Citation: *BH v Canada Employment Insurance Commission*, 2023 SST 237

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	B. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated September 27, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Teleconference
Hearing date:	January 10, 2023
Hearing participant:	Appellant
Decision date:	March 1, 2023
File number:	GE-22-3187

Decision

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

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant voluntarily left his job. The Commission has proven that he was dismissed from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means he is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant worked as a security guard at a remote worksite. He had to fly in and out of the worksite. He lost his job because he couldn't fly in or out of the worksite due to the federal government mandating COVID-19 vaccination for airline travel. The Appellant wasn't vaccinated. The employer had him sign a resignation letter just before this rule came into effect.

[4] The Commission decided the Appellant had voluntarily left his employment without having just cause, so it couldn't pay him EI benefits.

[5] The Appellant disagrees. He says that he didn't quit his job, the employer was forced to let him go due to the vaccination rules for airline travel. There was no other way to get to the worksite, so he couldn't continue working.

The employer is not a party to this appeal

[6] The Tribunal identified the Appellant's former employer as a potential added party to the Appellant'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 employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issues

[7] Did the Appellant voluntarily leave his job or did the employer dismiss him?

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

Analysis

[9] A claimant who voluntarily leaves their job is disqualified from receiving EI benefits, unless they can prove that they had just cause for voluntarily leaving their job.[1]

[10] Similarly, Appellants who have been dismissed from a job because of misconduct are also disqualified.[2]

[11] Sometimes it is not clear whether a Appellant voluntarily left or the employer dismissed them. Both of these notions are linked in the *Employment Insurance Act*. They relate to whether someone caused their own unemployment, either by initiating their separation from employment without just cause, or by losing their job due to misconduct.

[12] Because the reasons for these disqualifications are linked, it is open to me to make a decision based on either of these grounds. In other words, where the reason for the Appellant's separation from her employment is unclear, I have the jurisdiction to decide whether it is based on a voluntarily leaving or dismissal due to misconduct.[3]

Why did the Appellant stop working?

[13] The Commission decided that the Appellant had voluntarily left his employment. But, it is not clear that the Appellant voluntarily left his job. He has consistently stated to the Commission and the Tribunal that he didn't quit. He says it was the employer who let him go.

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[1] See section 30 of the *Employment Insurance Act* (Act).
[2] See section 30 of the Act.
[3] The Federal Court of Appeal explains these principles in *Canada (Attorney General) v. Desson,* 2003 FCA 303 and *Canada (Attoney General) v. Easson,* A-1598-92.

[14] The Appellant was employed as a security guard at a remote worksite. Because the worksite was remote, workers had to travel there by plane. The Appellant would fly in to the worksite for his shift, work a rotation of ten to fourteen days, and then fly out of the worksite to go home.

[15] Then, the federal government put in place restrictions on who could travel by plane. Starting November 30, 2021, you had to be vaccinated against COVID-19 to board a plane.

[16] The Appellant wasn't vaccinated against COVID-19. He knew this would affect his ability to travel to work. The employer confirmed that he couldn't continue working there if he wasn't vaccinated.[4]

[17] The Appellant said that on November 29, 2021, he was set to leave the worksite and travel home. He was called into the General Manager's office shortly before his flight. The General Manager presented him with a note stating that the Appellant wouldn't be returning to work because he wasn't allowed on the plane due to COVID-19 policy.[5] The General Manager asked the Appellant to sign the note, because they needed a record of why the Appellant was no longer working there.

[18] The Appellant testified that he didn't quit his job. He was forced to stop working because of the federal government's restrictions on airplane travel for people who were not vaccinated against COVID-19. His employer didn't want to let him go but said that he had to stop working because he couldn't travel to the worksite.

[19] On December 15, 2021, the employer issued a Record of Employment for the Appellant. It stated the reason for issuing as "quit."

[20] The Commission spoke to the General Manager on February 16, 2022. He said the Appellant resigned because "you have to be vaccinated to be at the site." He said

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[4] The Appellant testified that a Human Resources (HR) representative for the employer came to the remote worksite and announced that anyone who was not vaccinated would not be able to continue working there because of the upcoming travel restrictions.
[5] This note is found at GD3-23 of the appeal file. The note is dated November 7, 2021. However, the Appellant testified that it was only presented to him at the end of his work rotation on November 29, 2021.

the Appellant signed a letter saying that he would not be returning to work because he is not allowed on a plane due to COVID-19 policy.[6]

[21] There is some conflicting information about whether the Appellant voluntarily left his job, or the employer dismissed him. When there is conflicting information, I have to decide which version is most likely. I have to consider all of the evidence and make a decision on the balance of probabilities.[7]

[22] I find the evidence on file supports that the employer initiated the Appellant's separation from employment. I put weight on the Appellant's consistent statements that he did not resign, but that the employer let him go. He also gave credible testimony of the events leading up to his dismissal. I think his statements are the most reliable indicator of how he lost his job.

[23] For these reasons, I find the Appellant did not voluntarily leave his job. Rather, the employer dismissed him.

[24] As the Appellant was dismissed from his job, I must decide whether he lost his job because of misconduct.[8]

[25] 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 dismissed?

[26] Both parties agree that the Appellant was dismissed because he couldn't travel to the worksite due to vaccine requirements for travel by air in Canada. I see no evidence to contradict this, so I accept it as fact.

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[6] See the notes of the Commission's conversation with the General Manager for the employer on GD3-29.
[7] See *Bellefleur v Canada (Attorney General),* 2008 FCA 13.
[8] See sections 30 and 31 of the Act.

Is the reason for his dismissal misconduct under the law?

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

[28] 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.

[29] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[9] Misconduct also includes conduct that is so reckless that it is almost wilful.[10] 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.[11]

[30] 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 the employer and that there was a real possibility of being let go from his job because of that.[12]

[31] The Commission must prove that the Appellant lost his 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 his job because of misconduct.[13]

[32] 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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[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[10] See *McKay-Eden v his Majesty the Queen*, A-402-96.
[11] See *Attorney General of Canada v Secours*, A-352-94.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *Minister of Employment and Immigration v Bartone*, A-369-88.

decide.[14] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[33] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[15] 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.

[34] 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.

[35] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[16] 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

[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[16] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

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.[17]

[36] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[18] 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.[19]

[37] 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.[20]

[38] 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.[21]

[39] 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

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[17] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[18] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[19] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[20] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[21] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.

> case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[22]

[40] 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 dismissing the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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

- the employer did not want to let him go
- the employer didn't have a vaccination policy, it was the Government of Canada that put restrictions on his ability to travel to the worksite

[42] The employer told the Commission that it didn't have mandatory vaccine requirements. But, the only way to get to the worksite was to travel by airplane. Starting November 30, 2021, the federal government put rules in place that required airline travellers to be vaccinated against COVID-19 vaccinations. The Appellant couldn't continue working because he wasn't vaccinated and therefore couldn't travel to the worksite.

[43] The Appellant testified that a Human Resources representative for the employer visited the worksite in early November 2021. He told all the employees that if they didn't have the vaccine, they would lose their jobs. This was because of the government's new travel rules.

[44] I find the Appellant knew about the government's new air travel rules and knew what would happen if he didn't follow it because he testified that he was aware of the rules and that he was told he would lose his job if he wasn't vaccinated.

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[22] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

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

- the Government of Canada put in place restrictions on who could travel by plane. Starting November 30, 2021, you had to be vaccinated against COVID-19 to board a plane.
- the employer clearly told the Appellant about the new travel rules and that he would lose his job if he wasn't vaccinated
- the Appellant knew or should have known the consequence of not being vaccinated when the new travel rules came into effect

So, was the Appellant dismissed because of misconduct?

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

[47] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew or ought to have known that failing to comply with the government's new travel restrictions were likely to cause his to be dismissed, and he chose not to comply.

Conclusion

[48] The appeal is dismissed.

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

Catherine Shaw

Member, General Division – Employment Insurance Section