Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 1601

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (506156) dated August 3, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Teleconference
Hearing date:	November 29, 2022
Hearing participant:	Appellant
Decision date:	December 6, 2022
File number:	GE-22-2707

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant was suspended from his job. The Claimant's employer says that he was let go because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He applied for an accommodation on religious grounds, but the employer eventually denied his request and placed him on an unpaid leave of absence.

[5] The Commission accepted the employer's reasons why the Claimant was not working. It decided that the Claimant was suspended from his job because of misconduct. 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 this 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] Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits. A suspension is a leave from work that was initiated by the employer, not the employee.

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

Issue

[7] Did the Claimant lose his job because of misconduct?

Analysis

[8] 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]

[9] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[10] Both parties agree that the Claimant was suspended because he did not comply with the employer's policy that required him to be vaccinated against COVID-19. I see no evidence to contract this, so I accept it as fact.

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

[11] The reason for the Claimant's dismissal is misconduct under the law.

[12] 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.

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

[13] Case law says that, to be misconduct, 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 Claimant 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]

[14] There is misconduct if the Claimant 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]

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

[16] I only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[8] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] 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

---

[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.
[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[18] 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.

[19] 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]

[20] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[12] 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.[13]

[21] 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

---

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

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.

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

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about getting vaccinated
- the Claimant knew or should have known what would happen if he didn't follow the policy

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

- the employer didn't clearly communicate which vaccination policy applied to him. He works on a Canadian Armed Forces (CAF) base, but is a civilian employee. When he received emails, it linked the CAF's policy, but it was a different policy that applied to civilian employees.
- the employer's vaccination policy was not part of his conditions of employment when he was hired. And it wasn't part of his collective agreement.
- the employer unreasonably denied his request for an accommodation from the policy on religious grounds

[24] Both of the employer's vaccination policies says that employees were required to be fully vaccinated against COVID-19 by November 15, 2021. Employees who wanted an exemption had to submit a request by October 29, 2021.

[25] The Claimant said that he was notified of the policy in early October 2021. On October 29, 2021, he applied for an accommodation to the vaccination requirement on religious grounds. He met with the employer on November 3, 2021. The employer said

that he would be placed on unpaid leave for failing to comply with the policy as of November 15, 2021. The Claimant asked about his religious exemption, and they said he would receive an answer before that date.

[26] By November 12, 2021, the employer hadn't responded to his accommodation request. So, the Claimant asked one of his managers and the manager said the Claimant would be sent home with pay until he received an answer to his accommodation request.

[27] On November 15, 2021, the employer called the Claimant and told him to return to work the next day. He would be required to undergo regular COVID-19 testing while at work until he got an answer on his accommodation request.

[28] On March 14, 2022, the employer denied the Claimant's accommodation request. They told him that he would be placed on unpaid leave as of March 28, 2022, for non-compliance with the vaccination policy.

[29] The Claimant said that the employer failed to clearly communicate its vaccination policy, because he received emails that linked to the CAF policy. But, a different policy applied to him as a civilian employee.

[30] The Claimant testified that there were some subtle differences between the two policies, including I'm not convinced that the employer's communication of the CAF policy was a barrier to the Claimant complying with the policy that applied to him.

[31] He testified that there were some subtle differences between the two policies, including that the CAF policy allowed management the discretion to determine if there was a need to keep an unvaccinated employee at work. But there is no evidence to support that the differences between the policies had an effect on the Claimant's ability to comply with the policy. Or that the Claimant's conduct would be considered "compliant" with one policy, but "non-compliant" with another.

[32] I understand the employer's communication of the policy was confusing. The Claimant was directed to read the CAF policy, when it was a different policy that should

have applied to him as a civilian employee. However, I am not convinced that the differences between the policies had any impact on whether the Claimant was able to comply with the correct policy. So, I haven't put any weight on the fact that the employer's communications referenced a different, but nearly identical, policy.

[33] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Claimant about the requirements and the consequences of not following them.

[34] The Claimant argued that the employer's policy unilaterally changed the terms and conditions of his employment, in violation of his collective bargaining agreement and federal labour laws.

[35] 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.[14]

[36] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.[15]

[37] I do not have the authority to decide whether the employer breached the Claimant's collective agreement by implementing the vaccination policy or suspending the Claimant from his job. The Claimant said that he has asked his union to pursue grievances regarding the policy, the employer's denial of his accommodation request, and his suspension. That is a more appropriate venue to address allegations that the employer breached his collective agreement.

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

---

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

- the employer had a vaccination policy that said employees had to be fully vaccinated against COVID-19 or be placed on unpaid leave.
- the Claimant was given an extension of time for this requirement because the employer had not answered his request for an accommodation.
- when the employer denied his accommodation request, the Claimant was expected to be vaccinated.
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

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

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

[40] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

Other arguments

[41] The Claimant submitted there was a conflict between the federal government giving two opposing directives regarding how to handle employees who were placed on "vaccine-related leaves."

[42] First, he says the federal Minister of Employment, Carla Qualtrough, made public statements saying that employees who lost their jobs because of vaccination policies would not be eligible for EI benefits. The Claimant says the Minister ordered the

Commission to handle EI applicants who were on vaccine-related leaves as "misconduct" to justify denying them benefits.

[43] Second, he says the Claimant worked for the federal government, and his employer was clear that vaccine-related leaves were treated as "administrative leaves." These leaves were not disciplinary in nature, and the employer never used the term "misconduct" to describe non-compliance with the vaccination policy.

[44] The Claimant submits that this is a clear contradiction in how the same government handled vaccine-related leaves. However, I do not see this as a contradiction.

[45] It is true that the Claimant works for a government. However, there is a difference between the government as the nation's ruling body and the government as an employer. The statements of the Minister on the application of the Act in the circumstances she described speak only to the application of the Act. The statements do not concern the actions of the government as an employer with respect to the vaccination policies it put in place for its employees. Accordingly, the Minister's statements are not determinative of the issue before me.

[46] It is not necessary for the employer to make allegations of misconduct against a claimant for them to be found to have been suspended from their job due to misconduct within the meaning of the Act. In other words, these are separate considerations.

[47] The federal government, as any employer, may place an employee on leave for any number of reasons. However, to be eligible for EI benefits, a claimant must meet certain conditions set out by the Act, including that they didn't voluntarily leave their employment without just cause, or that they weren't suspended from their employment because of their own misconduct.

[48] The Claimant essentially argues that because his leave of absence was not disciplinary, or labelled as misconduct by the employer, the Commission should not view it as misconduct for the purposes of EI benefits. The FCA has considered this question and found that an employer's characterization of the grounds of an employee's

dismissal is not determinative of whether the employee lost their job because of misconduct within the meaning of the Act.[16] As a result, the employer's characterization of the reason the Claimant was not working is not determinative of the issue under appeal.

[49] I recognize the Claimant disagreed with his employer's vaccination policy and was denied his request for religious exemption. However, the only issue before me is whether the Claimant was suspended from his job due to misconduct. On this matter, I must apply the law.[17]

Conclusion

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

[51] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

[16] See *Canada (Attorney General) v Boulton,* 1996 FCA 1682.
[17] *Knee v Canada (Attorney General)*, 2011 FCA 301