Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 404

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (524148) dated August 24, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	January 24, 2023
Hearing participant:	Appellant
Decision date:	February 3, 2023
File number:	GE-22-3171

Decision

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

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

Overview

[3] The Claimant was suspended from her job. The Claimant's employer says that she was suspended because she went against its 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] The Commission accepted the employer's reason for the suspension. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Issue

[6] Was the Claimant suspended from her 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]

[8] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the

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[1] Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disentitled from receiving benefits.
[2] See sections 30 and 31 of the Act.

Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from her job?

[9] I find that the Claimant was suspended from her job because she went against her employer's vaccination policy.

[10] The Claimant says she refused to get vaccinated against COVID-19. She said that she had to be fully vaccinated to work.

[11] The Commission says the Claimant didn't adhere to her employer's COVID-19 vaccine policy. It says that because of that, her employer suspended her.

[12] The Claimant doesn't dispute the reason her employer suspended her. Even though she doesn't think not taking the vaccine is misconduct, I find that the Claimant was suspended from her job because she went against her employer's COVID-19 vaccination policy.

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

[13] The reason for the Claimant's suspension is misconduct under the law.

[14] 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 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 Claimant doesn't have to have

[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] 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.[5]

[16] 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.[6]

[17] The law doesn't say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.[8]

[18] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.[9]

[19] 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 is not for me to decide whether her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her.[10] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] 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.[11] 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

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[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] 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.[12]

[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.[13]

[23] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.[14] 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 Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[15]

[24] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.[16] 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 is not relevant that the employer didn't accommodate them.[17]

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

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[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

[26] The Claimant says there was no misconduct because

- there is nothing in her collective agreement about taking vaccines,
- her employer didn't follow the process to determine if there was misconduct, and,
- no one should be able to evaluate her religious beliefs.

[27] The Commission says there was misconduct because the Claimant knew about her employer's COVID-19 policy, including the consequences of non-compliance.

[28] I find that the Commission has proven that there was misconduct. I find that the Claimant knew that she could be suspended from her job if she went against her employer's COVID-19 vaccine policy. But she chose not to take the vaccine even after his employer denied her request for accommodation.

[29] The Claimant told the Commission that she was on a leave of absence because she didn't comply with a mandatory vaccination. She said she had to be fully vaccinated against COVID-19 to work.

[30] The Claimant works for the X. It implemented a COVID-19 vaccination policy effective October 6, 2021. The policy says that:

- all employees must be fully vaccinated unless accommodated on medical, religious, or other prohibited ground for discrimination under the *Canadian Human Rights Act*,
- employees must disclose their vaccination status by October 29, 2021,
- employees who don't disclose their vaccination status by the deadline will be placed on administrative leave without pay, and,

- the deadline for those who ask for accommodation is two weeks after notification of the employer's decision.

[31] The Claimant testified that she knew about the X policy in October 2021, but her department wasn't officially informed until November 2021. She said they got notice on November 8, 2021, that they had to confirm their vaccine status. The Claimant testified that if they weren't vaccinated by December 14, 2021, they would be placed on leave.

[32] I find from the Claimant's testimony that she knew about his employer's COVID-19 vaccination policy. She knew about the deadlines and the consequences of not complying with the policy. So, I find that the Claimant knew that if she didn't take the COVID-19 vaccine she would be suspended from her job.

[33] The Claimant asked her employer to accommodate her on religious grounds. She told the Commission that her employer denied her request. The employer sent her a letter on February 14, 2022, and the Claimant had two weeks to attest to her vaccination status.

[34] The Claimant testified that she doesn't know how someone who doesn't know her could assess her request for accommodation. She said people who know her know that she has gone to church for 30 years. The Claimant said her employer could have accommodated her, especially since she did most of her work from home.

[35] I understand that the Claimant doesn't agree with her employer's decision to deny her request for accommodation. But it's not my role to decide if the employer's decision was reasonable.

[36] The Claimant said the new condition of employment to be fully vaccinated against COVID-19 isn't in her collective agreement. She said her employer and union are negotiating now. But she doesn't know if the vaccine requirement will be added to the collective agreement.

[37] I asked the Claimant if she was saying that her employer can't create policies to deal with emergency situations like COVID-19. The Claimant said she guesses it can,

but the employer can't add a condition of employment when bargaining. She said when she was hired, there was nothing saying she has to be vaccinated against COVID-19 and her employer can't now say it's a condition of employment.

[38] I don't find that not having anything about vaccinations before in her collective agreement means that the Claimant's employer could not create and implement a policy to address the effects of COVID-19 on its operations. But the Claimant can seek recourse at another court or tribunal if she thinks her employer has operated outside her collective agreement by implementing its COVID-19 vaccine policy.

[39] The Claimant says her employer didn't follow its process to determine if there was misconduct. I have no reason to doubt this. The employer's COVID-19 vaccination policy refers to administrative leave without pay. But the question I must answer is whether the Claimant's decision not to take the COVID-19 vaccine is misconduct within the meaning of the Act, not according to the employer's processes.

[40] The Claimant testified that her decision about her own health is not misconduct. She said there was COVID-19 in the building where she works. But the vaccine didn't prevent it. She said she has issues with mRNA vaccines because of their use of fetal cell line tissue, but her employer denied her request for accommodation. She testified that she does her job well, so it can't be said that her health choice is misconduct.

[41] Despite the Claimant's concerns, I find that her decision to go against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to take the vaccine. She did so, knowing that she would be placed on an unpaid leave absence. I find that this means that she was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

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

Conclusion

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

[45] This means that the appeal is dismissed.

Audrey Mitchell
Member, General Division – Employment Insurance Section