Citation: *SB v Canada Employment Insurance Commission*, 2023 SST 2012

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (580231) dated May 23, 2023 (issued by Service Canada)

Tribunal member:	Rena Ramkay
Type of hearing:	In-person & Videoconference
Hearing date:	August 9, 2023; October 6, 2023; October 26, 2023
Hearing participant:	Appellant
Decision date:	December 6, 2023
File number:	GE-23-1579

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven 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.[1]

Overview

[3] The Appellant, S. B., lost his job as a support worker for a regional health facility. The Appellant's employer told the Commission that he was let go because he didn't comply with their COVID-19 vaccination policy.

[4] The Appellant disagrees that any misconduct took place. He says he was wrongfully dismissed by his employer, and his employer's actions violated the law. The Appellant says he didn't refuse to comply with the policy. Instead, he was looking for safety information on the vaccine so he could make an informed decision before taking it. He also says he had a vaccine exemption on file that his employer ignored.

[5] The Commission looked at the reasons the Appellant was not working. It decided the Appellant was dismissed from his job because of misconduct within the meaning of the *Employment Insurance Act* (EI Act).[2] As a result, the Commission disqualified the Appellant from receiving EI benefits.

[6] The Appellant says the Commission's decision was wrong because the Appellant's collective agreement doesn't justify the action taken by the employer. He says there are a number of laws that support his position, and the Commission hasn't met its burden to prove misconduct.

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

Matters I have to consider first

The Appellant withdrew his *Charter* challenge arguments

[7] At the hearing on August 9, 2023, the Appellant said he might be challenging the Commission's decision because it violated multiple laws, including the *Canadian Charter of Rights and Freedoms* (Charter). I explained the process for a Charter challenge is different from the process for a regular appeal and asked the Appellant if he wanted to proceed with a Charter appeal. The Appellant said he didn't want to make a Charter argument at that time, but he might want to do so later.

[8] After the hearing adjourned for a continuation, the Tribunal sent the Appellant an information package about how Charter arguments are handled.[3] Documentation from the courier shows this was hand-delivered to the Appellant on August 25, 2023. The Appellant was asked to let the Tribunal know if he wanted to make a Charter argument by September 12, 2023.

[9] The Appellant didn't respond to the Tribunal that he wanted to make a Charter argument by September 12, 2023. He confirmed he would not be making a Charter argument in his appeal when the hearing continued October 6, 2023.

[10] The Appellant said he understood this meant he could not make Charter arguments in this appeal or if he appeals the decision to the Appeal Division. This means I will not consider whether the Commission's decision to deny the Appellant EI benefits violated the Charter.

Procedural fairness issues were addressed

– The hearing continued over three different days to give the Appellant enough time to present his arguments

[11] The hearing was held in-person on August 9, 2023. The hearing was scheduled to continue on October 6, 2023, because the Appellant didn't get through all his submissions.

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[3] See GD10-1 to GD10-3.

[12] The Appellant sent the Tribunal two decisions he wanted to use to support his testimony on October 6, 2023.[4] These additional documents were received at the Tribunal on September 29, 2023, and shared with the Commission the same day.

[13] The Commission submitted supplementary representations in response to the documents sent by the Appellant.[5] These were placed in the appeal file on October 5, 2023, and sent to the Appellant by courier.

[14] The hearing continued by videoconference on October 6, 2023, as agreed, to give the Appellant time to respond to the Commission's representations. At the hearing, I told the Appellant the Tribunal had received supplementary representations from the Commission in response to his documents. I advised him he would be receiving them by courier. I also told the Appellant that one of the decisions he submitted had been overturned by the Appeal Division.

[15] The Appellant was given the option to respond to the Commission's supplementary representations (coded GD13) in writing or in a short continuation of the hearing devoted to the Commission's supplementary representations. I also said the Appellant could respond at that time to *Canada Employment Insurance Commission v A.L.*, the Appeal Division's decision that overturned the decision he submitted.[6] The Appellant said he wanted to respond in a hearing. The hearing was scheduled to continue by videoconference on October 26, 2023. I closed the hearing on October 26, 2023.

[16] I consider that the hearing over three days gave the Appellant ample time to prepare, provide his testimony, and respond to the Commission's representations.

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[4] See GD12-1 to GD12-27. The two decisions were *T.C. v Canada Employment Insurance Commission*, 2022 SST 891; and *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[5] See GD13-1.
[6] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.

– **The Appellant's three witnesses were allowed to testify and stay in the hearing as support to the Appellant**

[17] The Appellant came to the in-person hearing on August 9, 2023, with three people he said were witnesses. The Tribunal didn't have information they would be attending. I allowed the Appellant's witnesses to attend the hearing.

[18] The roles of the people in attendance were clarified, with two as witnesses and one as a support person. I asked the witnesses to provide their testimony at the beginning of the hearing so their submissions would not be influenced by the Appellant's testimony. After they gave their testimony, they remained in the hearing to provide the Appellant with support.

[19] One of the witnesses attended the October 6, 2023, and October 26, 2023, videoconference continuations of the hearing. This was so he could provide support to the Appellant and respond to additional questions from the Appellant in his role as a witness.

[20] I consider that the Appellant was given full opportunity to have support people with him throughout the hearing. He also was given the chance to use witness' testimony to support his arguments.

– **The hearing method changing from in-person to videoconference didn't affect the fairness of the hearing**

[21] The Appellant said he preferred in-person hearings. The hearing began in-person on August 9, 2023. As noted above, the hearing didn't finish on that day because the Appellant hadn't finished giving his evidence or submissions in the time scheduled. I said to the Appellant that he could continue the hearing in-person with another Tribunal member, or he could continue with me by videoconference. He said he would continue by videoconference.

[22] At the hearing continuances on October 6, 2023, and October 26, 2023, the Appellant and his witness joined by videoconference. The Appellant didn't mention any issues with the method of proceeding during these hearing dates.

[23] I don't consider that changing the hearing method caused any unfairness or injustice to the Appellant. It allowed him to continue his appeal with the same Tribunal member and no fairness issues were raised during the October 6, 2023, and October 26, 2023, continuances.

– **The Appellant's concerns about the Commission's bias are outside of the Tribunal's jurisdiction**

[24] The Appellant testified at the August 9, 2023, hearing that he thought the Commission was biased and he provided several examples.[7] Specifically, he believed the Commission had already decided to disqualify him before talking to him. He said a Service Canada officer told him the Commission was "financially incentivized" to deny claims like his.

[25] I understand the Appellant has concerns that he wasn't treated fairly by the Commission during the initial decision or the reconsideration process. But it isn't within my jurisdiction to consider. If he believes the Commission acted improperly, he can file a complaint with the Office for Client Satisfaction for ESDC.[8]

[26] Appeals heard at the Tribunal are de novo (or, treated as if they are being heard for the first time). This means I made my decision with "fresh eyes and ears", based on the testimony and submissions from both parties, and in accordance with the law.

Issue

[27] Was the Appellant's dismissal misconduct under the EI Act?

[7] The Appellant described the incidents he said showed Commission bias at GD3-47 to GD3-50; and GD2-8 to GD-10. He read from GD3-47 to GD3-50 as part of his testimony on August 9, 2023.
[8] The website for the Office for Client Satisfaction says that it is a neutral organization that receives, reviews, and responds to suggestions, compliments, and complaints about Service Canada's delivery of services. The website can be found at: https://www.canada.ca/en/employment-socialdevelopment/corporate/service-canada/client-satisfaction.html.

Analysis

[28] The law says you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has dismissed you.

[29] I have to decide two things. I have to decide why the Appellant was dismissed from his job. I then need to decide if this is considered misconduct under the EI Act.

[30] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits. The term "misconduct" in this context refers to the employee's violation of an employment rule.

Why was the Appellant dismissed from his job?

[31] I find that the Appellant was dismissed from his job because he didn't comply with his employer's COVID-19 vaccination policy.

[32] The Commission says the reason the employer gave is the reason for the dismissal. The employer told the Commission the Appellant was dismissed because he didn't comply with the COVID-19 vaccination policy.[9]

[33] The Appellant says he didn't refuse to comply with the policy. Instead, he wanted safety information on the vaccine prior to making his decision about taking it. The Appellant believes his employer tried to coerce him into taking the vaccine, and that his refusal wasn't misconduct.

[34] The Appellant confirms his employer dismissed him for not getting vaccinated in his initial application for benefits.[10] While he doesn't think his termination was justified, he doesn't dispute that his employer gave this reason for his dismissal.[11]

[35] During the reconsideration process, the Appellant told the Commission he was terminated "without cause." The Commission told the Appellant that, based on a balance of probabilities, given his occupation and where he worked, it was reasonable

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[9] See GD3-28.
[10] See GD3-8 to GD3-10.
[11] See GD3-29.

to assume he was terminated for failing to comply with the Provincial Health Order (the Order) set out by the Provincial Health Officer.[12] The Commission said the Appellant needed to provide evidence that rebuts this, such as his termination letter, medical exemption request, and correspondence between him and his employer. The Appellant says he was instructed to tell the Commission to get this information itself.[13]

[36] The Commission says there was a Provincial Health Order covering the Appellant's employer that required all workers at health facilities, including the Appellant, to be vaccinated against COVID-19. The Appellant said in his application for benefits that he was dismissed because he didn't follow his employer's COVID-19 vaccination policy. The employer told the Commission that this was the reason for the Appellant's dismissal. There is no evidence indicating any other reasons for the Appellant's dismissal.

[37] As a result, I find the Appellant was dismissed from his job because he didn't follow the COVID-19 vaccination policy his employer was subject to under the Provincial Health Order.

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

[38] Yes, the Appellant's failure to comply with the vaccination policy under the Provincial Health Order is misconduct under the EI Act.

– What the law says

[39] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that doesn't necessarily correspond to its everyday usage. An employee may be disqualified from receiving EI benefits because of misconduct under the EI Act, but that doesn't necessarily mean they have done something "wrong" or "bad."[14]

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[12] See GD3-52.
[13] See GD3-53. There is no mention of who instructed the Appellant to tell the Commission to get information about his dismissal itself.
[14] In *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140, the Federal Court of Appeal said that it was beside the point whether the root cause of an employee's dismissal was "blameless." According to the Court, "relevant conduct is conduct related to one's employment."

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

[41] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[15] Misconduct also includes conduct that is so reckless that it is almost wilful.[16] 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.[17]

[42] There is misconduct if the Appellant knew or should have known 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.[18]

[43] A deliberate violation of the employer's policy is considered to be misconduct.[19]

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

– **What I can decide**

[45] The Appellant says he could not have breached a duty or committed misconduct. He says this is because no expressed or implied duty was added to his employment agreement or collective agreement. The requirement to be vaccinated or provide an exemption wasn't a condition of his employment when he was hired, and the Appellant says he didn't agree to this condition.

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[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[17] See *Attorney General of Canada v Secours*, A-352-94.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[20] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[46] The Appellant says his employer's actions to make him take the vaccine are coercion and extortion. This goes against his rights to bodily autonomy and informed consent, both protected under common law and the *Canadian Charter of Rights and Freedoms*. He says exercising his right to choose medical treatment can't be considered misconduct.

[47] The Appellant's second affirmed witness, R., who said he is a retired dentist, testified on August 9, 2023, that the COVID-19 vaccine was an experimental genetic injection, or gene therapy. He said the vaccine had serious adverse affects. In his opinion, informed consent was a problem when long-term health consequences were unknown. R. testified again on October 26, 2023, that informed consent wasn't possible without data on the safety profile of the vaccine.

[48] I don't have the power to decide whether the COVID-19 vaccine is safe. Whether the Appellant's employer tried to coerce or extort him to take an experimental COVID-19 vaccine by having a policy requiring vaccination, or by following a Provincial Health Order requiring vaccination, falls outside the legal test for misconduct.[21] Issues about whether the Appellant's Collective Agreement or his offer of employment was violated aren't for me to decide.[22]

[49] The Federal Court (FC) recently issued a decision, *Kuk v Canada (Attorney General)*, about whether misconduct can arise in circumstances where the vaccination policy lies outside of an employment agreement, like the Appellant has argued.[23] The FC found that, for misconduct to arise, it was unnecessary that there was a breach of the employment contract. Misconduct could arise even if it results from a breach of a policy that didn't form part of the original employment contract.

[50] In *Kuk v Canada (Attorney General)*, the Court wrote at paragraph 34:

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[21] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 46.
[22] See *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Nelson v Canada (Attorney General)*, 2019 FCA 222; *Cecchetto v Canada (Attorney General)*, 2023 FC 102; *Canada (Attorney General) v Nguyen*, 2001 FCA 348; and *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[23] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

> …As the Federal Court of Appeal held in *Nelson*, an employer's written policy does not need to exist in the original employment contract to ground misconduct: see paras 22-26. A written policy communicated to an employee can be in itself sufficient evidence of an employee's objective knowledge "that dismissal was a real possibility" of failing to abide by that policy. The Applicant's contract and offer letter do not comprise the complete terms, express or implied, of his employment…It is well accepted in labour law that employees have obligations to abide by the health and safety policies that are implemented by their employers over time.

[51] Another case, *Cecchetto v Canada (Attorney General)*, also involved vaccination.[24] Mr. Cecchetto argued that his questions about the safety and efficacy of the COVID-19 vaccines and antigen tests were never satisfactorily answered by the Tribunal's General Division and Appeal Division. He also said that no decision-maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[25]

[52] In dismissing the case, the FC wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen testing … The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[26]

[53] The FC also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this

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[24] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[25] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraphs 26 and 27.
[26] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 32.

case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[27]

[54] The courts have consistently said the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the EI Act." [28] There are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers"[29] through EI benefits.

[55] The courts have made clear that I can't consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act may seem unfair to the Appellant, but it is one that the courts have repeatedly adopted and that I am bound to follow. [30] So, I will look only at whether what the Appellant did or failed to do is misconduct under the EI Act. I will consider if the Appellant deliberately violated his employer's policy, and if he knew that the violation could result in his dismissal.

– **The Commission's arguments**

[56] The Commission says the Appellant's conduct was wilful. He was dismissed for failing to comply with the COVID-19 vaccination policy. The employer confirmed to the Commission that several notices were issued to the Appellant, but he failed to comply.[31]

[57] The Commission says it isn't contesting the Appellant's right to choose what substances are put in his body. It says the courts and the Tribunal have confirmed that

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[27] *Cecchetto v Attorney General of Canada,* 2023 FC 102, at paragraph 47.
[28] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[29] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[30] See *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Nelson v Canada (Attorney General)*, 2019 FCA 222; *Cecchetto v Canada (Attorney General)*, 2023 FC 102; *Canada (Attorney General) v Nguyen*, 2001 FCA 348; *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140.
[31] See GD3-28.

the Commission doesn't have to prove an employer's policies are reasonable or fair.[32] Instead, the Commission says it must decide whether the Appellant's choice to not vaccinate led to his dismissal and whether this choice amounts to misconduct under the EI Act.

[58] The Commission acknowledges the employer didn't provide it with detailed information about warnings it gave to the Appellant, or correspondence it had with the Appellant before his dismissal. It also says the Appellant refused to provide it with any documents about what his employer said about the requirement to vaccinate or what the outcome would be if he failed to meet the conditions of the vaccination policy. He also refused to provide his termination letter to the Commission.

[59] The Commission submitted copies of the Public Health Order and the employer's COVID-19 Immunization Requirement Policy.[33] It says both support that vaccination policies were in place and that the Appellant would have been required to follow them as an employee of a regional health facility.

[60] While the Appellant indicated he had a vaccination exemption on file from many years ago, the Commission says there is no evidence he submitted a request for exemption from the COVID-19 vaccination policy. This is required under both the Provincial Health Order and his employer's policy.[34]

[61] The Commission says, based on the fact the Appellant was a support worker in a health facility, it is reasonable to find he lost his job because he failed to comply with the COVID-19 vaccination policy.

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[32] The Commission refers to *Paradis v Canada (Attorney General)*, 2016 FC 1282, at paragraph 31, as an example of the Federal Court confirming the Tribunal doesn't have jurisdiction to decide if the employer acted fairly.
[33] See the Provincial Health Order at GD3-54 to GD3-87, and the employer's COVID-19 Immunization Requirement Policy at GD3-88 to GD3-93.
[34] See GD3-79 at H., for the Provincial Health Order, and GD3-90, and GD3-92 at 4.1.3, for the employer's policy.

– **The Appellant's arguments**

[62] The Appellant says there was no misconduct because he didn't wilfully refuse the COVID-19 vaccine. He says he asked his employer for details about the vaccine's safety so he could make an informed decision about whether to take it. He never refused the vaccine, so he says he didn't fail to comply with the policy.

[63] The Appellant's first affirmed witness, M., who worked with the Appellant in a supervisory capacity for over 20 years, was brought in on August 9, 2023. She testified that she attended two termination meetings with the Appellant and the employer. In response to the Appellant asking her if his behaviour was "wilful at any time", she testified that his conduct wasn't "wilful".

[64] The Appellant also says he was off work on personal sick leave from October 3, 2021, to December 15, 2021. During this time, he says he wasn't in contact with work. He says he learned the day before he was due to return to work that he wasn't supposed to come in for his shift on December 21, 2021. He says his situation is like that of the appellant in *T.C. v Canada Employment Insurance Commission*, a decision of the Tribunal's General Division.[35]

[65] In *T.C.*, the appellant was only verbally advised of the requirement to be vaccinated, and he wasn't provided with any written policy. He was given only two days' notice to obtain the vaccine, and there was no evidence he knew about the consequences of not complying. The appeal was decided in favour of the appellant.

[66] The Appellant says he had a vaccine exemption on file that his employer disregarded. The Appellant says he didn't submit the vaccine exemption to his employer since it was already on file, and they could see it there. He says he reminded them it was on file.

[67] He sent his doctor's note to the Tribunal on August 10, 2023, as proof. The doctor's note is undated, but the Appellant has handwritten on it that it was sent to

[35] See *T.C. v Canada Employment Insurance Commission*, 2022 SST 891, at paragraphs 31 to 33.

Human Resources on October 1, 2007.[36] The note asks for the Appellant be excused from receiving the influenza shot “this season”, as he has had severe adverse reactions in the past.

[68] The Appellant’s second affirmed witness, R., testified on October 6, 2023, that when a patient has an allergic reaction to one vaccine, it is perfectly reasonable to assume the same patient will have an adverse reaction to other vaccines.

[69] The Appellant says the Commission hasn’t provided any evidence that his employer told him he needed to be vaccinated and sent him any notices. He thinks the Commission hasn’t proven its case of misconduct.

[70] I will look at the parties’ arguments in relation to the legal test below.

– My findings

[71] The Appellant argues that the Commission didn’t do its job of proving misconduct and the onus was on the Commission, and not him, to provide evidence of his misconduct. He says he didn’t want to do their work for them.

[72] The Appellant is correct that the Commission has the burden of proving misconduct, and I recognize the right of the Appellant to not help the Commission make its case. His testimony mostly addressed what he saw as weaknesses in the Commission’s position. He provided limited evidence to support his own position about what happened. This leaves me to assess all the evidence provided, some of it on a balance of probabilities, and that evidence must be sufficiently clear and convincing to satisfy the test.

[73] I find no evidence that proves or disproves if the Appellant’s employer sent him several notices about its policy and the consequences of not following it, outside of the Commission’s documented call to them. During the call, the employer representative

[36] See GD9-3.

explained that several notices were sent the Appellant, and he didn't comply with the COVID vaccination policy, so he was dismissed.[37]

[74] The Commission submitted two policies as evidence: the Provincial Health Order, dated November 18, 2021, and the employer's COVID-19 Immunization Requirement Policy, which came into force December 1, 2021.

[75] The evidence shows me there was a Provincial Health Order that applied to the Appellant's employer. It required that all staff members hired before October 26, 2021, be vaccinated, or have an exemption to work.[38] It says an employer can't allow unvaccinated staff members to work after October 25, 2021, unless they have a medical exemption and comply with the terms of the exemption, or they are following the guidance for getting a second dose of the vaccine as outlined.[39]

[76] The Appellant's Record of Employment (ROE) indicates he began working for his employer on November 16, 2002, so the Provincial Health Order would apply to him.[40]

[77] It would be reasonable for a health authority, such as the one the Appellant worked for, to communicate to its employees the contents of Provincial Health Orders it was required to follow. On a balance of probabilities, I find it is more likely than not that the Appellant's employer would have informed him of the Order, his requirement to vaccinate, and the consequences of not vaccinating by the deadline of October 25, 2021. This is what the employer told the Commission and I have no reason to doubt it.[41]

[78] When I consider that the Appellant was off work between October 3, 2021, to December 15, 2021, I still find it more likely than not he was informed of the Provincial Health Order. He didn't deny knowing about the Order in his testimony.

[79] While the Provincial Health Order provided by the Commission is dated November 18, 2021, I see there were earlier Orders dated August 20 and 31,

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[37] See GD3-28.
[38] See GD3-69 at I(1).
[39] See GD3-70 at I(4).
[40] See GD3-23.
[41] See GD3-28.

September 9 and 27, 2021, which allowed staff members to apply for non-medical exemptions, but these were reconsidered and no longer allowed in the November 18, 2021, Order.[42] Since the Appellant wasn't on sick leave when the earlier Orders came out, I find, on a balance of probabilities, that he would have been aware of the requirement to vaccinate and the consequences of not doing so.

[80] I don't accept as evidence the testimony of the Appellant's first affirmed witness, M., who answered his question, "at any time was my behaviour wilful?" by saying, "no," at the August 9, 2023, hearing. Neither the Appellant nor his witness provided detail about when these two meetings took place and what conduct was being referred to. The Appellant said the meetings were his two termination meetings. The Appellant later testified at the October 6, 2021, hearing that these two meetings took place after December 21, 2021, and before January 5, 2022, and involved "the injection".

[81] But this doesn't provide evidence that he didn't act wilfully. To determine if conduct is wilful or not, there must be sufficiently detailed evidence to know how the Appellant behaved and whether that behaviour or conduct went against an essential condition of his employment.[43] Without enough detail to understand the conduct and context under discussion, I can't accept this witness' testimony as evidence the Appellant's actions or inaction weren't misconduct because they weren't wilful.

[82] I also won't address the testimony of the Appellant's second affirmed witness, R. that there isn't any long-term safety data on the COVID-19 vaccine, making informed consent difficult, for the reasons I laid out earlier in paragraphs 47 to 55.

[83] The Provincial Health Order provides specific guidelines for vaccination exemptions. It says the medical health officer for the geographic region in which a staff member works is to receive, consider, and make a decision with respect to a request from the staff member for an exemption.[44]

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[42] See GD3-80.
[43] See *Canada (Attorney-General) v Brissette*, A-1342-92.
[44] See GD3-79 at H.

[84] By his own admission, the Appellant didn't formally submit a request for vaccine exemption. Since the Provincial Health Order required that staff members make these requests, and he didn't, I don't accept the Appellant's statement his vaccine exemption wasn't considered. He would have had to submit an exemption request before it could have been considered. There is no evidence he submitted an exemption request.

[85] The testimony of the Appellant's second affirmed witness, R., that an allergy to one vaccine makes it likely the Appellant would be allergic to other vaccines isn't relevant here because the Appellant didn't submit a COVID-19 vaccine exemption.

[86] I accept that the employer has a right to manage their day-to-day operations, which includes the right to develop and impose policies at the workplace for health and safety reasons, among others. I also accept that the Appellant has a right to choose to get vaccinated, or to decline vaccination. However, when his employer was required to follow the Provincial Health Order, directing those who worked in a health facility to be vaccinated, that requirement became a fundamental duty owed to his employer. Because the Appellant failed to comply with the order by not providing proof of vaccination or obtaining an exemption, this resulted in a breach of his duties owed to his employer.

[87] I acknowledge the Appellant faced a difficult decision because of his concerns about the safety of the COVID-19 vaccine. The evidence tells me the Appellant decided not to comply with the Provincial Health Order. Not getting vaccinated until he had the information he wanted about the vaccine was a deliberate action. I find the Appellant's actions to remain unvaccinated were intentional, deliberate and conscious. The evidence also tells me the Appellant was aware that he could lose his job and not be able to carry out his duties if he didn't comply with the Provincial Health Order. With this knowledge, he chose to not get vaccinated for personal reasons and this led to his dismissal.

[88] As a result, I find that the Commission has proven the Appellant was dismissed due to his own misconduct within the meaning of the EI Act and the case law described above.

Other Matters

– The jurisprudence submitted by the Appellant doesn't apply

[89] The Appellant refers to two Tribunal decisions from the General Division to support his argument.[45] The first, *A.L. v Canada Employment Insurance Commission*, involved an appellant who didn't get vaccinated because of her concerns over vaccination. The other decision, *T.C. v Canada Employment Insurance Commission*, deals with an appellant who worked as a delivery driver and was dismissed for failing to comply with his company's vaccination requirement.

[90] The Commission submitted representations in response to the decisions sent in by the Appellant.[46] It says the circumstances of *T.C.* are different enough from the Appellant's case to be irrelevant to his arguments. *T.C.* didn't work in healthcare where his employment was governed by a provincial health order, as was the Appellant's employment. And *T.C.* was only verbally advised of the requirement to be vaccinated, and he was given only two days' notice to obtain the vaccine.

[91] In this case, the Commission says the Appellant was advised in writing of his requirement to vaccinate through the Provincial Health Order dated November 18, 2021, and his employer's COVID-19- Immunization Requirement Policy, dated December 1, 2021. The Commission says he was advised he had to be vaccinated several weeks before his last day of work.

[92] The Commission notes the Appeal Division has since overturned the *A.L.* decision.[47] It found the General Division's decision made errors in the interpretation of misconduct under the EI Act, and that the General Division went beyond its powers by deciding the merits of a grievance between an employer and an employee.

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[45] See GD-12. The Appellant submitted *T.C. v Canada Employment Insurance Commission*, 2022 SST 891; and *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428, to be considered in deciding his appeal.
[46] See GD13.
[47] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.

[93] I agree that the facts in *T.C.* are different from the Appellant's case in legally relevant ways. As a result, I won't be following this Tribunal decision in the Appellant's appeal.

[94] The *A.L.* decision no longer stands, and I find the arguments of the Tribunal's Appeal Division in *Canada Employment Insurance Commission v A.L.*[48] more persuasive and more aligned with case law I am required to follow. For this reason, I won't follow the *A.L.* decision either in the Appellant's appeal.

[95] The Appellant says I should also apply the Federal Court decision in *Astolfi* to his situation.[49] He says his employer's conduct before his dismissal amounted to extortion. The Appellant says the *Astolfi* case says the Tribunal can look at an employer's conduct when it decides whether the employee's conduct in breaking rules or policy was intentional.[50] In particular, the Appellant says the Tribunal should consider whether his employer's conduct led to his alleged misconduct.

[96] I have reviewed *Astolfi* and conclude that it has limited applicability in the Appellant's circumstances. The claimant in *Astolfi* felt that the President and CEO of his company had harassed him during a meeting. After the meeting, Mr. Astolfi told his employer that he would work from home until the situation was investigated and resolved. His employer ordered him to physically show up at the office or face disciplinary measures. When he continued to work from home, the employer said his absence was "misconduct" and dismissed him.

[97] The facts in *Astolfi* are different from the facts in the Appellant's case. In this case, the Appellant wasn't singled out and harassed by his employer. This is not what led to the Appellant being dismissed. The implementation of the Provincial Health Order applied to all employees working in health care in the province, including the Appellant. There is no suggestion, as in *Astolfi*, that the Appellant's employer actively targeted the

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[48] See *Canada Employment Insurance Commission v A.L.*, 2023 SST 1032.
[49] See *Astolfi v Canada (Attorney General),* 2020 FC 30.
[50] See *Astolfi* at paragraph 33.

Appellant. In my view, *Astolfi* doesn't apply in the Appellant's case, so I won't follow it in this appeal.

[98] I find the case law and Tribunal decisions referred to by the Appellant don't apply in his case for the reasons I have set out above.

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

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

Conclusion

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

[101] This means that the appeal is dismissed.

Rena Ramkay
Member, General Division – Employment Insurance Section