



Citation: *JP v Canada Employment Insurance Commission*, 2022 SST 1703

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

Decision

Appellant: J. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (489602) dated June 30, 2022
(issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: In person
Hearing date: November 21, 2022
Hearing participant: Appellant

Decision date: December 29, 2022
File number: GE-22-2514

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 lose 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 let go because he went against its vaccination policy: he refused to say whether he had been vaccinated.

[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 dismissal. 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 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

¹ Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 imposes a disentitlement from benefits for suspension from a job for misconduct.

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 was the Appellant suspended from his job?

[9] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy by refusing to reveal his vaccination status.

[10] The Appellant says that he knew of the employer's vaccination policy. He states that a policy is not the law, and he could have worked from home.

[11] The Appellant did not request an exemption to the policy. As well, he says that he has the right not to declare his vaccination status, as providing his medical records is not part of his employment contract.³ The Appellant was aware that failure to reveal his vaccination status would result in separation from his employment.

[12] The Commission says the employer suspended the Appellant from his job on November 15, 2021, for non-compliance with the employer's vaccination policy, as evidenced by the Code "M" indicated on the Record of Employment.

[13] I find that the Appellant was suspended from his job for not complying with the employer's vaccination policy. The Appellant agrees that this is why he was suspended; I see no reason not to accept this as a proven fact.

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

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

[15] 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

³ See GD3-19, 32 to 33.

misconduct—the questions and criteria to consider when examining the issue of misconduct.

[16] 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 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.⁶

[17] 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.⁷

[18] 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.⁸

[19] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.¹⁰ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there

⁴ See *Mishibinjima 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 *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

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

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[21] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹¹

[22] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹²

[23] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.¹³ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Federal Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹⁴

[24] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.¹⁵ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it isn't relevant that the employer didn't accommodate them.¹⁶

[25] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or policies and determine whether it was right to suspend the Appellant from his job. Instead, I have to focus on

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about telling it whether he had been vaccinated
- the employer communicated what it expected; the Appellant agrees that he received many emails from his manager and had many conversations with them
- the Appellant knew or should have known what would happen if he didn't follow the policy

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

- the employer's vaccination policy was not the law; he could have worked from home
- it was not in his employment contract to reveal his medical records
- the vaccine is experimental; it is in the Nuremburg Code that you can't experiment on people

[28] The Appellant agrees that he knew of the vaccination policy and the consequences of not following it.

[29] The Appellant provided the "vaccination attestation" form to the employer as requested. On the form, he states his right not to declare his vaccination status, in contravention with the employer's policy.¹⁷

¹⁷ See GD3-22 to 30

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

- the employer had a vaccination policy that said you had to provide your vaccination status by a certain date
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated and telling it whether they have been vaccinated
- the employer sent emails to and spoke to the Appellant several times 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?

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

[32] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated and say whether he had been vaccinated was likely to cause him to be suspended from his job.

[33] I note that the Appellant has returned to his job as of June 20, 2022, as a result of the lifting of the vaccine mandates.

Conclusion

[34] 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 for the period of the suspension.

[35] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section