



Citation: *TS v Canada Employment Insurance Commission*, 2023 SST 334

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

Decision

Appellant: T. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (529883) dated September 9, 2022 (issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Videoconference

Hearing date: January 9, 2023

Decision date: January 11, 2023

File number: GE-22-3094

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she went against its Covid-19 (Covid) vaccination policy: she didn't get 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.

[5] She says the employer's vaccination policy was not justified. The policy wasn't part of her original employment contract. She didn't have contact with hospital patients, and could have done her administrative job entirely from home. She says she was willing to have regular testing instead of being vaccinated, but the employer refused to accommodate her.

[6] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

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

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

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 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.

Why did the Claimant lose her job?

[10] I find that the Claimant lost her job because she went against the employer's vaccination policy. She confirmed in her testimony that she lost her job because she refused to be vaccinated.

[11] The Claimant testified that she first became aware that a mandatory vaccination policy was being drafted by her employer in July or August, 2021. The employer put the policy in place effective August 19, 2021. It required all employees to be fully vaccinated by October 31, 2021.³ The Claimant testified that she received the policy by email. She said the policy applied to all employees, including her.

[12] The Claimant testified she understood that not getting vaccinated may lead to being suspended or dismissed.

[13] The Claimant sent an email to the employer on September 3, 2021, requesting an exemption from being vaccinated.⁴ In a September 17, 2021 email, the employer denied her exemption request.⁵

² See sections 30 and 31 of the Act.

³ GD3-34

⁴ GD3-22.

⁵ GD2-14.

[14] In a September 20, 2021 email to the employer, the Claimant asked that she be allowed to have testing instead of being vaccinated.⁶ The employer denied her request.⁷

[15] The employer's vaccination policy stated that after October 31, 2021, the option of being tested instead of getting vaccinated, was only available to employees who had an approved exemption from being vaccinated.⁸

[16] The Claimant testified that the employer held regular "Town Hall" meetings with all employees, where it provided information about its vaccination requirements and answered questions about the vaccine policy.

[17] The Claimant went on sick leave on October 5, 2021, with a planned return to work date of May 9, 2022.

[18] The employer told the Commission Officer that it sent the Claimant an email reminder that she had to provide proof of being vaccinated before she returned to work on May 9, 2022. It said the Claimant didn't provide proof of vaccination, and was therefore dismissed effective May 10, 2022.⁹

[19] The Claimant told the Commission Officer that she received the employer's reminder email, and that she told the employer she didn't have proof of vaccination.¹⁰ She testified at the hearing that she told her employer she couldn't provide proof of vaccination, because she wasn't vaccinated.

[20] The Claimant told the Commission Officer that she made a personal choice not to get vaccinated, because she didn't believe that the vaccine helped to prevent Covid.¹¹ She testified at the hearing that working in the hospital's infection control department, she heard about people having bad outcomes from getting the Covid

⁶ GD2-13.

⁷ GD2-13.

⁸ GD3-35.

⁹ GD3-30.

¹⁰ GD3-31.

¹¹ GD3-31.

vaccine. She didn't feel there had been enough long-term studies of the vaccine. Vaccinated employees were still testing positive for Covid.

[21] The Claimant says the employer's vaccination policy was arbitrary and unjustified. The province's directive outlined education and regular testing as an alternative to vaccination. She was willing to have regular testing instead of being vaccinated, but the employer refused to accommodate her.

[22] The Claimant argues that she had worked safely until she went on sick leave, following safety measures including regular testing, masking and handwashing. The employer's policy wasn't part of her original employment contract. She didn't have contact with hospital patients, and could have done her administrative job entirely from home. She paid into EI for many years, and feels she is entitled to benefits.

[23] The Commission says the Claimant knew the requirements of the employer's vaccination policy. Her requests for accommodation were denied, and she knew, or should have known, that if she didn't comply with the policy by her return to work date of May 9, 2022, she would be dismissed.

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

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

[25] 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.

[26] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹² Misconduct also includes conduct that is so reckless that it is almost wilful.¹³ The Claimant doesn't have to have

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.¹⁴

[27] 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.¹⁵

[28] The Commission has to prove that the Claimant lost her 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 her job because of misconduct.¹⁶

[29] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements (accommodations) for her.¹⁷ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[30] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.¹⁸ 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 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.

[31] 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.¹⁹

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

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

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

[32] 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.²⁰

[33] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.²¹ 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 FCA relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.²²

[34] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.²³ 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.²⁴

[35] 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 let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy;

²⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

²¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²² See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

²³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- the employer clearly notified the Claimant about its expectations regarding vaccination; and
- the Claimant knew or should have known what would happen if she didn't follow the policy.

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

- the employer's vaccination policy was unjustified – it went above and beyond the province's directive;
- she was willing to have regular testing instead of being vaccinated, but the employer refused to accommodate her;
- the employer's policy wasn't part of her original employment contract; and
- she didn't have contact with hospital patients, and could have done her administrative job entirely from home.

[38] The employer's vaccination policy said that:

- all employees had to be vaccinated by October 31, 2021, unless they had an approved, documented medical exemption or other approved exemption under the Ontario Human Rights Code;
- employees had to provide proof that they were fully vaccinated;
- after October 31, 2021, rapid testing would only be available for staff as an alternative to vaccination if they had an approved documented medical exemption, or other approved exemption under the Ontario Human Rights Code; and
- failure to comply with the policy may result in an unpaid leave of absence and/or discipline up to and including termination of employment.

[39] The Claimant made a conscious and deliberate choice not to be vaccinated. She testified that she told her employer that she wasn't vaccinated and wasn't going to get vaccinated.

[40] The Claimant knew that not being vaccinated meant that she couldn't do her job. She testified that employees couldn't work without being vaccinated, unless they had an exemption. Her exemption request was denied by the employer, so she knew that not being vaccinated meant that she couldn't work.

[41] The Claimant testified that the employer's vaccination policy applied to her. She confirmed that she knew what she had to do under the vaccination policy and what would happen if she didn't follow it. She knew that if she didn't provide proof of being fully vaccinated, she could be dismissed from her job.

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

- the employer had a vaccination policy that said all employees had to be vaccinated or have an approved exemption from being vaccinated;
- the policy required employees to provide proof of being fully vaccinated;
- the employer clearly communicated its policy to the Claimant, and specified what it expected in terms of getting vaccinated and providing proof of vaccination;
- the employer held regular meetings with employees, to communicate what it expected;
- the Claimant knew the consequence of not following the employer's vaccination policy;
- the Claimant didn't have an exemption from being vaccinated; and
- the Claimant didn't get vaccinated and was dismissed as a result.

So, did the Claimant lose her job because of misconduct?

[43] Based on my findings above, I find that the Claimant lost her job because of misconduct.

[44] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

[45] The Claimant feels that she has a right to receive EI benefits. I understand that she feels she should get EI because she's paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. She has not met the requirements to be eligible for benefits.

Conclusion

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

[47] This means that the appeal is dismissed.

Susan Stapleton
Member, General Division – Employment Insurance Section