Citation: *AG v Canada Employment Insurance Commission*, 2023 SST 2101

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (543725) dated November 2, 2022 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	In person
Hearing date:	May 25, 2023
Hearing participant:	Appellant
Decision date:	June 8, 2023
File number:	GE-22-3918

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that there were exceptional circumstances causing his delay in applying for benefits. In other words, the Appellant has given an explanation that the law accepts. This means that the Appellant's application can be treated as though it was made earlier.[1]

[3] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant isn't disqualified from receiving Employment Insurance (EI) benefits.[2]

Overview

[4] There are two issues in this appeal. First, whether the Appellant can antedate, or backdate, his application. Second, whether the Appellant was suspended from his job due to misconduct.

Antedate

[5] The Appellant applied for Employment Insurance (EI) benefits on May 5, 2022. He is now asking that the application be treated as though it was made earlier, on January 24, 2022. This is called antedating (or, backdating) the application. The Canada Employment Insurance Commission (Commission) has already denied this request.

[6] I have to decide whether the Appellant has proven that he had good cause for not applying for benefits earlier or whether exceptional circumstances existed.

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[1] See section 10(5) of the *Employment Insurance Act* (EI Act).
[2] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

[7] The Commission says that the Appellant didn't have good cause because throughout the delay period he did not act like a reasonable person in order to verify his rights and obligations. It also says there were no exceptional circumstances.

[8] The Appellant disagrees and says that he acted as soon as he became aware that he could apply for EI benefits even though he had not lost his job. The Appellant states he was suspended from his job but not terminated and was in the process of appealing that suspension when he discovered he could apply for EI benefits.

Misconduct

[9] The Appellant was suspended from his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.

[10] I have to decide whether the Commission has shown that the Appellant committed misconduct.

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

[12] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

Issue

[13] Can the Appellant's application for benefits be treated as though it was made earlier on January 24, 2022?

[14] Did the Appellant get suspended from his job because of misconduct?

Issue 1: Antedate

Analysis

[15] The Appellant wants his claim for EI benefits to be treated as though it was made earlier, on January 24, 2022. This is called antedating (or, backdating) the claim.

[16] To get a claim antedated, the Appellant has to prove that he had good cause for the delay during the entire period of the delay.[3] The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he had good cause for the delay.

[17] And, to show good cause, the Appellant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.[4] In other words, he has to show that he acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[18] The Appellant also has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[5] This means that the Appellant has to show that he tried to learn about his rights and responsibilities as soon as possible and as best he could. If the Appellant didn't take these steps, then he must show that there were exceptional circumstances that explain why he didn't do so.[6]

[19] The Appellant has to show that he acted this way for the entire period of the delay.[7] That period is from the day he wants his application antedated to until the day he actually applied. So, for the Appellant, the period of the delay is from January 24, 2022 to April 24, 2022.[8]

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[3] See *Paquette v Canada (Attorney General)*, 2006 FCA 309; and section 10(5) of the EI Act.
[4] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[5] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[6] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[7] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[8] This is not an initial claim for benefits because the Appellant had applied for EI parental benefits within the last year. A renewal benefit period can start the week prior to the week the claim is made. The Appellant applied in May 5, 2022 so the commencement date is April 24, 2022 if no antedate is granted.

[20] The Appellant said that he had good cause for the delay because he did not know he could apply since he was still employed by his employer. The Appellant testified that he was on leave without pay, and not terminated, therefore he didn't realise he could apply for EI benefits. He says he reviewed a "manager's toolkit" that described his situation as on leave without pay but still employed. This led him to believe he could not apply for EI benefits. He also continued to work, even on January 24, 2022, until he was told to no longer work by his employer and told his employer he was ready and willing to return at any time.

[21] The Appellant said that he spent between January 24 and May 5, 2022 researching his ability to appeal the leave of absence. He also says his research and work in appealing his work situation took a great deal of mental attention and was emotionally difficult. The result of his research was that he filed a grievance and filed documents with the Canadian Human Rights Commission. It was not until May 5, 2022, when he was having a discussion with other colleagues who were on leave without pay, that he was first learned he could apply for EI benefits. The Appellant said that he applied for EI benefits as soon as he was told he could.

[22] The Appellant said that he is not a sophisticated user. He said that he has a high school diploma. He testified that the only other time he had applied for EI was when he had gone on parental leave. At that time his employer guided him through the EI benefits system, unlike in this case.

[23] The Appellant also said that there were exceptional circumstances. The Appellant said that the government relied on the exceptional circumstances due to the pandemic to bring in the vaccine policy that is at issue here. The Appellant says that covid pandemic created an exceptional circumstance for him as well. He said that if the covid pandemic is an exceptional circumstance that allows an employer to unilaterally change a work contract, then he too can rely on the exceptional circumstance of the pandemic. He says the covid pandemic was a very confusing period. Because of covid restrictions and his location outside of the city he could not attend a Service Canada

location in person. He also said that he was the father of a newborn baby and another child under age 2 and that this added to his situation.

[24] Finally, the Appellant says that there is no prejudice to antedating his appeal because the Commission has already conceded that there is no issue with regard to his availability. He says that the initial reason the Commission gave for not antedating his application was because of the difficulty in showing availability. The Appellant states that this no longer applies to his case.

[25] The Commission says that the Appellant hasn't shown good cause for the delay. It says the Appellant was aware of the EI regime as he had previously submitted a claim for parental benefits. It says the Appellant has shown his capacity for research and the ability to take necessary steps to enquire about his rights as evidenced by his grievance and human rights application. Finally, the Commission says he has not shown any exceptional circumstances that would create obstacles to applying for EI benefits.

[26] I find that the Appellant has proven that there were exceptional circumstances for his delay in applying for benefits when considering the Appellant's situation as a whole. First, the Appellant has pointed to his lack of sophistication with the EI system and that since he was still employed did not understand that he could apply for EI benefits during his leave of absence. The Appellant's ability to discuss his situation with others was also reduced because of the pandemic: he worked remotely from home in a rural area and he could not attend a Service Canada location in person. The Appellant was also the father of a newborn and another young child. He was worried about the loss of income to support his young family and was working on researching and appealing his leave of absence. If he was allowed back to work or his appeals had been successful, he would have not been eligible for EI benefits. Further, when he found out he could apply for EI benefits he acted that day to apply for benefits. The Appellant also points out the lack of prejudice given that the Commission has acknowledged his availability. These factors combined show that there were exceptional circumstances that combined to explain the Appellant's delay period.

[27] The Appellant's application for antedating his application is granted.

Issue 2: Misconduct

[28] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.[9]

[29] To answer the question of whether the Appellant was suspended from his job because of misconduct, 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.

Why did the Appellant get suspended from his job?

[30] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[31] Both parties agree that this is the reason for the Appellant's suspension.

[32] I accept as a fact that the Appellant was suspended by his employer because his employer believed he went against the vaccination policy.

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

[33] The reason for the Appellant's dismissal isn't misconduct under the law.

[34] 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 dismissal 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.

[35] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also includes conduct that is so reckless that it is almost wilful.[11] The Appellant doesn't have to have

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[9] See sections 30 and 31 of the Act.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.[12]

[36] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended because of that.[13]

[37] 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 because of misconduct.[14]

[38] 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. Issues about whether the Appellant was discriminated against or whether the employer should have made reasonable accommodations for the Appellant aren't for me to decide.[15] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[39] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[16] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

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[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[14] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[40] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[41] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[17] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[18]

[42] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[19] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[20]

[43] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. Further, these same principles have been affirmed in a

[17] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[18] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[19] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[20] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

recent Federal Court case dealing directly with misconduct based on failure to follow an employer's vaccine policy: *Cecchetto v. Canada (Attorney General)*.[21]

[44] Therefore, my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

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

- The employer had passed a covid vaccination policy
- The employer clearly notified the Appellant about its expectations about telling it whether he had been vaccinated
- The Appellant was aware of the policy and submitted an exception request in October 2021
- The Appellant's manager spoke to the Appellant about the policy and the exemption request. The employer communicated many times with the Appellant by phone and with follow-up emails and letters.
- The Appellant knew or should have known what would happen if he didn't comply with the policy and attest that he was fully vaccinated

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

- The Appellant tried to comply with the policy by not providing his consent to the policy, by asking for an exemption by the deadline provided and by submitting documents to support his exemption request in accordance with the policy

[21] *Cecchetto v. Canada (Attorney General),* 2023 FC 102 at paras. 12, 15, 16, 17, 24. This decision is currently under appeal.

- The employer's vaccination policy violated his right against genetic discrimination and his right to be accommodated
- Prior to the covid pandemic, the Appellant had taken a job specifically because it was a teleworking position therefore no accommodation was necessary to allow him to continue to telework
- The Appellant says he never consented to the policy and its unilateral imposition on him violates contract law
- The employer didn't comply with its own policy and didn't give him two weeks after his accommodation request was denied.

[47] I find that the Commission hasn't proven that there was misconduct because the Appellant could not have known or could not reasonably have known that he could be suspended because of his conduct.

[48] There is no dispute that the Appellant was aware of the employer's policy. He knew that he was required to attest to his vaccination status and be vaccinated against covid or have an approved exemption under the policy. But he was not given the time to comply with the policy.

[49] The Appellant's accommodation request was verbally denied on January 21, 2022 and he was placed on a leave of absence three days later on January 24, 2022. The Appellant was not given two weeks, pursuant to the policy, to chose to comply or chose to violate the policy.

[50] It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the *Employment Insurance Act*.[22]

[51] In this case, there is no indication that the Appellant deliberately violated the employer's policy before he was suspended on January 24, 2022. Up to that point the

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

Appellant had followed the steps in the policy to apply for an exemption and had supplied his manager with the reasons for that request in accordance with the policy. This tells me that the Appellant attempted to comply with the policy.

[52] The Appellant only knew that he was not in compliance with the policy when his manager told him his request for an exemption was denied on January 21, 2022.

[53] But, the employer didn't give him an opportunity to meet the other policy requirements – attesting to being fully vaccinated – before he was suspended from his job. In addition, the Appellant's manager said he would provide him more details about the accommodation denial when he had the information. This could have meant that the Appellant would have a further opportunity to clarify his exemption request.

[54] For the Appellant's conduct to be misconduct within the meaning of the *Employment Insurance Act*, he must have wilfully committed the conduct. The conduct in question is that the Appellant did not comply with the employer's covid vaccination policy.

[55] In my view, the Appellant did not wilfully act in non-compliance with the policy before he was suspended from his job on January 24, 2022.

[56] Even though he would not disclose his vaccination status,[23] the policy considers that a non-vaccinated person can be in compliance if they have an approved exemption. The Appellant had asked for an exemption. His exemption request was denied three days before his suspension and there was communication from his manager that further information might be forthcoming.

[57] Before the Appellant's exemption request was denied, the Appellant could not have known, nor could he have reasonably known, that he could be suspended for his conduct. There was also some indication that the door to the exemption request was not fully closed. Even if it was, he should have had two weeks to consider whether or not to comply with the policy and disclose his vaccination status. So, I find the Appellant was

[23] Under the policy a person who does not disclose their vaccine status is considered to be unvaccinated.

not wilfully non-compliant with the employer's policy at the time he was suspended from work.

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

[58] Based on my findings above, I find that the Appellant was not suspended from his job because of misconduct.

[59] This is because the Commission has not shown that the Appellant's actions were wilfully non-compliant with the employer's policy.

Conclusion

[60] The Appellant has shown that there were exceptional circumstances and that therefore his EI benefits application should be antedated.

[61] The Commission hasn't proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant isn't disqualified from receiving EI benefits.

[62] This means that the appeal is allowed.

Marisa Victor

Member, General Division – Employment Insurance Section