Citation: *ZF v Canada Employment Insurance Commission*, 2023 SST 79

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Z. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 10, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Teleconference
Hearing date:	January 17, 2023
Hearing participant:	Appellant
Decision date:	January 30, 2023
File number:	GE-22-3691

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended). For this reason, she is disentitled to Employment Insurance (EI) benefits.

Overview

[3] The Claimant was suspended from her job.[1] The Claimant's employer says that she was suspended because she went against its vaccination policy: she didn't provide proof that she was vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct and that the employer effectively dismissed her rather than placing her on unpaid leave.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended because of misconduct.[2] Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Matter I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the

[1] The Claimant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Claimant's separation from employment, this is considered a suspension.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

The Claimant's appeal was returned to the General Division

[7] The Claimant first appealed her denial of EI benefits to the Tribunal's General Division in June 2022. The General Division member summarily dismissed the Claimant's appeal because she found the Claimant had no reasonable chance of success. This meant the Claimant didn't get a chance to speak at a hearing about her appeal, and that the Tribunal didn't fully consider her arguments about her case in its decision.

[8] The Claimant appealed the summary dismissal decision to the Appeal Division. The Appeal Division member found that the Claimant'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

Issue

[9] Did the Claimant lose her job because of misconduct?

Analysis

[10] 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.[3]

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

[3] See sections 30 and 31 of the Act.

Why did the Claimant lose her job?

[12] Both parties agree that the Claimant lost her job because she went against the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason she lost her job misconduct under the law?

[13] The evidence supports that the employer suspended the Claimant from her job and the reason for the Claimant's suspension is misconduct under the law.

[14] 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 Claimant'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.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[6]

[16] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[7]

[17] The Commission has to prove that the Claimant lost her job because of misconduct.[8]

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

[18] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act. I can't make my decision based on other laws.[9] I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.[10] And I can't decide whether an employer breached a claimant's privacy or other rights.

[19] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from her job under her employer's drug testing policy. she argued that she 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 she was unable to work in a safe manner because of the use of drugs, and she should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that she should get EI benefits because her employer's actions surrounding her dismissal were not right.

[20] 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.

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[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. This is not the case in the Claimant's appeal.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[21] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that she was wrongfully dismissed, the test results showed that she was not impaired at work, and the employer should have accommodated her 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.[13]

[22] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[14] Mr. Mishibinijima lost her job for reasons related to an alcohol dependence. she argued that, because alcohol dependence has been recognized as a disability, her 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.[15]

[23] These cases are 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 dismissing the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Claimant say

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

- the employer had a vaccination policy and communicated that policy to the Claimant
- the employer's policy required the Claimant to provide proof of her vaccination

[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

- the Claimant knew what she had to do under the policy
- she also knew that her employer could suspend her under the policy if she didn't give proof of vaccination by the deadline
- she made a personal choice not to get vaccinated by the deadline
- her employer suspended her because she didn't comply with its vaccination policy

[25] The Claimant says that there was no misconduct because:

- she thought she would be suspended if she went against the vaccination policy, but the employer effectively dismissed her
- the employer's vaccination policy wasn't part of her employment contract and wasn't a *bona fide* occupational requirement
- the employer could have offered alternatives to the vaccination requirement, such as working from home
- the policy went against her human rights

[26] I will start by examining the Claimant's argument that the employer dismissed her rather than suspending her. This is important because the Commission has to prove the Claimant knew or reasonably should have known that she would lose her job as a result of her conduct.

[27] The Claimant argues that she understood that she could be **suspended** as a result of going against the vaccination policy but could not have known that she would be **dismissed** for it. She says these are two vastly different penalties with different consequences and she didn't think that she could lose her job permanently as a result of going against this policy.

Was the Claimant suspended or dismissed from her job?

[28] The evidence supports that the Claimant was suspended from her job.

[29] The employer announced its COVID-19 vaccination policy on October 7, 2021. It stated that employees were expected to be fully vaccinated by November 19, 2021. Employees who didn't meet this expectation would be placed on unpaid leave effective November 20, 2021.

[30] On November 9, 2021, the employer sent the Claimant a letter stating that she has indicated she didn't receive her first dose of a COVID-19 vaccine yet and therefore will not be fully vaccinated by November 19, 2021. It says that she will be placed on unpaid leave effective November 20, 2021, in accordance with the policy.

[31] The letter also states that if she gets vaccinated in the future and wishes to return to work they "may not have a position open for [her], but will do [their] best to find [her] a position with [the employer]."

[32] The Claimant said that she "read through the lines" of this statement and understood that she was being dismissed. She worked in Human Resources and knew that positions are not filled for someone who takes a leave of absence. She felt the employer decided to send her the suspension letter instead of outright dismissing her because the circumstances may not reach the high threshold it takes to terminate someone.

[33] The Claimant submits that several things support her position:

- the employer removed her from the benefit plan and cut off access to her email. She says that employees are typically able to access their email and remain on their benefits plan while on leave from work.
- the employer filled her position. She checked the employer's website near the end of February 2022 and saw that someone had been hired in her role.[16]
- some of the Commission's notes reference "dismissal" as the reason for contacting her and the employer about the Claimant's EI benefits.[17]

[16] See GD2-19.
[17] See GD3-20 and GD3-21.

[34] I don't find the Claimant's argument persuasive for the following reasons.

[35] First, the Claimant testified that she had only handled employees going on voluntary leaves of absence from work in her role with the employer. However, the Claimant did not take a **voluntary** leave from work. The employer **placed** her on unpaid leave because she went against its vaccination policy

[36] Additionally, the Claimant's suspension appears to be of an indefinite duration. The employer's letter states that if the Claimant got vaccinated and wished to return to work, the employer would do its best to find a position for her. The Record of Employment issued on November 26, 2021, states the reason for issuing as "leave of absence," and under the "expected date of recall" the employer checked the box marked "unknown." This evidence tells me that the Claimant didn't have a specified or approximate return date from her suspension. Her return to work was conditional on her meeting the requirements of the vaccination policy and telling the employer she wanted to return to work.

[37] In my view, it is reasonable that an employer-initiated leave, or suspension from work, would be handled differently than a leave of absence.

[38] In most cases, an employee on a voluntary leave of absence is returning to the same position after a specified period. However, the Claimant was being suspended from work involuntarily and with no defined period of leave. Her suspension was, in a way, a disciplinary measure for not meeting the employer's expectations regarding vaccination. So, it is reasonable that the employer would remove her access to email and exclude her from the benefit plan. In fact, allowing her to retain access to her email may have indicated that she could still send messages and communications on behalf of the company. It would be unusual for an employer to allow a suspended employee to send and receive emails related to their work.

[39] Further, replacing an employee who is on leave is not atypical. Employers frequently fill vacant positions temporarily during maternity or parental leaves, as those leaves can be lengthy. As the Claimant's leave was of an indefinite duration, it is

reasonable that the employer had to fill her position. It is possible the employer could not operate effectively with the Claimant's position vacant for a perhaps-lengthy period of time.

[40] The employer notified her that she may not be able to return to the same position. But I find this isn't the same as stating that their employment relationship was permanently severed. The employer's communication to the Claimant stated that she was being placed on an unpaid leave of absence in accordance with its policy. The letter also stated the conditions under which the Claimant could return to work.

[41] I haven't put any weight on the Commission's notes referencing dismissal because these are only notes that a Commission officer took about its attempts to contact the Claimant and her employer. The notes aren't relevant to whether the employer suspended or dismissed the Claimant. They're not even determinative of whether the Commission thought the Claimant was suspended or dismissed. This evidence has no probative value. In other words, it doesn't prove anything.

[42] I am not convinced that the Claimant has shown that the employer dismissed her. The evidence supports that the Claimant was suspended from her job. However, my finding is only relevant to the context of whether the Claimant knew or should have known that she would lose her job as a result of her conduct. Whether the employer wrongfully or constructively dismissed the Claimant is outside of my legal authority. Those are concepts that exist in Canadian employment law and common law but are not relevant to this appeal.

The Commission has proven the Claimant was suspended for misconduct

[43] I find that the Commission has proven that there was misconduct because it has shown:

- the employer had a vaccination policy that said employees had to by fully vaccinated against COVID-19

- the Claimant knew about the vaccination policy and what the employer expected of its employees in terms of being vaccinated
- she knew that the employer could suspend her if she didn't get vaccinated before the deadline
- she consciously, deliberately, and intentionally made a personal decision not to get vaccinated by the deadline
- she was suspended from her job because she didn't comply with the employer's vaccination policy

- **The employer's policy was a condition of employment**

[44] The employer has a right to manage their 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.[18]

- **Other arguments**

[45] I don't have the legal authority (in law we call this "jurisdiction") to decide on some of the arguments the Claimant advanced. Specifically:

- whether the employer had the right to impose a new condition of employment without assessing whether it is a *bona fide* occupational requirement;
- whether the employer's policy violated her human rights.

[46] The Courts have said when I decide misconduct appeals, I shouldn't consider whether an employer's policy or the penalty it imposed on an employee is reasonable or legal under an employment contract, a collective agreement, or laws such as human rights laws.[19]

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[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

[47] There are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

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

[49] This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[50] But this Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[51] The Claimant may have other recourse to pursue her claims that the employer's policy violated her rights. But these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

- **Other Tribunal decision**

[52] The Claimant submitted a Tribunal decision that she says is relevant to her case.[20] She referenced the decision using its Tribunal file number. As this decision has not yet been published, I will refer it as *AL v Canada Employment Insurance Commission*.

[53] In this case, AL worked in the hospital's administration. She was suspended and later dismissed by the hospital because she did not comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job because of misconduct.

[20] See GD8-740 to GD8-765.

[54] The Tribunal member found the employer changed the terms of AL's employment contract and imposed a new condition of employment without her agreement, and without amending the collective agreement. And further found an employer could impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee" and that there was no such statutory obligation for the employer to require vaccination by employees. So, the member found the Claimant did not breach a duty owed to the employer when she chose not to be vaccinated as required by the policy.

[55] The Tribunal member also found that claimants have a right to choose whether to accept any medical treatment. And that even if her choice contradicts her employer's policy and leads to her dismissal, exercising that "right" cannot be seen as a wrongful act or conduct sufficient to conclude it is misconduct worthy of punishment or disqualification under the *Employment Insurance Act*.[21]

[56] I am not bound by other Tribunal decisions, but I may take guidance from them if I find them persuasive and helpful. I will not adopt the reasoning in AL for the following reasons.

[57] First, the Claimant's facts in the appeal before me are substantially different than those in AL. Importantly, AL had a collective bargaining agreement that considered whether vaccinations other than COVID-19 were mandatory. The Tribunal member relied on this fact to find that the employer and the union (the parties to the collective agreement) had addressed the requirement of other vaccines in the collective agreement, so, the Tribunal member reasoned, to require the COVID-19 vaccine should have followed the same process.

[58] I do not agree with that reasoning. The collective agreement governs the terms and conditions of employment for unionized employees. Whether a claimant's collective agreement addresses vaccination requirements is not determinative of the matter before me. What is determinative is whether the Claimant's conduct of refusing to follow

[21] See *AL v Canada Employment Insurance Commission*, paras 76, 79, and 80.

the employer's vaccination policy is misconduct within the meaning of the Act and case law as set out above. Further, in the appeal before me the Claimant has not produced evidence that she has a collective agreement and that it has a provision that considered mandatory vaccinations. So, I find the Claimant's case is distinguished from the facts in AL.

[59] Next, the Tribunal member based his finding on the principle that employers cannot put in place new conditions of employment unless there is a statutory obligation, or the employee has explicitly or implicitly agreed to it. But, other Courts and Tribunals have considered this question and found differently.

[60] For example, in the case of *Re Thompson and Town of Oakville Re Ruelens and Town of Oakville,* [1964] 1 OR 122, Ontario High Court of Justice held that, without a statutory or contractual obligation, that a municipal police Chief could not require members of the police force to submit to a medical examination by a specific doctor. At the time, police officers were required by law to be medically examined when they were appointed to the force, but that did not apply to an existing member of the force and there was no basis for the requirement that the Chief Constable would name the specific doctor to perform the examination. The Court indicated that employees could refuse to obey an employer's orders if there was no lawful basis for the order.

[61] However, in subsequent decisions other tribunals found that employers can require employees to submit to medical examinations in certain circumstances, even if there is no statutory or contractual obligation.[22] So, I am not persuaded that an employer can only implement a policy if there is an existing legislative or contractual basis for that policy.

[62] Lastly, I do not agree with the Tribunal member's reasoning that AL's conduct of failing to be vaccinated cannot be considered misconduct because she was exercising her right to choose whether to accept a medical treatment. The member's characterization that misconduct for EI purposes requires a "wrongful act" or "conduct

[22] See *Bottiglia v Ottawa Catholic School Board,* 2015 HRTO 1178, and White v. Canadian Nuclear Laboratories Ltd., 2020 CHRT 37.

sufficient to conclude it is misconduct worthy of punishment" is flawed and goes against the previous guidance of the Courts.

[63] In *Canada (Attorney General) v Secours,* the FCA held that it was an error of law to limit misconduct to actions for which there was a wrongful intent.[23] In this matter, I do not agree with the Tribunal member's finding that a finding of misconduct requires a wrongful act or conduct worthy of punishment. The Courts have clearly stated it would be an error of law to interpret the legal test in that way

So, was the Claimant suspended because of misconduct?

[64] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[65] This is because the Claimant's actions led to her suspension. she acted deliberately. She knew that failing to get vaccinated was likely to cause her to be suspended.

Conclusion

[66] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[67] This means that the appeal is dismissed.

Catherine Shaw

Member, General Division – Employment Insurance Section

[23] See *Attorney General of Canada v Secours*, A-352-94, at paras 9-10.