Citation: *JS v Canada Employment Insurance Commission*, 2024 SST 719

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. S.
Representative:	C. F.
Respondent:	Canada Employment Insurance Commission
Representative:	Rebekah Ferris

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated October 31, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	May 29 and 30, 2024
Hearing participant:	Appellant's representative Respondent's representative Observer
Decision date:	June 19, 2024
File number:	GE-22-3596

Decision

[1] The appeal is allowed in part.

[2] The Commission has not proven the Appellant was suspended from his job on November 15, 2021 because of misconduct.[1] Because of this, the Appellant is not disentitled from receiving EI benefits from November 15, 2021 to November 29, 2021.[2]

[3] The Commission has proven the Appellant was dismissed from job on November 30, 2021 because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits from that date.

Overview

[4] The Appellant's employer adopted a policy requiring all employees to provide proof they were fully vaccinated against COVID-19. The policy provided an accommodation for religious reasons. The Appellant asked his employer for an accommodation but was refused.

[5] The employer placed the Appellant on an unpaid leave beginning on November 15, 2021, because he failed to show he was fully vaccinated.[3] The Appellant's employment was terminated effective November 30, 2021 because of his ongoing non-compliance with the employer's policy.[4]

[6] The Commission accepted the employer's reasons for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant was disqualified from receiving EI benefits.

[7] The Appellant disagrees with the Commission's decision. The Appellant's representative says the employer's policy was effective November 30, 2021. The policy

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[1] A person who applies for employment insurance (EI) benefits is called a "claimant." A person who appeals to the Social Security Tribunal is called an "Appellant."
[2] The period of disentitlement ends on the day the Appellant's employment was terminated, which was November 30, 2021.
[3] See page GD3-38. All pages are in the appeal file.
[4] The employer wrote the Appellant on November 19, 2021 to say his employment was terminated effective November 30, 2021. See page GD3-36.

said employees had until that date to demonstrate compliance. The Appellant was trying to comply with the policy but was dismissed on November 19, 2021. The Appellant's representative argued it was impossible to be dismissed on November 19, 2021 for not being compliant with a policy that only became effective November 30, 2021. The Appellant could not foresee that he could lose his job for not providing proof of full vaccination on November 19, 2021. Further, at the time of his dismissal on November 19, 2021, the Appellant had not breached any term of the policy. The Appellant's representative argues this means the Appellant did not commit misconduct within the meaning of the EI Act.

Matters I considered first

The appeal was returned to General Division

[8] The Appellant first appealed the denial of his EI benefits to the Tribunal's General Division in April 2022. The General Division member summarily dismissed the Appellant's appeal because she found the appeal had no reasonable chance of success. This meant the Appellant didn't get a chance to speak at a hearing about his appeal.

[9] The Appellant appealed the summary dismissal decision to the Appeal Division. The Appeal Division member found that the Appellant's appeal should not have been summarily dismissed. She ordered the appeal to be returned to the General Division for a hearing. This decision is a result of that hearing.

The employer is not an added party to the appeal

[10] Sometimes the Tribunal sends an Appellant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[11] 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, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Appellant submitted a *Charter Challenge Notice*

[12] The Appellant submitted a *Charter Challenge Notice* to the Tribunal on January 5, 2023. The Appellant submitted he was not challenging the constitutional validity, applicability or operability of a provision of the EI Act or rules or regulations made under the EI Act. The Appellant argued the Tribunal was required to balance the values of the *Canadian Charter of Rights and Freedoms* (*Charter*) under sections 2(a), 7, 8 and 15 of the *Charter* with the statutory objectives of the EI Act and applicable regulations. This is known as a "*Doré* Analysis."[5]

[13] Another member of the Tribunal, trained in hearing and deciding appeals alleging a *Charter* breach determined the Appellant's *Charter Challenge Notice* did not meet the requirements to raise a constitutional issue before the Tribunal.[6] This meant the Appellant's appeal could only be considered under the rules of the regular appeal process and no further *Charter* arguments would be considered.

[14] The Tribunal member also said if the Appellant wanted to invoke the *Charter* as an interpretive tool but did not want to challenge the constitutional validity of a section of the EI Act or EI Regulations, he could do so without having to file a *Charter Challenge Notice*.

[15] The Appellant's representative later advised the Tribunal the Appellant would not be making submissions on the issue of *Charter* values, that is the *Doré* analysis.[7]

The Appellant wasn't at the hearing

[16] A hearing is allowed to go ahead without the Appellant if the Appellant was given the notice of the hearing. [8] I am satisfied the Appellant received the notice of hearing. It was emailed to him and his representative at the addresses they provided.

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[5] *Doré c. Quebec (Tribunal des professions)*, 2012 SCC 12.
[6] This interlocutory decision was issued on November 30, 2023. It has been marked GD16.
[7] See RGD25
[8] Section 58 of the *Social Security Tribunal Rules of Procedure* says an oral hearing may take place without a party if the Tribunal is of the opinion that the party received the notice of hearing. The parties to the appeal are the Appellant and the Commission.

[17] The hearing was established at the scheduled time on May 29, 2024. The Appellant's representative thought the Appellant would be in attendance but after 30 minutes the Appellant could not be contacted. Because the hearing was scheduled to continue on May 30, 2024, I adjourned to allow the Appellant's representative to confirm the Appellant's choice to attend or not attend the hearing.

[18] The hearing continued at the scheduled time on May 30, 2024. The Appellant's representative confirmed the Appellant would not be attending the hearing and wanted the representative to continue on his behalf. So, the hearing took place when it was scheduled, but without the Appellant.

An observer attended the hearing

[19] Before the hearing, the Commission notified the Tribunal an observer would be attending the hearing. The notice was sent to the Appellant and the Appellant's representative. I explained the role of an observer (meaning they don't take part in the hearing), and the observer said she understood. So, the hearing went ahead with an observer present.

Disentitlement and disqualification from EI benefits

[20] The EI Act says you can be disentitled from receiving EI benefits or you can be disqualified from receiving EI benefits.

[21] A disentitlement means there is something that is preventing you from receiving EI benefits and once that thing is addressed or removed the disentitlement can end. A disentitlement from receiving EI benefits due to being suspended for misconduct ends when the period of suspension expires, the claimant loses or voluntarily leaves their employment, or the claimant accumulates enough hours of work with another employer to qualify to receive EI benefits.[9]

[22] A "disqualification" means the thing that prevented you from receiving EI benefits cannot be changed or removed. So, a disqualification, once put in place does not end

[9] See section 31 of the EI Act

until such time as a claimant earns enough hours of insurable employment in another job to qualify for EI benefits or has a disentitlement for another reason imposed on them.[10]

The Appellant was not on a leave of absence

[23] The Appellant's employer wrote to him on November 12, 2021, to say he was being placed on an unpaid leave of absence effective Monday, November 15, 2021.[11] It then wrote to him on November 19, 2021, to say his employment was being terminated effective November 30, 2021.[12]

[24] The Appellant applied for EI benefits on November 22, 2021. The Commission's initial decision disentitled the Appellant from receiving EI benefits from November 14, 2021 because he lost his employment on November 19, 2021 as a result of his misconduct.[13]

[25] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.[14]

[26] In the Appellant's case, his employer initiated the stoppage of his employment on November 15, 2021 when he was placed on unpaid leave.

[27] There is no evidence in the appeal file to show the Appellant requested or agreed to taking a period of unpaid leave from his employment.

[28] The section of the EI Act on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.[15]

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[10] See section 30 of the EI Act
[11] See page GD3-38
[12] See page GD3-36
[13] See page GD3-49. The Commission's initial decision is in a letter dated January 28, 2022.
[14] See section 32 of the EI Act.
[15] See section 31 of the EI Act.

[29] The evidence shows the employer's operations were regulated by Transport Canada. That department required that all non-passengers be fully vaccinated effective November 15, 2021.[16] The Appellant had not provided proof by that date that he was fully vaccinated, so he was placed on an unpaid leave of absence from November 15, 2020 until he providing proof of being fully vaccinated, in accordance with the employer's policy or November 30, 2021, which eve came first.

[30] I am satisfied that, for the purposes of the EI Act, in the Appellant's circumstances the period of unpaid leave from November 15, 2021 can be considered as a suspension.[17]

[31] As noted above disentitlement from receiving EI benefits due to being suspended for misconduct ends when the claimant loses their employment. In this case, the Appellant's employment was terminated effective November 30, 2021. So, the period of disentitlement, had misconduct been found, would have run from November 15, 2021 to November 29, 2021.

[32] And, as found below, the Appellant was later terminated from his job due to his non-compliance with the employer's policy. This means the period of disqualification from receiving benefits begins on November 30, 2021.

Issues

[33] Was the Appellant suspended from his job because of misconduct?

[34] Was the Appellant dismissed from his job because of misconduct?

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

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[16] See page GD3-38

[17] A suspension under the EI Act does not necessarily mean a suspension from a disciplinary perspective.

Analysis

[36] To answer the question of whether the Appellant was suspended and later dismissed from his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended and later dismissed from his job. Then, I have to determine whether the law considers the reasons for the suspension and the dismissal to be misconduct.

Why was the Appellant suspended and then later dismissed from his job?

– Suspension

[37] I find the Appellant was suspended from his job because he was not fully vaccinated as required by Transport Canada.

[38] The employer wrote the Appellant on November 12, 2021 stating that effective November 15, 2021, it was subject to the Transport Canada requirement for all non-passengers to be fully vaccinated against COVID-19. The Appellant's position and work were subject to the Transport Canada requirement. He had not provided proof he was fully vaccinated by November 12, 2021 and was given notice he would be placed on an unpaid leave of absence (suspended) effective November 15, 2021.

[39] There is no evidence the Appellant was suspended for any other reason. So, I find the Appellant was suspended effective November 15, 2021, because he was not fully vaccinated as required by Transport Canada.

– Dismissal

[40] If find the Appellant was dismissed from his job because he did not comply with his employer's policy that required employees, who did not have an accommodation under the *Canadian Human Rights Act*, to demonstrate they were fully vaccinated against COVID-19.

[41] The employer's policy said, "Effective November 30, 2021, all employees must demonstrate that they are fully vaccinated, without exception, other than a duty to

accommodate protected grounds identified in the *Canadian Human Rights Act*." The policy also said that "fully vaccinated" meant "14 days following a full series of COVID-19 vaccinations." Employees were expected to attest to their vaccination status by completing a COVID-19 Attestation and Verification Form and showing a government issued vaccination record indicating the date the final injection was received to teir manager.

[42] The Appellant asked his employer for an exemption to vaccination due to religious reasons. His request was refused on November 9, 2021.

[43] The employer wrote the Appellant on November 19, 2021 that it would be terminating the Appellant's employment, effective November 30, 2021, because he had not provided an Attestation and Verification Form indicating his compliance with the employer's policy.

[44] The evidence tells me the Appellant was dismissed from his job because he failed to comply with his employer's mandatory vaccine policy.

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

[45] The circumstances of the Appellant's suspension from November 15, 2021 do not meet the legal test for misconduct under the law and within the meaning of the EI Act.

[46] The circumstances of the Appellant's dismissal on November 30, 2021 meet the legal test for misconduct under the law and within the meaning of the EI Act.

[47] The reasons for my findings follow.

– What the law says

[48] 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 disentitled and / or 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."[18]

[49] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's suspension and later dismissal is misconduct under the EI Act. Case law sets out the legal test for misconduct - the questions and criteria I can consider when examining the issue of misconduct.

[50] Case law says to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.[19] Misconduct also includes conduct that is so reckless it is almost wilful.[20] 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.[21] Put another way, misconduct as the term is used in the context of the EI Act and EI Regulations, does not require an employee to act with malicious intent, as some might assume.

[51] There is misconduct if the Appellant knew or should have known his conduct could get in the way of him carrying out his duties toward his employer and there was a real possibility of being suspended or dismissed because of that.[22]

[52] A deliberate violation of the employer's policy is considered to be misconduct.[23]

[53] The Commission has to prove the Appellant was suspended and later dismissed from his job because of misconduct. The Commission has to prove this on a balance of

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[18] 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."
[19] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[20] *McKay-Eden v Her Majesty the Queen*, A-402-96.
[21] *Attorney General of Canada v Secours*, A-352-94.
[22] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[23] *Attorney General of Canada v. Secours*, A-352-94; *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460

probabilities. This means it has to show it is more likely than not the Appellant was suspended and later dismissed from his job because of misconduct.[24]

– What I can decide

[54] I only have the power to decide questions under the EI Act. I can't make any decisions about whether the Appellant has other options under other laws or in other venues. Issues about whether the whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[25] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the EI Act.

[55] There is a Federal Court decision dealing with facts similar to this case.[26] It too is about a person who was disqualified from receiving EI benefits because he lost his job for not complying with his employer's COVID-19 vaccination policy. The applicant submitted that refusing to abide by a vaccine policy unilaterally imposed by an employer is not misconduct and put forward that it was not proven that the vaccine was safe and efficient.[27] The applicant felt discriminated against because of his personal medical choice.

[56] In *Cecchetto* the Court confirmed the Appeal Division's decision that, by law, this Tribunal is not permitted to address these questions. The Court agreed that by making a personal and deliberate choice not to follow the employer's vaccination policy, the applicant had breached his duties and had lost his job because of misconduct under the EI Act. The Court stated that there exist other ways in which the claimant's claims can properly advance under the legal system.

[57] In that case, the Court confirmed the Tribunal's narrow role. It said the Tribunal must decide whether a claimant was dismissed from their job and whether that reason

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[24] *Minister of Employment and Immigration v Bartone*, A-369-88.
[25] *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[26] See *Cecchetto v. Canada Employment Insurance Commission*, 2023 FC 102. The Federal Court of Appeal has also determined the Tribunal's Appeal Division's decision was reasonable. See *Cecchetto v Canada (Attorney General)*, 2024 FCA 102
[27] At the Federal Court the appellant is called the applicant.

was misconduct. The Court said the Tribunal is not permitted by law to address the legal, ethical, and factual questions he was raising because it was beyond the scope of the Tribunal's mandate.[28]

[58] Issues about whether the Appellant's Collective Agreement or his offer of employment was violated aren't for me to decide.[29]

[59] The Federal Court also 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.[30] The Court found that, for misconduct to arise, it was unnecessary that there was a breach of the employment contract. Misconduct could arise even if there was a breach of a policy that didn't form part of the original employment contract.

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

> … 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.

[61] In *Paradis v. Canada (Attorney General)*, 2016 FC 1282, the claimant was refused EI benefits because of misconduct. He argued that the employer's policy

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[28] See *Cecchetto v. Canada Employment Insurance Commission*, 2023 FC 102.
[29] 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.
[30] See *Kuk v Canada (Attorney General)*, 2023 FC 1134.

violated his rights under the *Alberta Human Rights Act*. The Federal Court found it was a matter for another forum.

[62] The Federal Court stated there are available remedies for a claimant to sanction the behaviour of an employer other than transferring the costs of that behaviour to the EI Program.

[63] In the *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, the Federal Court of Appeal stated the employer's duty to accommodate is irrelevant in deciding EI misconduct cases.

[64] Case law, that is decisions of the courts, makes it clear my role is not to look at the employer's conduct or policies and determine whether they were right in adopting those policies, suspending and later dismissing the Appellant or failed to accommodate him. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

– **The Commission's submissions**

[65] The Commission says it concluded the Appellant's termination of employment constituted misconduct within the meaning of the EI Act because he was aware that failure to comply with the employer's mandatory vaccination policy would lead to termination of his employment. It also says the Appellant's circumstances do not give rise to discrimination in any of the prohibited grounds listed in the *Canadian Human Rights Act* because personal beliefs and vaccination status are not prohibited grounds.[31]

[66] The Commission says the Appellant's failure to comply with his employer's mandatory policy constitutes misconduct. It says he had the opportunity to remedy his behaviour when suspended but he did not do so before the vaccination deadline. He requested and was denied a religious accommodation. The Appellant's employer reminded him that if he chose not to comply, he would be terminated by November 30,

[31] See GD4

2021. The Commission says the Appellant remained non-compliant, knowing that his conduct would impair his employment duties and result in his dismissal. It says this is type of wilful action that constitutes misconduct under the EI Act.[32]

[67] At the hearing, the Commission's representative argued the Federal Court of Appeal has ruled the refusal to comply with an employer's policy meets all the elements of the misconduct test. The Appellant told a Service Canada officer he received the employer's policy and knew what it said. The employer's policy was not ambiguous. The consequences of non-compliance were communicated.

[68] The Commission's representative noted that the Appellant was passionate that he would not get vaccinated. It was clear to the employer the Appellant would not get vaccinated or comply with the policy. The Commission's representative argued the Appellant's issues concerning the employer's refusal to grant him an exemption are not for the Tribunal to decide.

– **The Appellant's submissions**

[69] The Appellant's representative says the Appellant did not commit a breach of the employer's policy prior to his dismissal. He says the Appellant was actively trying to comply with the policy at the time of dismissal.

[70] The Appellant's representative noted the employer first announced the policy in memo on September 15, 2021. Employees would have a few months to get vaccinated. On October 20, 2021, the Appellant submitted a personal letter and a letter from 3 Pastors / elders of his church requesting exemption to the vaccine on religious grounds. The employer emailed the Appellant on November 9, 2021, that it was not prepared to accommodate his decision to not obtain the vaccination on the basis of religion. The Appellant responded to this email with an email further explaining his beliefs and his concerns with the employer's refusal of his request.

[32] See RGD-27

[71] The Appellant's representative argued the employer's policy says, "Effective November 30, 2021 all employees must demonstrate they are fully vaccinated, without exception, other than the duty to accommodate protected grounds identified in the Canadian Human Rights Act." And, that "Employees who fail to demonstrate that they are compliant with this policy by November 30, 2021, will be terminated from employment."

[72] The Appellant's representative said the key word is the word "effective." He says employees had until November 30, 2021 to show they were compliant with the policy. The policy was crystal clear on how to comply and also when compliance was required.

[73] The Appellant's representative noted the Appellant was trying to comply with the employer's policy when he submitted his request for exemption. The Appellant's request was denied on November 9, 2021 and he asked for a review on November 11, 2021.

[74] On November 12, 2021 the employer wrote the Appellant where it reiterated the terms of the policy: the Appellant had until November 30, 2021 to bring himself into compliance with the policy.

[75] But, on November 19, 2021, the employer wrote the Appellant, in part:

> You were notified in a letter dated November 12, 2021, that you would be placed on unpaid leave resulting from the lack of compliance with Transport Canada vaccine requirements. That letter clearly outlined that continued non-compliance would lead to termination of employment on November 30th, 2021. …
>
> As such in preparation for the [employer name] Covid-19 Vaccination Policy coming into effect November 30, 2021, this letter is to notify you that your ongoing lack of compliance has frustrate your employment agreement and/or result in your employment being terminated effective November 30th, 2021.[33]

[33] See page GD3-36

[76] The Appellant's representative argued the November 19, 2021 letter is saying the policy was breached as of November 19, 2021 because the Appellant was non-compliant and continued to be non-compliant. Even though the policy was not effective until November 30, 2021, the Appellant was being dismissed on November 19, 2021. The Appellant's representative argued it was impossible for the Appellant to breach a policy that did not come into effect until 11 days later.

[77] The Appellant's representative noted there was no "we anticipate non-compliance" or "there is no way for you to be compliant" in the November 19, 2021 letter. All that the employer knew on that date was that the Appellant was not vaccinated. This is what the employer relied upon when he was dismissed.

[78] The Appellant's representative argued for misconduct to be found the breach of policy has to be significant enough that the employee would foresee discipline. He said the Tribunal must consider all of the circumstances. The question to be asked is did the Appellant breach the policy of his employer? The Appellant's representative said, as of November 19, 2021 it was impossible to commit a breach because the policy was not in effect until November 30, 2021. In the employer's November 12, 2021 letter, the Appellant had been given until November 30, 2021 to comply. The employer's letter of November 19, 2021 says the Appellant has not complied with the policy but also that there is an ongoing lack of compliance. The Appellant's representative argued that what was foreseeable to the Appellant was the deadline of November 30, 2021. But, by November 19, 2021 that deadline no longer applies. In the Appellant's representative's view, the Appellant could not foresee that on November 19, 2021.

[79] This means, the Appellant's representative submitted, the reason for the Appellant's dismissal was non-compliance on November 19, 2021. The Appellant did his best, making a good faith effort, to comply with the policy. He submitted his request for exemption and a letter from his faith's leaders. Although he was on an unpaid leave, he was still technically employed until November 30, 2021. There was no overlap between losing his employment and the policy coming into force. He was dismissed on

November 30, 2021 and the policy came into force on November 30, 2021. So, he was terminated at the same time as the policy came into force.

[80] The Appellant's representative noted the Appellant's employer spoke to a Service Canada officer about the employer's code of conduct and certificates.[34] The Appellant's representative said he did not think the code or certificates were relevant or helpful to the issue. The Appellant has no issue that the employer's policy was valid or that it was entitled to impose it. The issue is whether the Appellant breached the policy.

[81] The Appellant's representative said that *DL v Canada Employment Insurance Commission*, 2022 SST 281, was not on point with the Appellant's circumstances. However, there is no case law where an employee was dismissed before a policy came into force or where there was an anticipated breach of a policy. By way of analogy, the Appellant's representative gave an example of an employee who is consistently late for work arriving in the employer's parking lot one minute before his shift is set to start and is seen sprinting across the lot to get to work. The employer observing this might think the employee will breach the policy in the future, but that is not misconduct. There may be a fear an employee is not going to comply with a policy in the future, but misconduct does not occur in that case.

[82] The Appellant's representative agreed the Appellant worked in an industry that was regulated by Transport Canada. He also noted that the argument put forth in paragraph 30 of the Appellant's submissions was no longer being made by him or the Appellant.[35]

– **My findings**

[83] The Commission has not proven the Appellant was suspended because of misconduct.

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[34] See page GD3-55. This conversation took place on February 18, 2022.
[35] See page RGD26-11.

[84] The Commission has proven the Appellant was dismissed from his job because of his misconduct.

[85] The reasons for my findings follow.

– **Suspension**

[86] The employer advised the Appellant on November 12, 2021 that it was subject to Transport Canada's requirement that all non-passengers by fully vaccinated effective November 15, 2021. The letter noted the Appellant had not demonstrated he was fully vaccinated in accordance with the employer's policy. The Appellant was given notice that because his work and work location were subject to the Transport Canada requirement he would be placed on an unpaid leave of absence (suspended).

[87] I recognize the employer's operations were regulated by Transport Canada. But there is no evidence in the appeal file of a directive to the employer detailing Transport Canada's vaccination requirements, if and when that directive was shared with employees, and whether that directive or the employer said that employees had to be compliant with the requirement by November 15, 2021 or risk being placed on an unpaid leave of absence (suspension).

[88] The appeal file has a Transport Canada "Religious Exemption Request Form" completed by the Appellant on November 15, 2021. The form asks for a detailed explanation of how a person's religious belief precludes an ability to be vaccinated. The form also contains a section "Confirmation of Exemption by Employer" to be completed by the employer in accordance with the applicable airport-wide mandatory vaccination policy. This section of the form is blank.

[89] There is no evidence in the appeal file as to when a request for exemption was to be made or processed under the Transport Canada requirement. There is no evidence the Appellant's request was considered by the employer or, if it was considered, whether the request was approved or denied.

[90] In my view, the evidence with respect to not complying with the Transport Canada requirement to be fully vaccinated, does not support a finding of misconduct. This is because the Transport Canada requirements are not in evidence. As a result, I cannot determine if the Appellant knew, or ought to have known, he could be suspended for not meeting Transport Canada's requirement to by fully vaccinated by November 15, 2021. Accordingly, the Commission has failed to prove the Appellant was suspended due to his own misconduct.

[91] This means the Appellant is not disentitled from receiving EI benefits during the period of the suspension.

– **Dismissal**

[92] The Appellant's representative argued the Appellant could not have committed misconduct at the time he was dismissed on November 19, 2021. He says this is because the employer's policy was not effective until November 30, 2021. In support of this he noted the policy says:

> "Effective, November 30th, 2021, all employees must demonstrate that they are fully vaccinated, without exception, other than the duty to accommodate protected grounds identified in the *Canadian Human Rights Act*." and
>
> "Employees who fail to demonstrate that they are complaint with this policy by November 30th, 2021, will be terminated from employment."

[93] As further support of the argument the employer's policy was not effective until November 30, 2021, the Appellant's representative noted the employer's letter of November 12, 2021, which placed the Appellant on an unpaid leave of absence, gave the Appellant until November 30, 2021 to provide a completed Attestation and Verification Form.

[94] Further, the Appellant's representative noted the employer's letter of November 19, 2021 referred to "ongoing lack of compliance" as follows:

> "In preparation for the [employer] COVID-19 Vaccination Policy coming into effect November 30, 2021, this letter is to notify you that your ongoing lack of compliance has frustrated your employment agreement and/or result in your employment being terminated effective November 30th, 2021."

[95] I do not agree the policy became effective on November 30, 2021. The employer's policy was issued to all employees on October 14, 2021.[36] On the bottom of the second page of the policy "October 12, 2021" appears to the right of "Last Updated Date."[37] In my view the words "Effective, November 30th, 2021" as it is used in the policy is not the policy's effective date but the date by which employees are expected to demonstrate they are fully vaccinated or have an accommodation. Further, a plain reading of the words "compliant with this policy by November 30th, 2021" establishes the latest day for an employee to attest to their COVID-19 vaccine status via the employer's form and showing a government issued vaccination record.

[96] I also do not agree the Appellant was terminated from his employment on November 19, 2021. The employer's letter of November 19, 2021 gives the Appellant notice his termination will be effective November 30, 2021. He remained in an employment relationship, although he was on an unpaid leave, until November 30, 2021. The evidence tells me the Appellant was dismissed on November 30, 2021.

[97] The policy defined "fully vaccinated" to mean "14 days following a full series of COVID-19 vaccinations authorized in each jurisdiction." The definition was "subject to change following applicable public health guidance." In my opinion, this wording, when read with the phrase "Effective November 30th, 2021" means that to be "fully vaccinated" an employee should have received the second and final dose of a two-dose vaccine or the single dose of a one-dose vaccine no later than the midnight that fell between Monday, November 15, 2021 and Tuesday, November 16, 2021.

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[36] See page GD3-23, this date was provided by the employer in a conversation with a Service Canada officer on November 30, 2021.
[37] See page GD3-26

[98] As noted above, the policy provided for a duty to accommodate protected grounds identified in the *Canadian Human Rights Act*.

[99] The Appellant asked for an accommodation on the basis of his religious beliefs. The employer advised him by email on November 9, 2021 that his exemption request was not granted. This email also said, "You will be required to demonstrate compliance with [employer name] COVID-19 Vaccination Policy by November 30, 2021."[38]

[100] The Appellant replied to the email on November 11, 2021, to further explain his reasons for requesting the exemption.[39]

[101] The employer wrote to the Appellant on November 12, 2021 giving him notice he was being placed on an unpaid leave (suspension) effective November 15, 2021.[40] The letter noted the Appellant had yet to demonstrate he was fully vaccinated using the Attestation and Verification Form. The letter also said the unpaid leave would continue until the Appellant demonstrated his compliance with the requirement / policy or November 30, 2021, which ever came first. If the Appellant was not able to provide a completed Attestation and Verification form, he "may be found to be out of compliance with the company COVID-19 Vaccination Policy resulting in termination of employment."

[102] The Appellant remained unvaccinated by November 30, 2021.

[103] The Tribunal is not doubting the Appellant's religious beliefs. Rather, it is the Appellant's choice to not follow the employer's policy that is at issue before me. The courts have been clear whether or not the employer wrongly refused to give the Appellant an exemption to vaccination or to accommodate him based on his religion is not for me to decide.

[104] The Federal Court has said that "the conduct of the employer is not a relevant consideration" to whether a claimant was dismissed due to their misconduct. Rather, the

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[38] See page GD3-29
[39] See page GD3-30
[40] See page GD3-38

focus is on whether the claimant's act or omission amounted to misconduct within the meaning of the Employment Insurance Act.[41]

[105] The evidence tells me the Appellant knew on November 9, 2021 his request for an accommodation had not been approved. He asked his employer to reconsider its decision when he emailed the employer on November 11, 2021 with a further explanation of reasons for being unable to comply with the policy.

[106] On November 12, 2021 the Appellant was advised he was being placed on an unpaid leave of absence (suspension) as of November 15, 2021 because he had failed to demonstrate he was fully vaccinated as required by Transport Canada. He was warned that his continued non-compliance with the policy may result in the termination of his employment. This evidence tells me the Appellant knew on November 12, 2021 that he could lose his job if did not comply with the policy by providing proof he was fully vaccinated.

[107] As noted above, to be fully vaccinated and employee would have to receive the second and final dose of two-dose vaccine or one dose of a single dose vaccine by the midnight that fell between November 15, 2021 and November 16, 2021.

[108] The evidence shows the Appellant was aware from mid-October that he had to be fully vaccinated or have an accommodation in place by November 30, 2021. He had received the employer's policy and applied for an accommodation under that policy. On November 9, 2021 he knew that he did not have an accommodation. He was also made aware in the email of November 9, 2021 that he could lose his job if he was not fully vaccinated. The employer also advised the Appellant on November 12, 2021 he could lose his job if he was not fully vaccinated by November 30, 2021. It was with this knowledge that the Appellant made the conscious, wilful and deliberate choice to not comply with the employer's COVID-19 policy when he knew that by doing so there was a real possibility he could lose his job and not be able to carry out the duties he owed to his employer.

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[41] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282

[109] In not providing proof that he was fully vaccinated against COVID-19 the Appellant was terminated from his job effective November 30, 2021. As a result, he was impaired from performing the duties he owed to his employer. This means the Appellant had the mental element of wilfulness when he chose not to provide proof of vaccination because he was aware of the consequences of his decision to not provide proof of vaccination and chose to ignore the effect his choice would have on the performance of his duties.

[110] Based on the evidence, I am satisfied the Appellant acted willfully when he chose not to comply with the employer's vaccination policy. This means the Commission has proven the Appellant was dismissed from his job due to his misconduct.

Conclusion

[111] The Commission has not proven the Appellant was suspended from his job on November 15, 2021 because of misconduct. Because of this, the Appellant is not disentitled from receiving EI benefits from November 15, 2021 to November 29, 2021.[42]

[112] The Commission had proven that the Appellant was dismissed from his job on November 30, 2021 because of his own misconduct. Because of this, the Appellant is disqualified from receiving EI benefits from that date.

[113] This means the appeal is allowed in part.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

[42] The period of disentitlement ends on the day the Appellant's employment was terminated, which was November 30, 2021.