Citation: *NE v Canada Employment Insurance Commission*, 2022 SST 1378

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated August 8, 2022 (issued by Service Canada)

Tribunal member:	Sylvie Charron
Type of hearing:	Videoconference
Hearing date:	November 14, 2022
Hearing participant:	Appellant
Decision date:	November 30, 2022
File number:	GE-22-2718

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 (in other words, because he did something that caused him to be suspended from his job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from his job. The Appellant's employer says that he was temporarily let go because he went against its vaccination policy: he didn't get vaccinated by the date in the employer's policy. He also refused the option of testing every two days.

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

[5] The Commission accepted the employer's reason for the leave without pay. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

Issue

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

Analysis

[7] 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.[2]

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[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See sections 30 and 31 of the Act.

[8] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[9] I find that the Appellant lost his job because he went against his employer's vaccination policy.

[10] The Appellant says that even though he knew of the employer's vaccination policy and the possible repercussions for not following it, he objected to sharing his private medical or religious information with the employer.

[11] The Appellant states that he works in IT and worked from home; even if not vaccinated, he was never not able to carry out his duties. As well, he was recalled to the job after 5 weeks of suspension. At that time, he agreed to rapid testing every second day, but that condition was dropped once he was back at work.

[12] The Commission says that the Appellant was suspended from his job because of his own misconduct. He was informed of the employer's vaccination policy that required vaccination by October 15, 2021 or taking a rapid test provided by the employer every second day. The Appellant refused both options, without giving any reason. The Appellant was suspended on October 21, 2021.

[13] On his application for benefits, the Appellant says that he refused to comply because it would have compromised his personal and deeply held religious beliefs.

[14] I find that the Appellant was suspended from his job for refusing to comply with the employer's vaccination policy.

[15] Both parties agree that this is what happened. I see no evidence to contradict this.

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

[16] The reason for the Appellant's dismissal is misconduct under the law.

[17] The *Employment Insurance Act* (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.

[18] Case law says that, to be misconduct **under the EI Act**, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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.[5]

[19] 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 let go because of that.[6]

[20] The Commission has to prove that the Appellant lost 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 lost his job because of misconduct.[7]

[21] 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 wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.

decide.[8] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[9] 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.

[23] 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.

[24] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[10] 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.[11]

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[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[25] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[12] Mr. Mishibinijima lost his job for reasons related to 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.[13]

[26] These cases are obviously not about COVID vaccination policies. But, the principles in those cases are still relevant. 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 Act.

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated, then telling it whether he had been vaccinated or if he was choosing to get tested regularly
- the employer sent emails to the Appellant and the other employees several times to communicate what it expected. The employer also set up a meeting for employees to attend and be told that failure to comply could result in unpaid leave or termination of employment.
- the Appellant knew or should have known what would happen if he didn't follow the policy

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

- the employer's vaccination policy was illegal

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[12] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[13] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

- the Appellant was being coerced into taking the vaccine
- the vaccination policy was not in his employment contract and was irrelevant to his job duties as he worked from home
- the employer never said that the Appellant committed misconduct
- the Appellant assumed that he was protected by the Charter for his desire to protect his privacy as regards his vaccination status and religious beliefs
- the Appellant is a law-abiding citizen; he wants the money he is owed

[29] The employer's vaccination policy says that employees were to have received two doses of the vaccine by October 15, 2021, or agree to be tested every second day by rapid testing at the employer's expense.

[30] The policy was adopted on September 1, 2021, and communicated to all employees in both official languages by email and in person.

[31] Employees were warned that failure to comply could result in termination of employment.

[32] The Appellant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Appellant about the requirements and the consequences of not following them. Furthermore, the Appellant testified that he knew of this.

[33] At the hearing, the Appellant confirmed that he did not ask for an exemption to the vaccination policy. He stated that to his knowledge, there was no formal paperwork one could fill out to request an exemption. In any event, he would not have asked for one as he did not want to reveal his medical or religious information.

[34] The Appellant also informed me that he got a new job; he left the company on October 7, 2022.

[35] The Appellant is adamant that he should not have to comply with an employer policy that is not lawful. That is not misconduct in his view. However, he did not offer any evidence as to how the policy would be unlawful.

[36] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said that leave without pay (suspension) was a possible outcome for not complying by the given date…
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated, telling it whether they have been vaccinated or getting tested regularly[14]
- the employer sent emails to the Appellant and to other employees to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

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

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

[38] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated, or to say whether he had been vaccinated or follow the testing rules was likely to cause him to be suspended or to lose his job.

[39] While I am sympathetic to the Appellant's situation at the time, I cannot consider the legality or the validity of the employer's vaccination policy, as explained above.

[14] See GD3-23 to 27

Conclusion

[40] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[41] This means that the appeal is dismissed.

Sylvie Charron
Member, General Division – Employment Insurance Section