employees. The evidence supports the Appellant breached the employer's policy when she failed to disclose that she was fully vaccinated against COVID-19 by the set deadlines, which constitutes misconduct.

[50] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.[22]

[51] I do not have the authority to determine whether the employer's actions or policy in response to the PHO was unlawful. Equally, I do not have the authority to decide whether the employer breached any of the Appellant's rights as an employee when they

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[19] See *MN v Canada Employment Insurance Commission,* AD-22-628.
[20] For example, see *LN v Canada Employment Insurance Commission*,2022 SST 1654 (CanLII); *AB v Canada Employment Insurance Commission,* GE-22-3753.
[21] I must follow the Federal courts decisions that are on point with the case I am deciding. This is because the Federal courts have greater authority to interpret the EI Act. I don not have to follow other Social Security Tribunal decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis.*
[22] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General),* 2016 FC 1282.

suspended and then dismissed her, or whether they could or should have accommodated her in some other way. The Appellant's recourse against her employer is to pursue her claims through her union, in Court, or any other tribunal that may deal with those particular matters.

[52] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary. This is not an automatic right, even if a claimant has paid EI premiums.

[53] In my view, the Appellant did not lose her job involuntarily. This is because the Appellant chose not to comply with the employer's policy requirements, set out in response to the PHO, and which led to her suspension and then dismissal. She acted deliberately.

[54] The Appellant was suspended effective October 26, 2021, and then dismissed on November 18, 2021. Her benefit period was antedated to start on October 31, 2021. So, the Appellant is disentitled during the period of suspension from October 26, 2021, to November 17, 2021.[23] Her employment was terminated on November 18, 2021. This means she is disqualified from receiving EI benefits as of November 14, 2021, the Sunday of the week in which she was dismissed.[24]

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[23] Section 31 of the EI Act says a Appellant who is suspended due to misconduct is disentitled until the week in which the Appellant is dismissed from their employment. The disentitlement is imposed on any normal workday (Monday through Friday) that the Appellant is not entitled to EI benefits.
[24] Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.

Conclusion

[55] The Appellant lost her job because of misconduct. Because of this, the Appellant is disentitled and disqualified from receiving EI benefits.

[56] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section