



Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 441

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (494949) dated July 9, 2022
(issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: In person
Hearing date: November 28, 2022
Hearing participant: Appellant

Decision date: January 12, 2023
File number: GE-22-2657

Decision

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

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

Overview

[3] The Appellant lost his job. The Appellant's employer says that he was let go because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He also says that he asked to be exempted from vaccination for religious reasons and this was denied. He believes that this is discrimination on the basis of religion as well as wrongful dismissal.

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

Matter I have to consider first

I will accept the documents sent in after the hearing, or shortly before

[6] At the hearing, the Appellant submitted certain documents that he wanted to include for me to consider. He had also sent in documents at the last minute the evening before the hearing. The Commission responded to these submissions. These documents were coded as GD-9, 11 and 12 and were all considered in rendering this decision.

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

Issue

[7] Did the Appellant lose his 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 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 did the Appellant lose his job?

[10] I find that the Appellant lost his job because he went against his employer's vaccination policy by refusing to get vaccinated.

[11] In very complete and thorough submissions, the Appellant says his employer showed bias by not accepting his request for a religious exemption; this was an unjust denial. He points out that he worked for many months before the vaccines became mandatory. He had agreed to twice a week testing.³

[12] The Appellant says that once he was suspended from his job, he started to do a lot of research on the vaccines. He found that the vaccines were produced using fetal cell lines and that this is against his personal beliefs. He explained that he practices the ISKCON faith, which in his view is even more pure than the basic Hindu faith. For example, there is to be absolutely no killing of animals.

² See sections 30 and 31 of the Act.

³ See GD2-9

[13] The Appellant is adamant that he resents being treated as a safety risk, given that the vaccines do not prevent transmission or infection. In all, the vaccines are not safe.⁴

[14] The Appellant's submissions revolved around two main points: first, that the employer has not justified termination of employment given his request for a religious exemption. He argues that refusing to take a vaccine because of his faith is not misconduct resulting in termination of employment. Second, the Appellant outlines the adverse effects of this termination, saying that he needs the financial help that EI benefits are supposed to provide. He has paid into the system for more than 5 years and needs help now. He feels it is unfair to refuse him EI benefits.

[15] The Commission says that the Appellant's conduct is misconduct under the Act. The Appellant was made aware of the vaccination policy and the deadlines to get the vaccine. He was also made aware of the consequences for not complying. The Appellant chose non-compliance; this choice was wilful and deliberate and intentional. That is the definition of misconduct **under the Act**.

[16] I find that the Appellant was dismissed from his job because of his refusal to be vaccinated.

[17] The Appellant agrees that this is why he was terminated. I see nothing in the evidence to contradict this finding.⁵

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

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

[19] 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 Appellant's dismissal is misconduct under the Act. It sets out the legal test for

⁴ See GD2-9

⁵ See GD3-30

misconduct—the questions and criteria to consider when examining the issue of misconduct.

[20] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[21] 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 his employer and that there was a real possibility of being let go because of that.⁹

[22] The Commission has to prove that the Appellant lost his 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 Appellant lost his job because of misconduct.¹⁰

[23] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.¹¹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct **under the EI Act**.

[24] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.¹² 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

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² 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.

[25] 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.¹³

[26] 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.¹⁴

[27] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.¹⁵ 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 Federal Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹⁶

[28] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.¹⁷ 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.¹⁸

[29] 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

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the Appellant knew or should have known what would happen if he didn't follow the policy

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

- the employer did not accept his request for an exemption based on religion
- the vaccines are not safe and do not prevent one from contracting the virus
- when he signed his contract of employment in 2016 there was no requirement for vaccination
- the vaccination policy goes against his personal beliefs
- it is his right to chose not to be vaccinated

[32] The employer's vaccination policy was communicated to all employees in October 2021. It says that all staff had to be fully vaccinated no later than December 20, 2021. The Appellant was contacted when it became known that he was refusing vaccination; he was placed on an unpaid leave of absence.

[33] The Appellant was then told that he had to either get the vaccine or provide a valid exemption by February 28, 2022. Neither was provided; the religious exemption was denied. The Appellant was terminated on February 28, 2022.

[34] The Appellant knew what he had to do under the vaccination policy and what would happen if he didn't follow it.¹⁹

[35] I recognize that the Appellant feels very strongly that his personal beliefs concerning the vaccines, the possibility that they were developed using aborted fetal cell lines and the fact they are not effective should have warranted being granted a religious exemption. These issues are best debated in another forum.

[36] The Appellant also submits that he was unjustly terminated. Again, this is best debated in another forum. The arbitration case submitted by the Appellant could be used there.

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

- the employer had a clear vaccination policy
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

So, did the Appellant lose his job because of misconduct?

[38] Based on my findings above, I find that the Appellant lost his job because of misconduct.

[39] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

¹⁹ See GD3-26 to 29

Conclusion

[40] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[41] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section