



Citation: *AC v Canada Employment Insurance Commission*, 2023 SST 2092

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

Decision

Appellant: A. C.
Representative: Daniel Freiheit

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (510967) dated August 17, 2022
(issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference
Hearing date: April 17, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: April 25, 2023
File number: GE-22-3220

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his employment due to misconduct. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant works as a Collections Officer for Canada Revenue Agency. The Appellant's employer introduced a mandatory vaccination policy. The policy said that all employees had to be fully vaccinated against Covid-19 (Covid). All employees had to attest to their vaccination status by November 26, 2021, or they would be placed on unpaid leave (suspended).²

[4] The Appellant didn't disclose his vaccination status to the employer, and he was suspended from his job on December 13, 2021. His suspension ended on June 20, 2022, when the employer's vaccination policy was abolished.

[5] The Commission says the reason the Appellant was suspended from his job is misconduct under the law. It says the Appellant knew about the employer's policy, and wilfully refused to comply with the policy, by refusing to disclose his vaccination status to the employer. It says the Appellant knew that he would be suspended from his job if he didn't follow the policy.³

¹ Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act says a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until they meet one of the following provisions:(a) the period of suspension expires; (b) the claimant loses or voluntarily leaves their employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

² See GD10-3-GD10-8 .

³ See GD4-4.

[6] The Appellant says there was no misconduct on his part. He says the employer doesn't have a right to access his medical information.⁴ He said the employer's vaccination policy violated his rights. He has never received disciplinary action at work for misconduct.⁵

Matter I have to consider first

[7] At the hearing, the Appellant said that his employer had sent him a letter saying he was suspended from his job. That letter wasn't on the file, so I asked the Appellant's representative to submit a copy of it to the Tribunal after the hearing, which he did.⁶ He also submitted a copy of an email from the employer, introducing the vaccination policy,⁷ and a copy of an email sent to the Appellant by his manager.⁸

[8] I accepted these documents after the hearing, as they are directly relevant to the issue of misconduct.

Issue

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

[10] To answer this, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

⁴ See GD3-21.

⁵ See GD3-24.

⁶ See GD12-2.

⁷ See GD13-3-GD13-4.

⁸ See GD13-4.

Analysis

Why was the Appellant suspended from his job?

[11] I find that the Appellant was suspended from his job because he didn't comply with the employer's mandatory Covid vaccination policy: he didn't disclose his vaccination status to the employer.

[12] The Appellant said in his application for EI benefits that he was suspended because he was not willing complete an attestation regarding the employers vaccination policy.⁹

[13] The employer stated in the Appellant's Record of Employment (ROE) that he was on leave due to non-compliance with its vaccination policy.¹⁰

[14] The Appellant told the Commission that he refused to disclose his vaccination status to the employer. He said that he knew he would be placed on leave without pay or dismissed because he refused to disclose his vaccination status. He said that he didn't meet the requirements for an exemption from being vaccinated, so he didn't request an exemption. He said he didn't believe that the employer had a right to access his medical information.¹¹

[15] The employer told the Commission that it agreed with what the Appellant had told the Commission. He didn't provide an attestation and didn't request an exemption.¹²

[16] During the Reconsideration process, the Appellant told the Commission that he was suspended from his job on December 10, 2021, for non-compliance with the employer's mandatory vaccination policy. He said he knew that the employer would be

⁹ See GD3-9.

¹⁰ See GD3-18.

¹¹ See GD3-21.

¹² See GD3-22.

implementing a vaccination policy. He said he was also aware of the consequences for not complying with the policy within the established timeframes. He said that he made a personal decision not to comply with the policy, for personal reasons. He said he didn't have any medical or religious reason to request an exemption from being vaccinated. He confirmed that he returned to work on June 20, 2022, after the vaccination policy was relaxed.¹³

[17] During the reconsideration process, the employer told the Commission that the Appellant was suspended because he didn't comply with its vaccination policy. All employees were required to attest to being vaccinated by November 26, 2021, or submit a request for exemption. Effective December 13, 2021, any employee who was unwilling to be vaccinated or unwilling to attest to their vaccination status would be placed on administrative leave without pay. All employees were notified of the vaccination policy by email prior to the effective date of November 8, 2021. The Appellant didn't submit a request for a medical or religious exemption. The employer stated that the Appellant returned to work effective June 20, 2022.¹⁴

[18] The Appellant testified that the employer sent an email to employees, which included a link to the vaccination policy. He said that he read the policy. He said he thinks it applied to all employees. He said it applied to him.

[19] The Appellant testified that according to the employer's vaccination policy, he had to be vaccinated against Covid, and disclose whether or not he was vaccinated. He said that according to the policy, if he didn't disclose his vaccination status by the deadline, he would be suspended from his job.

[20] The Appellant testified that he refused to disclose his vaccination status, because it is his private medical information. He told his manager in informal conversations that he felt this way. His manager suggested that he go along with the employer's policy and

¹³ See GD3-28.

¹⁴ See GD3-29.

get vaccinated. She talked to him about the consequences of not complying with the policy.

[21] The Appellant testified that he didn't disclose his vaccination status to the employer and was therefore suspended from his job. He said that he also didn't complete online training that was required according to the policy.

[22] The Appellant testified that he was surprised that the employer suspended him, because at the time, he was working from home. He had been working remotely since March, 2020. He had no contact with the public. He didn't see a reason why he had to comply with the policy and didn't think the employer would go through with dismissing him.

[23] The Appellant testified that he didn't think the employer's policy was legal. There was no policy requiring vaccination when he was hired by the employer. If there had been, he wouldn't have started working for the employer.

[24] The Appellant testified that he filed a grievance through his union. He said there wasn't any final determination about that yet.

[25] The employer wrote to the Appellant on December 1, 2021. It said because he hadn't complied with its vaccination policy, he had to complete online training on the benefits of the vaccination, and receive the first dose of the vaccine, by December 10, 2021. It said that if he didn't comply by December 10, 2021, he would be suspended effective December 13, 2021, until he complied with the policy.¹⁵

[26] The Appellant's manager sent him an email on December 2, 2021. In it, she said that it was her understanding that the Appellant was maintaining his position of being unwilling to attest to being vaccinated. She confirmed that the Appellant would be suspended effective December 13, 2021.¹⁶

¹⁵ See GD12-2.

¹⁶ See GD13-2.

[27] The Appellant didn't disclose his vaccination status to the employer, and he was suspended as a result, effective December 13, 2021.

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

[28] I find that the reason for the Appellant's suspension is misconduct under the law.

[29] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has dismissed you or suspended you.¹⁷

[30] The 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 is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[31] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁹ 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.²⁰

[32] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward the employer, and that there was a real possibility of being suspended from his job because of that.²¹

[33] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether the employer wrongfully suspended him or should have made

¹⁷ See sections 30 and 31 of the Act.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁰ See *Attorney General of Canada v Secours*, A-352-94.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

reasonable arrangements (accommodations) for him.²² I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[34] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because the employer wrongfully let him go.²³ He lost his job because of the employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[35] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.²⁴

[36] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.²⁵

[37] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.²⁶ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.²⁷

²² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

²⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

[38] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.²⁸ He argued that the employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.²⁹

[39] These cases aren't about Covid vaccination policies. But what they say is still relevant. In a very recent decision, which did relate to a Covid vaccination policy, the Appellant argued that his questions about the safety and efficacy of the Covid vaccines and the antigen tests were never satisfactorily answered. The Appellant 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.³⁰

[40] In dismissing the case, the Federal Court 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...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.³¹

[41] The Court 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 case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."³²

[42] So, case law makes it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to suspend the Appellant.

²⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁰ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

³¹ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

³² See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

Instead, I have to focus on what the Appellant did or failed to do, and whether that amounts to misconduct under the Act.

[43] The Commission has to prove that the Appellant was suspended from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from his job because of misconduct.³³

[44] The Commission says that there was misconduct because:

- the Appellant was aware of the employer's vaccination policy and the deadline to comply with it;
- the Appellant knew that if he didn't disclose his vaccination status to the employer, he could be suspended from his job; and
- he willfully refused to disclose his vaccination status, and was suspended from his job as a result.

[45] The Appellant says that there was no misconduct, because:

- the employer's policy was illegal and violated his rights;
- his vaccination status is private medical information;
- his employer doesn't have a right to access his private medical information;
- he had been working from home and had no contact with the public; and
- he never received any disciplinary action at work for misconduct.

[46] The Appellant's representative provided the following submissions on the Appellant's behalf:

³³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Commission hasn't proven that there was an express or implied duty under the Appellant's employment contract to get vaccinated and disclose his vaccination status to the employer.
- There was nothing in the Appellant's employment contract or his collective agreement requiring vaccination or the disclosure of his vaccination status.
- There is no evidence to show that the Appellant's employment contract or collective agreement was validly revised as of November, 2021, when the employer issued its vaccination policy.
- Neither the Appellant nor his union agreed to the employer unilaterally changing the terms of his employment.
- It is questionable whether the employer's vaccination policy was legal.

[47] The employer's vaccination policy was a condition of employment. The employer has a right to manage its daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.³⁴

[48] The Appellant submits that the employer's policy violated his rights under the Charter.

[49] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45, that protect rights and freedoms.

[50] These laws are enforced by different courts and tribunals.

³⁴ See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[51] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to an Appellant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law as violating his Charter rights.

[52] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates an Appellant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, or any of the provincial laws that protect rights and freedoms.

[53] The Appellant may have other recourse to pursue his claims that the employer's policy violated his rights. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.³⁵

[54] After studying the record, hearing the Appellant, and considering the parties' submissions, I agree with the Commission. I find that the Appellant was suspended from his job because of misconduct.

[55] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated;
- the policy said that all employees had to disclose their vaccination status;
- the employer communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated and disclosing his vaccination status;
- the Appellant knew the consequence of not following the employer's policy;
and

³⁵ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102.

- the Appellant consciously and deliberately refused to disclose his vaccination status, and was suspended as a result.

[56] The Appellant testified that he didn't think the employer would go through with suspending him. He said that he had been working from home since March, 2020, and had no contact with the public, so he didn't see a reason why he should have to comply with the policy.

[57] However, the Appellant also testified, and told the Commission, that he knew the employer would suspend him if he didn't attest to being vaccinated by the deadline.

[58] I understand that the Appellant didn't want to disclose his vaccination status to the employer because it is his private medical information. I sympathize with his situation. However, I cannot change the law. Based on my findings above, I find that the Commission has proven that the Appellant was suspended from his job because of misconduct, for refusing to follow the employer's vaccination policy.

So, was the Appellant suspended from his job because of misconduct?

[59] I find that the Appellant was suspended from his job because of misconduct. This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to disclose his vaccination status to the employer would cause him to be suspended from his job.

Conclusion

[60] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[61] This means that the appeal is dismissed.

Susan Stapleton
Member, General Division – Employment Insurance Section