Citation: *CI v Canada Employment Insurance Commission*, 2023 SST 2050

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. I.
Representative:	Christina Lazier
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (459796) dated March 15, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	September 7, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	December 22, 2023
File number:	GE-22-1612

Decision

[1] The appeal is dismissed, with a modification. The Appellant is still not entitled to EI benefits on her claim, but the reason why has changed.

[2] The Appellant cannot receive employment insurance (EI) benefits because she was suspended from her job due to her own misconduct[1].

Overview

[3] The Appellant worked as a teacher with a district school board (the employer). In October 2021, the province where the Appellant lived and worked introduced a mandatory vaccination protocol for people working in high-risk settings (the provincial protocol). It applied to teachers, so the employer implemented it as a workplace policy (the policy).

[4] The policy required all employees to provide proof they were fully vaccinated against Covid-19 by November 30, 2021 or be placed on unpaid leave until proof of full vaccination was provided[2].

[5] The Appellant was advised of the policy. But she didn't want to disclose her vaccination status and didn't want to be vaccinated against Covid-19 for religious reasons. She provided the employer with a Statement of Religions Belief and Conscience Affidavit[3], but the employer denied her request to be exempt from the policy.

[6] Since the Appellant didn't provide proof of vaccination by the policy deadline, the employer placed her on an indefinite unpaid leave of absence (LOA) after her last paid day on November 30, 2021[4].

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[1] That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term "misconduct" for EI purposes is discussed under Issue 2 below.
[2] A copy of the provincial protocol is at GD3-28 to GD3-46. See article 3.4 of the protocol (starting at GD3-35) for the discipline provisions.
[3] See GD3-24.
[4] The Appellant's Records of Employment (ROEs) are at GD3-13 and GD3-15.

[7] The Appellant applied for EI benefits[5]. The Respondent (Commission) denied her claim[6]. It said she could not be paid regular EI benefits starting from December 1, 2021 because she voluntarily took an LOA from her job without just cause[7].

[8] The Appellant asked the Commission to reconsider that decision. She said she was entitled to EI benefits because of her constitutional rights to refuse to disclose her medical status and to bodily autonomy – and because she paid into the EI program[8].

[9] The Commission maintained its decision to deny the Appellant's claim. The Appellant appealed that decision to the Social Security Tribunal (Tribunal).

[10] I have decided the Appellant stopped working because she was suspended from her employment – not because she voluntarily took an LOA. I have also decided the conduct that caused her to be suspended is misconduct for purposes of EI benefits. This means she is disentitled to EI benefits during the period of her suspension, starting from December 1, 2021.

[11] These are my reasons.

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[5] The Appellant initially asked for sickness benefits, but subsequently told the Commission that she was asking for regular EI benefits.

[6] There is no decision letter on file for this decision. But an initial decision was made because the Appellant didn't receive any EI benefits on her claim. The Appellant was verbally notified she was being denied regular EI benefits in mid-February (see the Appellant's affidavit at GD29-2). On February 14, 2022, she accessed her Service Canada account online and saw a notification that her claim was denied because she took an LOA from her job without just cause (see GD29-4). In the Request for Reconsideration she filed on February 15, 2022, she indicated the decision she was asking the Commission to reconsider was "EI denial" (see GD3-21). In the reconsideration interview on March 10, 2022, the Service Canada representative told the Appellant it had determined she didn't have just cause for taking an LOA (see GD3-25). The reconsideration decision letter issued by the Commission on March 15, 2022 says the decision on "Issue: Leave of Absence" was "maintained" (see GD3-74).

The Appellant subsequently asked the Commission to issue a decision letter for the initial decision on her claim (see the Appellant's affidavit at GD29-2 to GD29-3). At the hearing her legal representative advised that no such decision letter has ever been received.

[7] See GD29-4.
[8] See GD3-21.

Preliminary Matters

a) The Appellant's constitutional argument

[12] In her Notice of Appeal, the Appellant stated that the "mandate" that required her to be vaccinated against Covid-19 violated rights guaranteed to her by the Canadian Charter of Rights and Freedoms (the Charter)[9].

[13] There is a special appeal process for making a Charter argument before the Tribunal.

[14] The first step in the Tribunal's Charter process required the Appellant to file a Charter Challenge Notice setting out the specific sections of the EI Act (or related legislation) that are alleged to breach her constitutional rights *and* brief submissions setting out the facts that support the constitutional challenge and the legal argument being made[10].

[15] If the Tribunal is satisfied this foundation has been laid, the Appellant will be permitted to move on to the next step in the Charter process (namely, the filing of a Charter Record).

[16] On August 18, 2022, the Tribunal provided the Appellant with the information package and form required to start the Charter appeal process[11]. The Appellant filed some documents in response, but the Tribunal determined her materials did not satisfy the requirements for making a Charter argument before the Tribunal. On November 15, 2022, her appeal was returned to the Tribunal's regular (non-Charter) appeal process[12].

[17] The appeal was subsequently assigned to me for hearing, and I scheduled a videoconference hearing to take place on March 21, 2023.

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[9] See GD2-5.
[10] This requirement is set out in subsection 1(1) of the *Social Security Tribunal Regulations, 2022*.
[11] See GD6.
[12] See GD3-19.

[18] On March 20, 2023, the Appellant requested an adjournment because she was in the process of retaining legal counsel[13]. The Appellant's legal representative asked for the hearing be adjourned to July 11, 2023 in order to review the file and obtain instructions from the Appellant.

[19] I granted the adjournment request and a new Notice of Hearing was issued for July 11, 2023[14].

[20] On April 6, 2023, the Appellant's legal representative advised that the Appellant was considering pursuing leave to appeal the interlocutory decision refusing her Charter Challenge Notice to the Tribunal's Appeal Division (the AD)[15].

[21] On July 6th and 10th, 2023, the Appellant's legal counsel asked for a second adjournment because of documents she believed were missing from the Appellant's file[16]. I advised that this second adjournment request was to be spoken to at the start of the July 11, 2023 hearing[17].

[22] Although I was not entirely satisfied the Appellant met the test for a second adjournment[18], I granted the adjournment on a peremptory basis to a new hearing date of September 7, 2023[19]. This meant no further adjournments would be granted.

[23] At the start of the September 7, 2023 hearing, I asked the Appellant's legal representative if an appeal of the interlocutory decision denying her Charter appeal had been filed with the AD. The representative advised that the Appellant had decided not to appeal the interlocutory decision.

[24] The appeal was heard on September 7, 2023 and no Charter arguments were made during the hearing.

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[13] See GD3-21.
[14] See GD3-22.
[15] See GD23-2.
[16] See GD27-2 and GD29.
[17] See GD28.
[18] Set out in section 43(3) of the Social Security Tribunal Rules of Procedure.
[19] See GD30.

b) The Appellant's natural justice argument

[25] At the start of the hearing, the Appellant's legal representative submitted that the Commission "twice erred" in the process of denying the Appellant's claim, and asked me to "correct" those errors by ordering the Commission to pay the Appellant her EI benefits.

[26] Specifically, the representative argued the Commission breached the standards of natural justice when it:

- failed to issue a written decision with reasons in the first instance, and simply made a phone call to tell the Appellant her claim was denied without explaining why; and

- failed to issue a decision with proper reasons at the reconsideration stage, and simply made a vague reference to "Issue: Leave of Absence" without setting out the basis for the denial.

[27] I acknowledge the Appellant's frustration with the administration of her claim. But I can't do what her legal representative asked.

[28] A mistake by the Commission's representative doesn't override the law[20]. So, even if the Commission failed to give the Appellant enough information or the right information, she can't receive EI benefits if the law doesn't allow it.

[29] The Supreme Court of Canada has also said I don't have jurisdiction to grant the equitable relief the Appellant is asking for with her natural justice argument[21]. This means I can't make an exception for her[22].

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[20] See *Canada (Attorney General) v. Shaw*, 2002 FCA 325, where the Federal Court of Appeal explained that misinformation from the Commission does not give a claimant relief from the provisions of the EI Act.

[21] Namely, to grant her benefits even if she's not entitled to them at law. The Supreme Court of Canada said I am bound by the law and cannot refuse to apply it, even on grounds of equity: *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141.

[22] See also *Pannu*, 2004 FCA 90.

[30] And I don't have the power to order the Commission to compensate the Appellant for its mistakes[23].

[31] I must focus on whether the *Employment Insurance Act* (EI Act) allows the Appellant to receive the EI benefits she has requested for the time she was separated from her employment.

c) My jurisdiction

[32] The Tribunal only has jurisdiction over decisions that have been reconsidered[24].

[33] In the Appellant's case, the only decision which has been reconsidered is the Commission's initial decision on the application for sickness benefits that she submitted on December 13, 2021[25] and subsequently confirmed was to be treated as an application for regular EI benefits[26].

[34] The Commission did not issue a decision letter for this initial decision.

[35] However, based on the evidence set out in footnote 6 above, I find that the Commission's initial decision was its determination that the Appellant was not entitled to regular EI benefits because she voluntarily took an LOA from her employment without just cause.

[36] I further find this is the decision that was reconsidered by the Commission when it issued the March 15, 2022 reconsideration decision letter[27]. So, this is the decision I have jurisdiction over.

Issues

[37] Did the Appellant voluntarily take an LOA from her job?

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[23] See *Granger, supra*, and *Canada (Attorney General) v. Romero*, A-815-96.
[24] The Tribunal's jurisdiction is limited to decisions that have been through the Commission's reconsideration process: sections 112 and 113 of the *Employment Insurance Act* (EI Act).
[25] At GD3-3 to GD3-12.
[26] See GD3-18.
[27] See GD3-74 to GD3-75.

[38] If yes, did she have just cause for doing so?

[39] If no, why did she stop working? And is that reason considered to be misconduct for purposes of EI benefits?

Analysis

[40] Section 30 of the EI Act says that claimants are disqualified from receiving EI benefits if they:

- lose their employment because of misconduct ***or***
- voluntarily leave their employment without just cause[28].

[41] Loss of employment includes a suspension from employment[29].

[42] Claimants who are suspended from their employment because of their own misconduct are not entitled to receive EI benefits **until**:

a) the period of suspension expires;

b) they lose or voluntarily leave their employment; or

c) after the suspension starts, they accumulate enough hours of insurable employment in other employment to qualify for benefits[30].

[43] Such claimants are not entitled to receive EI benefits while they are suspended from their employment[31]. So, during the period of suspension the consequences are the same as a dismissal for misconduct[32].

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[28] Section 30(1) of the EI Act.
[29] Section 29(b) of the EI Act.
[30] Section 31 of the EI Act.
[31] Although you may be entitled to receive EI benefits after your suspension is over.
[32] See *CUB 51820.*

[44] Claimants who **voluntarily** take an LOA without just cause are similarly not entitled to receive EI benefits[33].

[45] Where an employer has refused to allow a claimant to continue working and placed them on an unpaid LOA (in other words, an **involuntary** LOA), the claimant will be considered to have been suspended for purposes of the EI Act. And if the suspension was due to misconduct, the claimant is not entitled to receive EI benefits during the period of the unpaid LOA[34].

[46] An employer's characterization of the separation from employment – be it as a layoff due to a shortage of work, a dismissal, or an administrative LOA – is not determinative[35]. This means I am not bound by how the employer and the Appellant might characterize the way the employment ended[36].

[47] I must assess the evidence and decide the true reason the Appellant stopped working.

[48] If she voluntarily took an LOA, then I have to decide whether she had just cause for doing so.

[49] If she did **not** voluntarily take an LOA and was instead prevented from working by her employer – then I must decide if the reason the employer took this step was due to conduct by the Appellant that is considered to be misconduct under the EI Act.

[50] This is because the Federal Court of Appeal has said that the grounds for refusing EI benefits in section 30 of the EI Act are linked in a way that requires me to consider whether a disqualification is warranted **on either of the 2 related grounds[37]**.

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[33] Sections 32(1) and 32(2) of the EI Act – unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer after the LOA started.
[34] Section 31 of the EI Act.
[35] See *Walls v. Canada (Attorney General)*, 2022 FCA 47 (CanLii) at paragraph 41.
[36] See *KJ v. Canada Employment Insurance Commission*, 2023 SST 266, a case where this Tribunal's Appeal Division confirmed I am not bound by a Record of Employment.
[37] See *Attorney General of Canada v. Easson*, A-1598-92, and *Borden* 2004 FCA 176.

[51] So, since the law says that loss of employment includes a suspension (and since a suspension includes an involuntary LOA), I have to consider whether the Appellant is disentitled to EI benefits because she **was suspended from her job due to her own misconduct**.

Issue 1: Did the Appellant voluntarily take a LOA from her job?

[52] To decide this question, the Federal Court of Appeal (FCA) has said I must consider whether the Appellant had a choice to stay or leave the job[38]. Decisions of the FCA are binding on the Tribunal.

[53] I find the Appellant did ***not*** voluntarily take an LOA from her job because she didn't have a choice to continue working after her last paid day of work on November 30, 2021. The evidence shows the employer prevented her from working after that.

[54] The employer told the Commission that:

- The employer implimented the provincial protocol as a workplace policy[39].
- The Appellant's ROEs were coded as LOA because the Appellant wasn't vaccinated but was required to be vaccinated to work[40].
- Employees had to be vaccinated. Regular testing by unvaccinated employees was not acceptable[41].

[55] The Appellant told the Commission that:

- She was forced to take an LOA due to the vaccine mandate[42].
- She asked the employer for an exemption, but her request was rejected[43].

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[38] See *Canada (Attorney General) v. Peace*, 2004 FCA 56.
[39] See GD3-27.
[40] See GD3-17.
[41] See GD3-27.
[42] See GD3-19.
[43] See GD3-25.

[56] At the hearing, the Appellant testified that:

- Her last day on the job was November 26, 2021.
- She asked for sick leave, and the employer gave her 2 days of sick leave on November 29th and 30th.
- But as of December 1, 2021, she wasn't allowed to go to work unless she was fully vaccinated and disclosed her vaccination status to the employer.
- She made a personal decision not to do either of these things.
- She asked the employer if she could stay on if she did regular rapid testing, but the employer said No.
- She also asked for an exemption, but the employer said No to that, too.
- So, she wasn't allowed to go to work starting on December 1, 2021.
- The employer put her an unpaid LOA that continued until March 2022, when she was invited back to work without complying with "the protocol".
- She then finished her teaching contract, which ended on July 31, 2022.

[57] The evidence shows the Appellant didn't have the choice of continuing to work after November 30, 2021. She was required to be fully vaccinated against Covid-19 by that time. When she didn't provide proof of vaccination to the employer by that deadline (or obtain an approved exemption), the employer prevented her from working and placed her on an unpaid LOA.

[58] I therefore find the Appellant did ***not*** voluntarily take an LOA.

[59] This means she can't be denied EI benefits on the basis of having voluntarily taken an LOA. It also means I don't need to consider whether she had just cause for voluntarily taking an LOA.

Issue 2: Why did the Appellant stop working?

[60] The Appellant stopped working because she didn't provide proof of vaccination as required by the policy and didn't have an approved exemption.

[61] The undisputed evidence set out under Issue 1 above shows the employer prevented the Appellant from working after November 30, 2021 because she was non-compliant with the policy. Specifically, she failed to provide proof she was fully vaccinated against Covid-19 by the November 30, 2021 policy deadline and didn't have an approved exemption to the mandatory vaccination requirement.

[62] The evidence also shows the employer chose to put the Appellant on an unpaid LOA rather than impose a suspension or termination during this period.

[63] Where an employer chooses to put an employee on leave without pay rather than imposing a suspension or termination, it is considered an involuntary LOA and **will be treated as a suspension** – regardless of what the ROE says[44].

[64] The Appellant testified that she remained on an unpaid LOA until March 2022.

[65] I therefore find the Appellant was suspended from her employment from December 1, 2021 until March 2022[45] for failing to comply with the policy. This is why she stopped working.

[66] I must now consider if the reason she was suspended, namely her non-compliance with the policy, is considered misconduct for purposes of EI benefits.

Issue 3: Is the reason for her suspension misconduct under the law?

[67] Yes, the reason for the Appellant's suspension and subsequent dismissal (namely, her non-compliance with the policy) is misconduct for purposes of EI benefits.

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[44] See paragraphs 45 to 47 above.
[45] The Appellant didn't indicate the exact date she was invited to return to work without complying with the policy, only that this occurred in March 2022 and that she returned to work and completed her teaching contract for that school year. This means the period of her suspension runs from December 1, 2021 to whatever date in March 2022 she returned to work.

The legal test for misconduct

[68] To be misconduct under the EI Act, the conduct that caused the separation from employment has to be wilful. This means the conduct was conscious, deliberate, or intentional[46]. Misconduct also includes conduct that is so reckless (or careless or negligent) that it is almost wilful[47] (or shows a wilful disregard for the effects of their actions on the performance of their job).

[69] The law says the Appellant doesn't need to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct for purposes of EI benefits[48].

[70] There is misconduct if she knew or ought to have known her conduct could get in the way of carrying out her duties to the employer and there was a real possibility of being suspended[49].

[71] The Commission must prove the Appellant was suspended fom her job due to misconduct[50]. It relies on the evidence Service Canada representatives obtain from the employer and the Appellant to do so.

Evidence from the Employer

[72] The employer's evidence is generally set out in paragraph 54 above.

[73] A copy of the provincial protocol the employer implemented as the policy is at GD3-28 to GD3-46.

[74] A copy of Public Health Order (PHO) #5 of the Chief Medical Officer of Health is at GD3-47 to GD3-72.

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[46] See *Mishibinijima v. Canada (Attorney General),* 2007 FCA 36.
[47] See *McKay-Eden v. Her Majesty the Queen*, A-402-96.
[48] See *Attorney General of Canada v. Secours*, A-352-94.
[49] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[50] 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 Appellant lost her job because of misconduct.

Evidence from the Appellant

[75] The statements and other evidence the Appellant gave to the Commission are generally set out in paragraph 55 above.

[76] The Appellant testified at the hearing that:

- She started her job on August 1, 2021. She had a 1-year term teaching contract that ran from August 1, 2021 to July 31, 2022.
- On October 12, 2021, she received an E-mail from the employer's Director of Human Resources advising that the province was bringing in a protocol for Covid-19 and she was required to be fully vaccinated by November 30, 2021[51].
- Between October 12, 2021 and November 30, 2021, she received "continual E-mails pressuring" herself and all employees to get fully vaccinated and reveal their vaccination status.
- She was afraid of getting a Covid vaccine.
- She was also uncomfortable disclosing her "medical status".
- She felt "segregated" in her employment because of the policy and the media around vaccine mandates.
- She also felt "threatened" because she was living in fear of losing her ability to earn income and provide for her family if she followed her "heart" and her conscience and refused to get vaccinated or disclose her vaccine status.
- On November 3, 2021, she submitted her request to be exempt from the mandatory vaccination requirement.

[51] This E-mail was admitted as Exhibit A to the Appellant's testimony at the hearing. A copy of this E-mail is at GD31-18 to GD31-19.

- She received an E-mail from the employer denying her exemption request shortly before November 26, 2021.

- Between November 26th and November 30th, she was in talks with her union, which told her she could put in a grievance after December 1, 2021.

- She was also having conversations with the employer's Human Resources representative and her local MLA[52], asking for an explanation of why the province was putting in the vaccine protocol and why "a segregated policy was necessary".

- She asked if she would be allowed to remain on the job if she did regular rapid testing, but the employer said "No".

- On November 26, 2021, she asked to take sick leave. The employer said she could take November 29th and 30th as sick days, but nothing after that.

- She wasn't allowed to go to work after December 1, 2021 unless she became fully vaccinated and provided the employer with proof of vaccination.

- She made a personal decision "not to comply with the protocol", so she didn't go to work. This is "why" she stopped working.

- By putting her "off work", the employer effectively disclosed to her "community" that she was unvaccinated and didn't comply with the protocol.

- This was discrimination.

- But she couldn't comply with the protocol because of her spiritual and conscientious beliefs.

- So as of December 1, 2021, she wasn't allowed to work.

[52] Member of Legislative Assembly.

- She started the grievance process on December 14, 2021[53].
- In March 2022, she was "invited back to work" without complying with "the protocol". She returned to work and finished her contract.
- On April 26, 2023, she received an E-mail from her union advising it had reached a final settlement for her grievance[54].
- This settlement is "a concession" that she had "valid grounds for an exemption" and that the employer should have granted her exemption request but didn't.
- She can't disclose the terms or the "dollar amount" she received in the settlement because of confidentiality requirements in the settlement agreement.
- The "vaccine mandate" was unilaterally imposed by the employer with a coercive process and an extortive deadline, and without any re-negotiation of the collective agreements that governed her employment[55].

[77] The Appellant's legal representative filed additional materials that were referred to at the hearing and which I agreed to accept post-hearing[56]. I have reviewed all of these materials but will not summarize them here.

Submissions by the Appellant's representative

[78] The Appellant's legal representative made the following submissions:

a) The EI Act needs to be applied "through the lens" of Canada's Bill of Rights.

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[53] A copy of her "Provincial Grievance" against the employer for denying her "an exemption to the vaccine mandate", in contravention of her human rights is at GD31-22. A copy of her "Regional Grievance" on the same ground is at GD31-23.
[54] This E-mail was admitted as Exhibit B to the Appellant's testimony at the hearing. A copy of this E-mail is at GD31-20.
[55] The Appellant's employment was governed by 2 agreements: an agreement between her union and the school board, and an agreement between her union and the provincial Minister of Education. These agreements were admitted as Exhibit D to the Appellant's testimony at the hearing. Copies are at GD31-62 to GD31- 230.
[56] See GD31 and GD32.

- Sections 1(a) and (b) of the Bill of Rights protects the Appellant's rights and freedoms and protect her from discrimination.

- She wants the Tribunal to adjudicate that issue.

b) The employer didn't have a policy requiring mandatory vaccination, so there's no evidence the Appellant breached a condition of her employment.

- The only policies that are relevant to the Appellant's employment are those set out in the 2 collective agreements governing her employment. There is nothing in either of the agreements that provided for mandatory vaccination against Covid-19.

- The vaccine protocol brought in by the province is irrelevant and not part of the conditions of the Appellant's employment. And there's "nothing" in the provincial Health Protection Act that would allow the Chief Medical Officer to amend the terms of an employment contract.

- So, there's no evidence of a public health order that applied to the Appellant, and no evidence that she breached any policy or condition of her employment.

c) The settlement reached in the Appellant's grievance is proof the employer should have granted the Appellant's request to be exempt from vaccination. This means the employer acted wrongfully when it put her "off work", so she should be entitled to receive EI benefits.

Analysis and Findings

A) What legal test do I use for my analysis?

[79] The Appellant's legal representative wants me to make a ruling based on the Canadian Human Rights Act.

[80] But the Tribunal has no jurisdiction to make such rulings[57], so I can't do that.

[81] The Appellant's legal representative also wants me to pretend that the Appellant was never suspended for non-compliance with the policy because the employer invited her to return to work without being vaccinated and a favourable settlement was reached in her grievance.

[82] I can't do that, either.

[83] The employer and the Appellant's union may have reached a settlement agreement, but I'm not required to be blind to what occurred in real time. I have to look at the period of time the Appellant was separated from her employment (and for which she is seeking EI benefits) and decide if the reason she wasn't working constitutes misconduct for purposes of EI benefits.

[84] In *Attorney General of Canada v. Perusse*[58], the Federal Court of Appeal (FCA) found that the outcome of a grievance had no impact on whether or not an EI claimant lost their employment due to their own misconduct[59]. As stated above, decisions of the FCA are binding on the Tribunal.

[85] In the *Perusse* decision, the FCA said it was "wrong" to assume that an award allowing a grievance proved the claimant did not lose their job due to their own misconduct[60]. This means I can't simply assume that because the Appellant settled her

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[57] The Tribunal doesn't have legal authority to interpret or apply privacy laws, human rights laws, international, law, the Criminal Code or other legislation – to decisions under the EI Act: 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. That is not the case in this appeal.

[58] See Federal Court Decision *A-309-81, The Attorney General of Canada v. Perusse, Serge.*

[59] This case is similar to the Appellant's situation in that Mr. Perusse had been successful with his grievance and been reinstated.

[60] See *Perusse, supra*.

grievance and was reinstated to her position – there was no misconduct involved in her separation from employment.

[86] The Tribunal also does not have jurisdiction to interpret or apply a collective agreement or employment contract[61].

[87] This means it's not the Tribunal's role to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal decide whether the penalty of being suspended or placed on an unpaid LOA was too severe. The Tribunal must focus on the reason ***the Appellant*** was suspended from her employment and decide if the conduct that caused her to be suspended constitutes misconduct under the EI Act.

[88] So, I must apply the legal test established by the cases that have considered misconduct for purposes of EI benefits. These cases say that misconduct is any conduct that is intentional and likely to result in a loss of employment[62].

B) Is there any evidence to prove misconduct in the Appellant's case?

[89] Yes, there is.

[90] The Appellant denies that the employer even had a mandatory vaccination policy. She says the employer relied instead on a Provincial Health Order (PHO) and protocol that did not apply to her. She also says that since her collective agreement didn't require vaccination, there can be no misconduct on her part.

[91] This is not a persuasive argument.

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[61] 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. The Tribunal's legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting and applying a collective agreement. This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

[62] See paragraphs 68 to 71 above.

[92] The employer may not have had its own formal vaccination policy when it suspended the Appellant from her employment. But the evidence on file shows the employer was following a PHO when it required its employees to provide proof of vaccinations against Covid-19 by November 30, 2021. The evidence also shows that **the employer** communicated ***its*** requirements for and expectations directly to employees[63]. And the Appellant's testimony shows she recognized that her employer had implemented a vaccination policy and it required her to be fully vaccinated by November 30, 2021 or she would not be allowed to work.

[93] I also note that the AD has considered this very issue and found that an employer's adoption of a PHO can be considered an employer policy[64].

[94] I therefore find the employer adopted the provincial protocol based on PHO #5 as policy.

[95] I have already found that the conduct which led to the Appellant's suspension was her refusal to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[96] The uncontested evidence obtained from the employer, together with the Appellant's evidence and testimony at the hearing, allow me to make these additional findings:

a) the Appellant was informed of the policy and given time to comply with it.

b) her failure to comply with the policy was intentional – she made a **deliberate personal decision** not to be vaccinated and not to disclose her vaccine status.

c) she knew her refusal to provide proof of vaccination in the absence of an approved exemption could cause her to be suspended from her employment.

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[63] Starting with the E-mail admitted as Exhibit A to the Appellant's testimony at the hearing (at GD31-18 to GD31-19) and, according to the Appellant's testimony, continuing with "continual E-mails" between October 12th and November 30th after that (see paragraph 76 above).
[64] See *CD v. Canada Employment Insurance Commission*, 2023 SST 887.

The provincial protocol and PHO linked the employer's initial E-mail to employees on October 12, 2021 (Exhibit A to the Appellant's testimony) clearly state that employees who are not fully vaccinated by the deadline will be placed on administrative leave and not permitted to return to work until they provide proof of vaccination. And the Appellant's compelling testimony about feeling threatened because of the loss of employment and income if she followed her heart and her conscious – *and* the talks she was holding with her union, the employer's Human Resources representative and her local MLA – clearly show she was aware she could be suspended from her job for non-compliance with the policy.

(These 3 factors made her refusal to comply with the policy wilful.)

d) her failure to comply with the policy was the direct cause of her suspension.

A settlement may have been reached in the Appellant's grievance. But that doesn't change the fact that the Appellant was suspended after her last paid day on November 30, 2021 and separated from her employment **in real time** for over 3 months. The policy was in effect when she was suspended. Nothing changes the fact that the reason for this separation from employment was because she was non-compliant with the policy.

And even if the Appellant sees the settlement as some sort of concession by the employer that it should have grated her exemption request[65] (I make no findings on this), she received her remedy for that after-the-fact.

Similarly, reinstatement does not change the nature of the misconduct that initially led to the Appellant's suspension and subsequent dismissal[66].

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[65] See the Appellant's testimony in paragraph 76 above.
[66] See the FCA decisions in *Canada (Attorney General) v. Boulton*, 1996 FCA 1682 and *Canada (Attorney General) v. Morrow*, 1999 FCA 193.

[97] **This** is the test for misconduct under the EI Act, and the evidence shows the Appellant's conduct meets the test.

[98] The employer has the right to set policies for workplace safety[67]. The Appellant had the right to refuse to comply with the policy. By choosing not to provide proof of vaccination (in the absence of an approved exemption), she made a personal decision that led to foreseeable consequences for her employment.

[99] The FCA has said that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act[68]. And the Federal Court's decision in *Cecchetto* affirmed this principle **in the specific context of a mandatory Covid-19 vaccination policy**[69].

[100] The AD has repeatedly applied this principle and confirmed it doesn't matter if a claimant's decision is based on religious beliefs, privacy concerns, medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits[70].

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[67] The Appellant's legal representative submitted there was "controversy" around the circumstances at the time the provincial protocol and PHO #5 came into effect. The representative said there was no evidence before me about whether there was, in fact, a pandemic, a virus of concern, or that the medical intervention being mandated was safe. I don't have to make findings on any of these questions. It is not in dispute that an employer is entitled to set workplace health and safety policies as changing circumstances may require.

[68] See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

[69] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102. The *Cecchetto* decision has since been followed in a number of other Federal Court decisions, including *Milovac v. Canada (Attorney General)*, 2023 FC 1120, *Kuk v. Canada (Attorney General)*, 2023 FC 1134 and *Matti v. Canada (Attorney General)* 2023 FC 1527. These decisions found it reasonable for the Tribunal to conclude the claimants lost their employment because of misconduct because they were aware of their employer's vaccination policies and the consequences that would result for refusing to comply.

[70] There are now many cases where the Appeal Division has confirmed this. For a small sample of these cases, see: *NL v. CEIC*, 2023 SST 143, *DM v. CEIC*, 2023 SST 256, *KW v. CEIC*, 2023 SST 271, *CEIC v. RB*, 2023 SST 1249, *JP v. CEIC*, 2023 SST 925, *MJ v. CEIC*, 2023 SST 799, *CD v. CEIC*, 2023 SST 887 and *SC v. CEIC*, 2023 SST 1077.

[101] Here, as in *Cecchetto*, the only issues are whether the Appellant was suspended for breaching her employer's vaccination policy and, if so, whether that breach was deliberate and foreseeably likely to result in her suspension (by being placed on an unpaid LOA).

[102] The answer to all of these questions is yes.

[103] I therefore find the Appellant's wilful refusal to provide proof of vaccination in accordance with the policy – in the absence of an approved exemption – constitutes misconduct under the EI Act.

[104] This means the Appellant was suspended from her employment because of conduct (her wilful non-compliance with the policy) that constitutes misconduct for purposes of EI benefits.

[105] As stated above, I have no authority to decide whether the employer breached the Appellant's collective agreements or whether she was wrongfully suspended. The Appellant's recourse for her complaints against the employer was to pursue her claims in court or before another adjudicative body that deals with such matters.

[106] She has already done this through the grievance process. And she has received her remedy.

[107] However, none of the Appellant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that she was suspended from her employment because of conduct that is considered misconduct under the EI Act.

[108] And this means she cannot be paid EI benefits during the period of her suspension.

Conclusion

[109] The Commission has proven the Appellant was suspended from her employment because of her own misconduct.

[110] The Appellant is disentitled to EI benefits from December 1, 2021 to March 2022[71] because **during this period of time** she was suspended from her employment due to her own misconduct[72].

[111] The outcome of this appeal doesn't change anything for the Appellant. She still cannot receive EI benefits on the application she filed December 13, 2021.

[112] The appeal is dismissed, with the modification set out in paragraph 110 above.

Teresa M. Day
Member, General Division – Employment Insurance Section

[71] See footnote 45 above.
[72] Pursuant to sections 29(b) and 31 of the EI Act.