



Citation: *AA v Canada Employment Insurance Commission*, 2024 SST 450

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

## Decision

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

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (627501) dated November 16, 2023 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy  
**Type of hearing:** In person  
**Hearing date:** February 29, 2024  
**Hearing participant:** Appellant  
**Decision date:** March 6, 2024  
**File number:** GE-23-3573

## Decision

[1] The appeal is dismissed.

[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 the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant was initially placed on a Leave of Absence without pay on November 21, 2021, and then dismissed by the employer. The Appellant's Record of Employment indicated his last day paid was November 19, 2021 (GD3-20).

[4] The Appellant's employer ("X") said the Appellant was on a Covid-19 leave until May 2022 (GD3-22). The Appellant was let go by the employer because he didn't comply with the mandatory Covid-19 vaccination policy.

[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 the Appellant was disqualified from receiving EI benefits.

## Issue

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

## Analysis

[7] 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

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

lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Appellant lose his job?**

[8] I find the Appellant lost his job because he didn't comply with the employer's Covid-19 vaccination policy.

[9] The Commission says the reason the employer gave is the reason for the dismissal. Specifically, the employer dismissed the Appellant because he didn't comply with the Covid-19 vaccination policy.

[10] The Appellant agrees that he lost his job because he didn't comply with the employer's Covid-19 vaccination policy. However, the Appellant says he didn't agree that failing to comply with the Covid-19 vaccination policy was misconduct.

[11] I find the Appellant lost his job because he didn't comply with the employer's mandatory Covid-19 vaccination policy.

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

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

[13] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</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>4</sup>

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

[14] 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>5</sup>

[15] 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>6</sup>

[16] The Commission says there was misconduct, because the Appellant knew that failing to comply with the employer's Covid-19 vaccination policy would cause him to be terminated and he made the choice not to comply.

[17] The Appellant says there was no misconduct because the Covid-19 vaccination policy wasn't a condition of his employment.

[18] I find the Commission has proven there was misconduct, because they showed the Appellant was aware that failing to comply with the employer's Covid-19 policy would lead to his dismissal. Specifically, the Appellant told the Commission that he **was aware** that failing to comply with the Covid-19 vaccination policy would cause a loss of employment (GD3-30 and GD3-24). I realize the Appellant testified that the Covid-19 vaccination policy wasn't a condition of his employment and collective bargaining agreement. However, the matter of determining whether the employer's Covid-19 vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for the Appellant to make these arguments.<sup>7</sup>

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

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

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<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

## **Additional Testimony from the Appellant**

[20] I realize the Appellant testified that the Covid-19 vaccine wasn't proven to be effective. Nevertheless, the efficacy of the Covid-19 vaccine was beyond my jurisdiction.<sup>8</sup> In short, the only issue before me was whether the Appellant lost his job because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore or re-fashion the law even for compassionate reasons.<sup>9</sup>

[21] I further realize the Appellant testified that the mandatory Covid-19 vaccination policy was a violation of his Human Rights. Specifically, the Appellant explained that it was his personal choice not to have the vaccine. However, I agree with the Commission's submission that personal beliefs and vaccination status were not prohibited grounds within the "Canadian Human Rights Act" (GD4-4).<sup>10</sup>

[22] Finally, the Appellant testified that not complying with the Covid-19 vaccination policy wasn't misconduct. However, I must apply the legal test for misconduct as established in the **case law (listed above)**. In other words, I cannot ignore the law even in the most compassionate cases.<sup>11</sup>

## **Conclusion**

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

[24] This means the appeal is dismissed.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section

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<sup>8</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

<sup>9</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.

<sup>10</sup> *Canadian Human Rights Act* (R.S.C.), 1985, c. H-6.

<sup>11</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.