



Citation: *RD v Canada Employment Insurance Commission*, 2023 SST 422

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

## Decision

**Appellant:** R. D.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (515187) dated August 18, 2022 (issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** January 18, 2023

**Hearing participant:** Appellant

**Decision date:** February 3, 2023

**File number:** GE-22-2954

## 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.<sup>1</sup>

## 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 follow the testing rules she was supposed to.

[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 was suspended from 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.<sup>2</sup>

[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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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disentitled from receiving benefits.

<sup>2</sup> 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 had agreed to her employer's testing requirement but wanted to do it in her own way. She says her employer is discriminating against her by denying her request for accommodation on religious grounds.

[11] The Commission says the reason the Claimant's employer suspended her is that she failed to comply with its COVID-19 vaccine policy and requirements. It says she refused to participate in the monitored rapid testing as an alternative to disclosing her vaccination status.

[12] The Claimant's employer issued a record of employment (ROE). In the comments section, the employer noted that the Claimant refused to participate in testing at work as per its policy, so it put her on unpaid leave.

[13] The Claimant doesn't appear to dispute the reason her employer suspended her. She insists her employer was wrong to deny her request for accommodation. I find that the Claimant's employer placed her on unpaid leave because she refused to do COVID-19 testing. I find that this is the same as a suspension. So, 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?**

[14] The reason for the Claimant's suspension 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 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.

[16] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> The Claimant 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.<sup>5</sup>

[17] 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.<sup>6</sup>

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

[19] 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.<sup>9</sup>

[20] 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 let her go (or in this case wrongfully suspended her) or should have made reasonable arrangements (accommodations) for her.<sup>10</sup> I can

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>7</sup> See section 30 of the Act.

<sup>8</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] 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.<sup>11</sup> 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.

[22] 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.<sup>12</sup>

[23] 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.<sup>13</sup>

[24] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.<sup>14</sup> 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.<sup>15</sup>

[25] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.<sup>16</sup> He argued that his employer had to accommodate him because alcohol

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<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

<sup>13</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

<sup>14</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>15</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

<sup>16</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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.<sup>17</sup>

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

[27] The Claimant says her employer's refusal to accommodate her based on her religious beliefs goes against the *Ontario Human Rights Code*, the *Canadian Charter of Rights and Freedoms* (Charter) and the Act. She says there is nothing in her employment contract about testing or medical treatment. The Claimant also says the Commission's officer who made the decision on her case was biased and didn't listen to her.

[28] The Commission says there was misconduct because the Claimant was suspended as a direct result of her behaviour, namely she refused to participate in her employer's rapid testing.

[29] I find that the Commission has proven that there was misconduct, because the Claimant knew that her employer would suspend her if she went against its COVID-19 vaccine policy that required testing as an alternative to taking the vaccine. But she chose not to take the vaccine even after his employer denied her request for accommodation.

[30] The Claimant sent the Commission a copy of her employer's COVID-19 vaccine policy. Under the policy:

- employees must disclose their vaccine status by November 30, 2021,

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<sup>17</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- employees who aren't fully vaccinated or are considered unvaccinated will have to take a minimum of two weekly COVID-19 tests at locations offered by the employer, or at the employees' local pharmacy or community health centre,
- the employer will consider accommodation requests from employees who are unable to be fully vaccinated based on one or more protected grounds, and,
- employees who don't follow the policy may be placed on an unpaid leave of absence or may be subject to disciplinary action, up to and including termination of employment.

[31] The Claimant testified about her employer's COVID-19 policy. She confirmed that she received an email about the policy on November 10, 2021, the same day it was effective. The Claimant didn't disclose her vaccination status to her employer. She said she understood that anyone who wasn't vaccinated had to do COVID-19 testing and that if she didn't follow the policy, she might be placed on unpaid leave.

[32] The Claimant asked her employer to accommodate her. She sent the employer an affidavit notarized on November 19, 2021. In it, she states she can't consent to COVID-19 testing due to her religious beliefs. The Claimant explained her reasons in the six-page affidavit.

[33] The Claimant's employer notified the Claimant that it could not accommodate her request to be exempt from testing. The employer's letter said that if the Claimant refused to do rapid testing, she would be placed on unpaid leave effective immediately. But it also asked the Claimant for written documentation from her religious officiant with the tenets of her faith concerning vaccination.

[34] The Claimant replied to her employer's refusal to grant her request for accommodation. She said that under duress, she would do rapid testing. But she wanted to do so at home.

[35] The employer notified the Claimant that she was required to participate in COVID-19 rapid testing as per its vaccination policy. It said that all staff would be tested

at the employer's location and that results would be reported to the Red Cross. It said that if the Claimant continued to refuse, she would be placed on a three-month leave of absence effective immediately. The employer then suspended the Claimant.

[36] I find from the Claimant's testimony that she knew about her employer's COVID-19 vaccination policy. She knew about having to do rapid testing if she was unvaccinated or didn't say if she was vaccinated. The policy said she could face unpaid leave if she didn't do rapid testing. But two additional letters to the Claimant from her employer said she would be placed on unpaid leave if she continued to refuse to do rapid testing. So does the employer's frequently asked questions about the COVID-19 vaccination policy. So, I find that the Claimant knew that refusing to do testing as the employer required would result in her suspension.

[37] The Claimant disagrees with her employer's decision to refuse to accommodate her request not to do COVID-19 testing. She also says she doesn't have to support her request for accommodation with a letter from a religious authority. The Claimant concludes her employer is discriminating against her because of her religion. And she cites the *Ontario Human Rights Act*, the Charter, the Act, and a Supreme Court of Canada decision<sup>18</sup> in support of her argument that her employer's decision is wrong.

[38] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. There is also the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[39] Despite the Claimant's argument, I am not allowed to consider whether an action taken by an employer violates a claimant's Charter rights. I am also not allowed to make rulings on the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant must go to a different tribunal or a court to address that. My role is to decide whether the reason for the Claimant's suspension is misconduct.

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<sup>18</sup> See *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] SCR 551.



[40] The Claimant says that the Commission didn't explain how paragraph 29(c) of the Act doesn't apply to her. This is because this section of the Act applies where a claimant has left their job without just cause. The Commission is not arguing that the Claimant voluntarily left her job. It says the Claimant was suspended due to her misconduct. I have already found that the Claimant's employer suspended her. So, I don't find that paragraph 29(c) of the Act applies in this case.

[41] The Claimant says there is nothing in her employment contract about testing or medical treatment, or that she has to give the Red Cross any of her medical information. So, she says she never breached her contract of employment.

[42] I have no reason to doubt that the Claimant's employment contract didn't speak to COVID-19 vaccines, rapid testing, or related procedures. But I don't find this means that her employer could not create and implement a policy to address the potential effects of COVID-19 the operation of its business.

[43] The employer's policy states that new employees will be required to provide proof of vaccination as a condition of being hired. It did not do so for existing employees. I accept that the employer's COVID-19 vaccination policy confirms its stated commitment to maintain a safe and healthy workplace to protect its workers and their families from contracting and spreading COVID-19. So, it required unvaccinated employees to do rapid testing. I find that the Claimant breached this policy by refusing to do testing.

[44] The Claimant says the officer at the Commission who decided that she didn't follow her employer's policy and that this is misconduct was biased. She also points to parts of the Commission's representations that she says are not true.

[45] The Claimant may disagree with some of what the Commission has said and its approach to deciding that she isn't entitled to EI benefits. But I agree with the Commission's decision. As already stated, I find that the Claimant didn't follow her employer's COVID-19 vaccination policy, knowing that she would be suspended.

[46] I find that the Claimant's action, namely going against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to do rapid testing. She did so, knowing that she would be placed on unpaid leave. 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?**

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

[48] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to do rapid testing would result in her suspension.

### **Conclusion**

[49] 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.

[50] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section