



Citation: *ME v Canada Employment Insurance Commission*, 2022 SST 1618

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

Decision

Appellant: M. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (464926) dated April 28, 2022 (issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Teleconference

Hearing date: November 17, 2022

Hearing participant: Appellant
Witness (J. P.)

Decision date: December 9, 2022

File number: GE-22-1859

Decision

[1] The appeal is dismissed.

[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 vaccination policy: she didn't provide proof of vaccination.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. The employer's CEO had said that employees who worked solely from home would be exempted from the policy. She was under an accommodation and working from home for health reasons. But the employer denied her exemption request.

[5] 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.

Matter I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant'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

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

employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issue

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

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] Both parties agree that the Claimant was dismissed because she didn't provide proof of vaccination as required by her employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

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

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

[12] 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.

² See sections 30 and 31 of the Act.

[13] 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 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

[14] 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

[15] 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.⁷

[16] I only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁸ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.⁹ 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 because of the use of drugs, and he should have been covered under the last test he'd

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[18] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said 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.

[19] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.¹⁰ 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 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.¹¹

[20] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.¹² 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.¹³

[21] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies

¹⁰ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹¹ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

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

¹³ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

and determine whether they were right in dismissing the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about providing proof of vaccination
- the Claimant knew or should have known what would happen if she didn't follow the policy

[23] The Claimant says that there was no misconduct because

- she didn't think the policy applied to her because she was working from home
- the employer unreasonably denied her an exemption from the policy
- asking her to disclose her vaccination status violated her right to privacy
- the employer's policy went against her human rights and medical ethics
- she hadn't thought that she could lose her job if she didn't follow the policy

[24] The employer's vaccination policy says that employees had to be vaccinated against COVID-19 and provide proof of their vaccination by October 22, 2021. Employees who were not vaccinated by the deadline would be subject to disciplinary measures, up to and including termination.

[25] In September 2021, the Claimant's manager told her that if she didn't submit her vaccination information, then she wouldn't be able to continue working. But, the Claimant was working from home and thought the vaccination policy shouldn't apply to her.

[26] The employer's CEO sent an email to staff on September 13, 2021. The email had a list of Frequently Asked Questions, including:

Q: In a previous FAQ, it was stated that those employees working remotely may not need to receive a mandatory COVID-19 vaccination. How will this be addressed in light of the Remote Working Policy?

A: The intent of the Remote Work policy is to allow our employees flexibility in how the work is performed. The vast majority of [employer's] employees are considered essential and as such might be recalled back to the worksite at any given time. In accordance with the Business Continuity Policy, those recalled back to work will be expected to be compliant with the COVID-19 Vaccine Policy. There are very few ... employees who work remotely 100% of their time and as a result, can be exempted. Each case will be reviewed on its own merits.

[27] On September 14, 2021, the Claimant asked for an exemption from the policy. She was on an accommodation to work from home for health reasons.¹⁴ The employer denied her request.¹⁵

[28] The Claimant asked her manager about the CEO's statement. She told him that she should be exempted from the policy, since she was not going to work onsite. But the manager said that her health situation didn't matter when it came to the policy. She still had to show proof of her vaccination to continue working.

[29] At first, the employer told the Claimant that she would be placed on unpaid leave. Then her manager told her she would be terminated if she didn't comply with the policy.

[30] The Claimant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. The employer told the Claimant about the requirements and the consequences of not following them.

¹⁴ See GD3-36 to GD3-37.

¹⁵ See GD3-35.

[31] The Claimant says that she hadn't thought she would lose her job if she didn't follow the policy because she was working remotely and the employer's policy was ambiguous about the consequences of not following it. The policy states that non-compliance "may result in discipline up to and including termination of employment." She says this statement was ambiguous and she didn't think that termination would be the first disciplinary step.

[32] I don't find this argument persuasive. The evidence shows that the employer told the Claimant several times that she could lose her job if she didn't follow the policy. When asked about the CEO's statement regarding remote work, her manager told her that she was still required to comply with the policy. And if she didn't follow the policy she would be terminated. This tells me that the Claimant reasonably should have known that she could lose her job if she didn't follow the policy.

[33] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became a condition of the Claimant's employment.

[34] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.¹⁶

[35] The Claimant also argued that the employer's policy violated her human rights and other legislation by requiring her to disclose her vaccination status or get vaccinated against her will.

[36] In Canada, there are a number of 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 Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

¹⁶ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[37] These laws are enforced by different courts and tribunals.

[38] This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[39] But this Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[40] The Claimant may have other recourse to pursue her claims that the employer's policy violated her rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

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

- the employer had a vaccination policy that said employees had to provide proof of their vaccination by October 22, 2021
- the employer clearly told the Claimant about what it expected of its employees in terms of providing proof of vaccination
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

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

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

[43] 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.

Conclusion

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

[45] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section