



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

Decision

Appellant: Joseph Hickey

Respondent: Canada Employment Insurance Commission
Representative: Dani Grandmaître

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (483650) dated June 17, 2022
(issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Videoconference

Hearing date: September 12, 2023

Hearing participants: Appellant
Respondent's Representative

Decision date: November 23, 2023

File number: GE-22-2365

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 job because of misconduct. The Appellant is disentitled from receiving Employment Insurance (EI) benefits during the period of the suspension.¹

Overview

[3] The Appellant's employer had a COVID-19 vaccination policy. The policy said that if an employee wasn't vaccinated and hadn't been approved for an accommodation by November 22, 2021, they would be suspended.²

[4] The Appellant didn't get vaccinated by the deadline and his reasons for refusing were not approved by his employer, so he was put on a mandatory unpaid leave of absence (suspension).

[5] The Appellant applied for EI regular benefits.

[6] The Commission decided that the Appellant was suspended from his job because of misconduct.³ Its decision meant the Appellant was disentitled from receiving EI benefits.⁴

[7] The Appellant says that the Commission hasn't proven misconduct under the *Employment Insurance Act* (Act). He says that the Commission has to prove that he willfully failed to comply with the policy. He says he wasn't vaccinated, but he

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are not entitled to receive benefits until the suspension ends, the claimant loses or voluntarily leaves the job, or the claimant qualifies for benefits from another job.

² See page GD2-210.

³ The Commission's original decision was that the Appellant had taken a voluntarily leave of absence without just cause. See initial decision letter on page GD3-26. Upon reconsideration, the Commission decided that the Appellant was suspended from his job because of misconduct. See reconsideration decision letter on page GD3-42.

⁴ The disentitlement is under section 31 of the Act.

deliberately and intentionally followed the policy through his continued efforts to have his accommodation request approved.

Issue

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

Analysis

[9] The law says that you can't get EI benefits while you are suspended from your job because of misconduct.⁵

[10] To decide if the Appellant was suspended from his job because of misconduct, I must look at why he was suspended, then I have to look at whether that conduct is misconduct under the law. But first I'll explain what misconduct is under the law.

What is misconduct?

[11] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) tells 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.

[12] Case law says that to be misconduct the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost willful.⁷ 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.⁸

[13] There is misconduct where a claimant's conduct was willful in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. The Federal Court of Appeal says that this means that there is misconduct where the claimant knew

⁵ See section 31 of the Act.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

or ought to have known that his conduct was such as to impair the performance of duties owed to his employer and that, as a result, dismissal was a real possibility.⁹ Some cases describe this subjective part of the test as whether the claimant could have normally foreseen that their conduct would be likely to result in dismissal.¹⁰

[14] In most misconduct cases, the claimant has been dismissed from their job. So caselaw talks about whether the claimant knew or should have known that there was a real possibility of being “dismissed.” When, as in the Appellant’s case, the discipline is a suspension, not a dismissal, I have to consider whether he knew or ought to have known that a suspension was a real possibility.

[15] 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.¹¹

[16] Now I’ll look at why the Appellant was suspended from his job.

Why was the Appellant suspended?

[17] I find that the Appellant was suspended from his job because by the deadline set in the policy, he was neither vaccinated nor approved for an accommodation. So, he hadn’t complied with the policy by the deadline. There isn’t any dispute about the reason for his suspension.

Is the reason for his suspension misconduct under the law?

[18] Yes, the reason for the Appellant’s suspension is misconduct under the law. My reasons for this decision follow.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, paragraph 14.

¹⁰ See, for example, *Canada (Attorney General) v. Pearson*, 2006 FCA 199.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

– **What the Commission says**

[19] The Commission argues that there was misconduct because there was a causal link between the Appellant's conduct and his suspension. It says that I must not decide if the suspension is justified under labour law. I have to decide if the Appellant could have normally foreseen that his refusal to comply with his employer's vaccination policy was likely to result in his suspension. The Commission says that I have to focus on the Appellant's conduct. I shouldn't focus on the employer's conduct or whether the accommodation request should have been allowed.¹²

[20] The Commission says that the Appellant knew about the policy and the consequences of non-compliance. It says he chose not to comply, and his direct actions led to his suspension.¹³

– **What the Appellant says**

[21] The Appellant says that to prove misconduct, the Commission has to show that he willfully failed to provide a legitimate reason for not being vaccinated. He says that he followed the vaccination policy. There were two distinct ways to follow the policy. An employee could be vaccinated, or he could ask for an accommodation. He chose the accommodation path. He asked for an accommodation for legitimate reasons based in medicine, religion and human rights.

[22] The Appellant says that his decision not to be vaccinated isn't relevant because he followed the accommodation path of the policy. He says his actions can only be considered misconduct if he didn't get vaccinated and didn't ask for an accommodation. He wasn't in breach of the policy because he fulsomely and genuinely sought to comply with the policy to the best of his ability. He was engaged with and in contact with his employer about his accommodation until his suspension ended.

¹² For example, see pages GD4-3 and GD4-4 and the Respondent's oral arguments.

¹³ See page GD4-4.

[23] The Appellant says that I can't decide misconduct without considering the policy itself. He argues it can't be misconduct if he refuses an employer's unreasonable policy.¹⁴ He explained why he believes the employer's policy wasn't reasonable.

[24] The Appellant also says that mandatory medical interventions were not and are not part of his employment contract. So, by not being vaccinated, he didn't breach an explicit or implicit condition of his employment.

– **The vaccination policy**

[25] The employer had a policy about COVID-19 vaccinations.¹⁵ The policy said that

- employees would be suspended on November 22, 2021, if they failed to attest to and provide proof of **one** of the following:
 1. They have been fully vaccinated against COVID-19 or would be by November 22, 2021.
 2. A legitimate medical, religious, or other human-rights based reason for not being vaccinated against COVID-19.
- Where an employee cannot receive a COVID-19 vaccine due to protected grounds under the *Canadian Human Rights Act*, such as medical, religious or other protected reasons, and where the employee requires workplace accommodation as a result, the employer will accommodate to the point of undue hardship. Accommodations could include COVID-19 testing at regular intervals, observation of enhanced health and safety protocols, modified job duties, reassignment to other duties, or other appropriate measures.¹⁶
- Employees who opted not to get fully vaccinated as “required by the policy,” and did not have “a requirement for accommodation,” would be placed on special

¹⁴ He relies on *A.S. v Canada Employment Insurance Commission*, 2022 SST 215, paragraph 18.

¹⁵ See policy starting on page GD2-210.

¹⁶ See page GD2-212.

leave without pay or benefits as of November 22, 2021.¹⁷ The status of employees on COVID-19 leave would be reviewed regularly.

- The duration of the COVID-19 leave could be limited by the employer at its discretion considering factors such as public health environment, the risk to other individuals in the workplace, the impact on the bank's operations, and any other considerations relevant to the objectives of the policy.¹⁸

– **The Appellant's actions led to his suspension**

[26] I find that the Commission has proven that there was misconduct.

[27] The Appellant opted to remain unvaccinated after November 22, 2021, even though the employer hadn't approved an accommodation for his unvaccinated status under its policy. The Appellant was suspended under the policy. He knew that he couldn't perform his duties while suspended. His decision to remain unvaccinated when he hadn't been approved for an accommodation was a deliberate, intentional and willful act. He knew that his decision would get him suspended under the policy, and he decided to continue on that course. He knew that his suspension would continue until he was vaccinated, received accommodation under the policy, or the policy was revoked or changed.

[28] I will now explain these findings.

– **The Appellant knew that he would be suspended because of his choices**

[29] The Appellant knew about and understood the policy. He wasn't vaccinated. He applied for an accommodation and continued to make efforts to receive an accommodation until his suspension was lifted.¹⁹

¹⁷ See page GD2-212.

¹⁸ See page GD2-211.

¹⁹ For example, see the chronology in the Appellant's affidavit on page GD2-22.

[30] His employer denied his accommodation request on November 18, 2021, and told him he would be put on unpaid leave as of November 22, 2021.²⁰

[31] So, the Appellant knew that he would be suspended on November 22, 2021. He wasn't vaccinated and his accommodation request hadn't been approved.

[32] In the circumstances, the Appellant could have normally foreseen that his decision to stay unvaccinated when his accommodation request hadn't been approved would result in his suspension. In other words, he knew or ought to have known that his conduct would impair the performance of the duties he owed to his employer. He couldn't perform his duties if he was suspended.²¹

[33] This means he was suspended by reason of his own misconduct. The conduct that led to his suspension was willful, intentional and deliberate.

[34] Next, I will explain why I don't agree with the Appellant's position.

– **The Appellant's position**

[35] I accept that the Appellant continued to make efforts to receive an accommodation.²² But accepting this doesn't change my decision. As I explain in the next paragraphs, his conscious and deliberate conduct still led to his suspension from work.

– **The conduct that led to the suspension**

[36] The Appellant says that:

- the Commission hasn't shown that he willfully failed to provide a legitimate reason for not being vaccinated

²⁰ As per the Appellant's affidavit on page GD2-22. See also the employer's email to the Appellant dated November 19, 2021, on page GD2-218.

²¹ See *Nelson v Canada (Attorney General)*, 2019 FCA 222, which was recently cited by the Federal Court in *Kuk v Canada (Attorney General)*, 2023 FC 1134, paragraph 25.

²² For example, he submitted an appeal in March 2022 (GD2-75) and provided additional submissions in June 2022 (GD2-861). See page GD2-22. See also pages GD2-230 and GD2-707.

- he didn't go against the policy – he took the accommodation path
- his vaccination status isn't the issue because he chose to follow the accommodation path

[37] The Appellant is focusing on the wrong question. I have to decide if the Appellant did or didn't do something that led to his suspension from work.

[38] To do this, I have to make sure I focus on the actual conduct that led to his suspension.

[39] The conduct that led to his suspension was his decision not to be vaccinated by the deadline despite his employer's denial of his accommodation request.

[40] The policy is clear that employees who weren't vaccinated and hadn't received an accommodation by the deadline would be suspended. The result of his decision not to be vaccinated by the deadline when his accommodation request had been refused, meant that he was suspended. It was this conduct that led to his suspension. And being suspended meant he couldn't carry out his duties to his employer.

[41] As I explained above, misconduct under the law doesn't mean that the Appellant had wrongful intent. But in the Appellant's case, he made a deliberate decision to follow a certain path despite knowing that he would be suspended. There was a direct link to his employment because it was a policy implemented by his employer to cope with the COVID-19 pandemic. His conduct affected his ability to do his job because he was suspended from work. This is misconduct under the law.

– **Looking behind the policy, and other labour law arguments**

[42] I am not looking behind the policy. I am not going to make a finding about whether the policy was reasonable, or whether the employer should have accommodated the Appellant.

[43] The Appellant says I have to consider whether the policy was reasonable. He says:

- The policy wasn't reasonable because it didn't allow for rapid antigen testing or remote work instead of vaccination.²³
- Refusing a potentially deadly medical intervention isn't misconduct under the Act, just as refusing to adopt a religion or commit an illegal act at an employer's insistence, isn't misconduct.²⁴
- I can't ignore the nature of the employer's policy because doing so would lead to absurd results. The case law around misconduct evolved around workplace activities like theft and missing work. This is completely different from a policy that requires a person to be subjected to dangerous medical interventions. The definition of misconduct in the case law is wrong when it comes to mandatory vaccinations.
- The employer didn't explain what was needed to get his accommodation approved.

[44] To support this position, the Appellant relies on a Federal Court decision called *Astolfi* and a decision of the General Division of this Tribunal.²⁵

[45] I don't agree with the Appellant about the application of the *Astolfi* decision to his case.

[46] In the *Astolfi* case, the claimant stopped going to work. The issue was whether this was misconduct (job abandonment). The court said that in such a case, a reasonable decision requires some consideration of the employer's conduct before the "misconduct" in order to properly assess *whether the employee's conduct was intentional or not*. It differentiated between an employer's conduct after the alleged misconduct, and an employer's conduct that might have actually led to the "misconduct." In that case, the employer had allegedly harassed the claimant. The court

²³ See recording at about 1:04:41. He explains that during the period of his suspension, none of his colleagues who continued working ever had to go to the office. See also GD2-65.

²⁴ This alternative argument starts about 1:02:02 of the hearing recording.

²⁵ See *Astolfi v Canada (Attorney General)*, 2020 FC 30 and *AS v Canada Employment Insurance Commission*, 2022 SST 215.

decided that this alleged harassment had to be considered in the context of deciding whether there was misconduct.²⁶

[47] I find that the *Astolfi* case means that I have to look at the employer's conduct to see if it might have affected the willfulness of the Appellant's conduct. In doing so, I see nothing in the employer's conduct that would lead me to believe that the Appellant's conduct might not have been intentional. Looking at the employer's conduct in this way isn't the same as looking into the reasonableness of the policy.

[48] The Appellant also relies on a decision of one of my colleagues in the General Division of the Tribunal called *AS v Canada Employment Insurance Commission*.²⁷ In that decision, the Tribunal member wrote that:

“misconduct according to the EI Act is, as explained in paragraphs 11 and 12 above, means that an employee does something that goes against a *reasonable* employer policy willfully and deliberately, knowing that it might result in dismissal” [*emphasis mine*].

[49] Respectfully, I can't agree with my colleague's summary of the law.²⁸ The case law summarized and footnoted in paragraphs 11 and 12 of that decision, is the same case law I summarized above under the heading, “What is misconduct?” Those cases do not say that for there to be misconduct the violated policy must be reasonable.²⁹ And if I did look into the reasonableness of the vaccination policy, I'd be going against the law as set by the Federal Court.

[50] Recent Federal Court decisions, as well as a decision of this Tribunal's appeal division, explain that I shouldn't look behind vaccination policies.³⁰

²⁶ See paragraph 33, *Astolfi v Canada (Attorney General)*, 2020 FC 30.

²⁷ *AS v Canada Employment Insurance Commission*, 2022 SST 215, specifically paragraph 18.

²⁸ Other Tribunal decisions aren't binding on me. In other words, I don't have to follow decisions made by other Tribunal members.

²⁹ See *Canada Employment Insurance Commission v AL*, 2023 SST 1032, paragraph 36. This decision is on page GD31-3.

³⁰ *Canada Employment Insurance Commission v AL*, 2023 SST 1032. See also *Kuk v Canada (Attorney General)*, 2023 FC 1134 and *Milovac v Canada (Attorney General)*, 2023 FC 1120.

[51] The Appellant put forth other arguments that are based in labour law. For example, he pointed out that mandatory vaccinations weren't part of his employment contract. But arguments based in labour law are beyond the scope of this appeal. Arguments about the employer's duty to accommodate, the contractual language, and whether the suspension was justifiable under labour laws and principles, are not relevant to the question of misconduct under the Act.³¹ The Appellant's arguments about the policy may be relevant in another forum, but they don't change my decision that he was suspended due to misconduct.

[52] Further, the law says that it doesn't matter that the employer's written vaccination policy didn't exist when the Appellant was hired.³² It is enough that the employer notified the Appellant about the new policy and the Appellant had time to comply with the policy.

[53] The Appellant says that the recent Federal Court case called Kuk doesn't apply.³³ He says that his employer's policy had an open-ended avenue for getting accommodations that wasn't available to the claimant in the Kuk case.

[54] I am not persuaded that the facts in Kuk were significantly different from those before me. As explained above, the issue isn't whether he did everything he could to get an accommodation, the question is whether he did or failed to do something and knew that his action or inaction would likely lead to his suspension.

The Appellant was suspended from his job because of misconduct

[55] Based on my findings above, I find that the Appellant was suspended from his job because of misconduct.

[56] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that his conduct would lead to his suspension. He continued in his chosen course of not being vaccinated despite having not been approved for an

³¹ See *Kuk v Attorney General of Canada*, 2023 FC 1134, paragraphs 34 to 41. See also *Canada Employment Insurance Commission v AL*, 2023 SST 1032 (page GD31-3).

³² See *Kuk v Attorney General of Canada*, 2023 FC 1134. See also *Canada Employment Insurance Commission v AL*, 2023 SST 1032 (page GD31-3).

³³ Hearing recording about 2:30.

accommodation. He knew that these decisions would cause him to be suspended from his job.

Conclusion

[57] 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.

[58] This means that the appeal is dismissed

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section