Citation: *LW v Canada Employment Insurance Commission*, 2023 SST 230

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 21, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Teleconference
Hearing date:	February 9, 2023
Hearing participant:	Appellant
Decision date:	February 10, 2023
File number:	GE-22-3774

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant lost her job. The employer says that she was dismissed for non-compliance with its vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. Further, she didn't know that she could lose her job for going against the policy, because the policy said non-compliance would result in unpaid leave, not termination.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job due to misconduct.[1] Because of this, it decided that she is disqualified from receiving EI benefits.

Matters I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party. The employer did not respond. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

[1] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

The Appellant's appeal was returned to the General Division

[7] The Appellant first appealed her denial of EI benefits to the Tribunal's General Division in March 2022. Before her hearing, she asked the General Division member to adjourn the hearing for a later date because she was scheduled to have a mediation with the employer regarding her wrongful dismissal action. The General Division member refused the adjournment request and held the hearing as scheduled. She later dismissed the Appellant's appeal.

[8] The Appellant appealed this decision to the Appeal Division. The Appeal Division member found that the Appellant's hearing should have been adjourned, in part, because she was given late notice of the General Division member's refusal to adjourn and was not prepared for the hearing when it proceeded as scheduled. The Appeal Division member ordered the appeal to be returned to the General Division for a new hearing. This decision is a result of that hearing

Issue

[9] Did the Appellant 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.[2]

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

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

Why was the Appellant dismissed?

[12] Both parties agree that the Appellant was dismissed because she didn't comply with the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for her dismissal misconduct under the law?

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

[14] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law explains 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.

[15] 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 Appellant 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.[5]

[16] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward the employer and that there was a real possibility of being let go from her job because of that.[6]

[17] The Commission must prove that the Appellant lost her job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost her job because of misconduct.[7]

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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.

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

[19] 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 due to 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.

[20] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found 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.

[21] A more recent decision following 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

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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.

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]

[22] Another similar case decided by 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]

[23] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[14]

[24] In dismissing the case, the Federal Court wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises…the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[15]

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[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.
[14] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[15] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.

[25] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[16]

[26] Case law makes it clear that 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 must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[27] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

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

- the employer had a vaccination policy and communicated that policy to the Appellant
- the employer's policy required the Appellant to be vaccinated against COVID-19 or get an approved exemption.
- the Appellant knew what she had to do under the policy
- she also knew that she could not continue working if she didn't get vaccinated or get an exemption by the deadline,
- she made a personal choice not to disclose her vaccination status to the employer
- she knew that not disclosing her vaccination status would mean she would be considered unvaccinated, and therefore, not in compliance with the policy

[16] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at para 47.

- the employer dismissed her because she did not comply with its vaccination policy

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

- the employer's vaccination policy went against the law and her human rights
- the policy was not reasonable in her workplace context because she works from home
- she could not have returned to the office without significant accommodation due to her disability, so her vaccination status did not affect her ability to do her job
- she didn't know that she could lose her job because the policy says non-compliance would result in unpaid leave, not termination

[30] The Appellant argues that she was dismissed without warning during a meeting with the employer on October 13, 2021. She says this was described as a "fact finding meeting" regarding the vaccination policy. At the meeting, the employer asked her if she had read the vaccination policy and she responded that she did not consent to releasing her health information regarding her vaccination status and would not add anything further to the conversation. She said the employer then told her that she was terminated, and her termination meeting would be held on October 22, 2021.

[31] I understand the Appellant's submissions and that she took notes of the meeting that she submits support her argument that she was dismissed on October 13, 2021. However, I find that is more likely than not that she was terminated from her employment on October 22, 2021, not on October 13, 2021. I have relied on the following evidence in this finding:

[32] First, the Appellant continued working past October 13, 2021. Her last day of work was October 21, 2021, and she attended a termination meeting the next day. If she was dismissed on October 13, 2021, it is unlikely that the employer would allow her to continue working past that date.

[33] Next, the Appellant emailed the HR representative on October 15, 2021, and asked if she had been terminated on October 13, 2021, “for cause” or “without cause.” The HR representative responded that the Appellant had not been terminated on October 13, 2021.

[34] Finally, the Appellant’s termination letter dated October 22, 2021, states that she is being terminated effective October 22, 2021. It says that they met with the Appellant on October 13, 2021, and informed her at the meeting that they would be terminating her employment “on or after October 22, 2021, due to her non-compliance” with the mandatory vaccination policy.

[35] For the above reasons, I find the evidence supports that the Appellant was dismissed on October 22, 2021, not on October 13, 2021. I also find it likely that the Appellant knew that she was not dismissed on October 13, 2021, because the HR representative had informed her on October 15, 2021, that she had not been dismissed during the October 13th meeting.

[36] The employer’s policy made it clear that the Appellant could not continue working if she did not comply with its requirements. The employer also warned the Appellant on October 13, 2022, prior to her dismissal, that she would be dismissed as a result of her non-compliance with the vaccination policy. This tells me that the Appellant knew, or ought to have known, that she could be dismissed if she did not comply with the employer’s policy.[17]

[37] I find the Appellant knew that her employer instituted a mandatory vaccination policy and knew what would happen if she didn’t follow it. The employer was clear that the policy applied to all employees, including those who worked from home. While exemptions were available, an exemption or accommodation was never guaranteed to the Appellant because of her disability.

[17] The Federal Court of Appeal also found that the fact that a disciplinary sanction was harsher than the one the claimant expected did not mean that his conduct was not misconduct. See *Canada (Attorney General) v Jolin*, 2009 FCA 303.

[38] 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 Appellant's employment.[18] There is no evidence that the Appellant was exempt from the policy because she worked from home or would have required accommodation if she was recalled to the workplace.

[39] 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 Appellant's conduct amounted to misconduct within the meaning of the Act.[19]

[40] The Appellant submits that the employer's policy violated the law and her human rights.

[41] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45,[20] that protect rights and freedoms.

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

[43] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to a claimant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating his Charter rights.

[44] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill*

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[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[20] The Appellant mentioned this a few times and submitted that it gave him the right to refuse unsafe work.

of Rights, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

[45] The Appellant may have other recourse to pursue her claims that the employer's policy violated her rights, including her right to privacy. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[21]

[46] I find the Appellant was aware of the employer's COVID-19 vaccination policy. She was also aware of the consequences for not complying with it. The Appellant knew or ought to have known that she would lose her job if she didn't comply with the policy.

So, was the Appellant dismissed because of misconduct?

[47] Based on my findings above, I find that the Appellant was dismissed from her job because of misconduct.

[48] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew or ought to have known that failing to comply with the employer's policy was likely to cause her to be dismissed, and she chose not to comply.

Conclusion

[49] The appeal is dismissed.

[50] The Commission has proven that the Appellant was dismissed from her job because of misconduct. This means the Appellant is disqualified from receiving EI benefits.

Catherine Shaw

Member, General Division – Employment Insurance Section

[21] *Cecchetto v. Attorney General of Canada,* 2023 FC 102.