Citation: *SP v Canada Employment Insurance Commission*, 2023 SST 440

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (474199) dated June 24, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	January 19, 2023
Hearing participant:	Appellant
Decision date:	January 23, 2023
File number:	GE-22-3457

Decision

[1] The appeal is dismissed.

[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). For this reason, she is disentitled to Employment Insurance (EI) benefits.

Overview

[3] The Claimant was suspended from her job.[1] The Claimant's employer says that she was suspended because she went against its vaccination policy: she didn't provide proof that she was 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 was suspended because of misconduct.[2] Because of this, the Commission decided that the Claimant is disentitled 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 employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

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[1] The Claimant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Claimant's separation from employment, this is considered a suspension.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Issue

[7] Was the Claimant suspended from 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.[3]

[9] 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 Claimant was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended?

[10] Both parties agree that the Claimant was placed on unpaid leave (suspended) from her job because she went against the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for her suspension misconduct under the law?

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

[13] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] The Claimant doesn't have to have

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[3] See sections 30 and 31 of the Act.
[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] 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.[6]

[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.[7]

[15] The Commission has to prove that the Claimant lost her job because of misconduct.[8]

[16] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act. I can't make my decision based on other laws.[9] I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't decide whether an employer discriminated against a claimant or should have accommodate them under human rights law.[10] And I can't decide whether an employer breached a claimant's privacy or other rights.

[17] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[11] Mr. McNamara was dismissed from her job under her employer's drug testing policy. she argued that she 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 she was unable to work in a safe manner because of the use of drugs, and she should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that she should get EI benefits because her employer's actions surrounding her dismissal were not right.

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[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] 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. See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. This is not the case in the Claimant's appeal.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[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)*.[12] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that she was wrongfully dismissed, the test results showed that she was not impaired at work, and the employer should have accommodated her 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.[13]

[20] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[14] Mr. Mishibinijima lost her job for reasons related to an alcohol dependence. she argued that, because alcohol dependence has been recognized as a disability, her 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.[15]

[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 and determine whether they were right in dismissing the Claimant. Instead, I have to

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[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[14] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Claimant say

[22] The Commission and the Claimant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Claimant's conduct is misconduct within the meaning of the Act.

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

- the employer had a vaccination policy and communicated that policy to the Claimant
- the employer's policy required the Claimant to provide proof of her vaccination or get an approved exemption.
- the Claimant knew what she had to do under the policy
- she also knew that her employer could suspend her under the policy if she didn't give proof of vaccination by the deadline
- she applied for an exemption on religious grounds, but the employer denied her exemption request
- she made a personal choice not to get vaccinated by the deadline
- her employer suspended her because she didn't comply with its vaccination policy

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

- the employer's vaccination policy wasn't part of her employment contract when she was hired
- the policy violated her collective bargaining agreement
- the policy went against the law, her right to privacy, and her human rights

- the employer didn't have the right to place her on leave without pay involuntarily
- the employer considered her leave to be administrative, not disciplinary, so it should not be considered a suspension for EI purposes

[25] The evidence in this appeal is consistent and straightforward. 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.

The employer's policy was a condition of employment

[26] 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 an express condition of the Claimant's employment.[16]

The employer didn't consider her leave misconduct

[27] The Claimant argues that because her leave of absence was not disciplinary, or labelled as misconduct by the employer, the Commission should not view it as misconduct for the purposes of EI benefits.

[28] The Courts have considered this question and found that an employer's characterization of the grounds of an employee's dismissal is not determinative of whether the employee lost their job because of misconduct within the meaning of the Act.[17] As a result, the employer's characterization of the reason the Claimant was not working is not determinative of the issue.

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[16] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[17] See *Canada (Attorney General) v Boulton,* 1996 FCA 1682.

Other arguments

[29] I don't have the legal authority (in law we call this "jurisdiction") to decide on some of the arguments the Claimant advanced. Specifically:

- whether the employer had the right to impose a new condition of employment without going through the bargaining process;
- whether the employer had the right to place her on leave without pay under the provisions of her collective agreement; and
- whether the employer's policy went against the law, violated her right to privacy, and violated her human rights.

[30] 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.

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

[32] 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.

[33] 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.

[34] The Courts have said when I decide misconduct appeals, I shouldn't consider whether an employer's policy or the penalty it imposed on an employee is reasonable or

legal under an employment contract, a collective agreement, or laws such as human rights laws.[18]

[35] 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.

Benefit of Digest Principles

[36] The Claimant also provided an excerpt of chapter 6 of the Employment Insurance *Digest of Benefit Entitlement Principles*. This section states that a claimant who is on a temporary leave of absence is considered to be laid off if the leave is imposed by the employer and not taken voluntarily. The Claimant says I should follow the principle set out in this section as it aligns with her circumstances.

[37] The *Digest of Benefit Entitlement Principles* isn't law, so I don't have to follow it. It is the Commission's internal policy. In other words, it's the Commission's rule book for staff to use when they interpret and apply the Act to decide EI claims.

[38] The section of the *Digest of Benefit Entitlement Principles* that the Claimant provided is about voluntarily taking a leave of absence under the EI Act. It is not about misconduct. This means this section doesn't apply to the decision the Claimant is appealing. So, I am not going to apply it.

Other Tribunal decisions

[39] The Claimant submitted two Tribunal decisions that she says are relevant to her case.[19] She provided copies of the decisions that were not redacted and contained the claimants' full names, but I will refer to the cases as *AL v Canada Employment Insurance Commission* and *TC v Canada Employment Insurance Commission*.

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[18] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[19] See GD8-740 to GD8-765.

- AL v Canada Employment Insurance Commission

[40] In this case, AL worked in the hospital's administration. She was suspended and later dismissed by the hospital because she did not comply with its mandatory COVID-19 vaccination policy. Based on the evidence and argument in that case, the Tribunal member found that AL did not lose her job because of misconduct.

[41] The Tribunal member found the employer changed the terms of AL's employment contract and imposed a new condition of employment without her agreement, and without amending the collective agreement. And further found an employer could impose a new term of employment on an employee only "where legislation demands a specific action by an employer and compliance by an employee" and that there was no such statutory obligation for the employer to require vaccination by employees. So, the member found the Claimant did not breach a duty owed to the employer when she chose not to be vaccinated as required by the policy.

[42] The Tribunal member also found that claimants have a right to choose whether to accept any medical treatment. And that even if her choice contradicts her employer's policy and leads to her dismissal, exercising that "right" cannot be seen as a wrongful act or conduct sufficient to conclude it is misconduct worthy of punishment or disqualification under the *Employment Insurance Act*.[20]

[43] I am not bound by other Tribunal decisions, but I may take guidance from them if I find them persuasive and helpful. I will not adopt the reasoning in AL for the following reasons.

[44] First, the Claimant's facts in the appeal before me are substantially different than those in AL. Importantly, AL had a collective bargaining agreement that considered whether vaccinations other than COVID-19 were mandatory. The Tribunal member relied on this fact to find that the employer and the union (the parties to the collective agreement) had addressed the requirement of other vaccines in the collective

[20] See *AL v Canada Employment Insurance Commission*, paras 76, 79, and 80.

agreement, so, the Tribunal member reasoned, to require the COVID-19 vaccine should have followed the same process.

[45] I do not agree with that reasoning. The collective agreement governs the terms and conditions of employment for unionized employees. Whether a claimant's collective agreement addresses vaccination requirements is not determinative of the matter before me. What is determinative is whether the Claimant's conduct of refusing to follow the employer's vaccination policy is misconduct within the meaning of the Act and case law as set out above. Further, in the appeal before me the Claimant has not produced evidence that her collective agreement has a provision that considered mandatory vaccinations. So, I find the Claimant's case is distinguished from the facts in AL.

[46] Next, the Tribunal member based her finding on the principle that employers cannot put in place new conditions of employment unless there is a statutory obligation, or the employee has explicitly or implicitly agreed to it. But, other Courts and Tribunals have considered this question and found differently.

[47] For example, in the case of *Re Thompson and Town of Oakville Re Ruelens and Town of Oakville,* [1964] 1 OR 122, Ontario High Court of Justice held that, without a statutory or contractual obligation, that a municipal police Chief could not require members of the police force to submit to a medical examination by a specific doctor. At the time, police officers were required by law to be medically examined when they were appointed to the force, but that did not apply to an existing member of the force and there was no basis for the requirement that the Chief Constable would name the specific doctor to perform the examination. The Court indicated that employees could refuse to obey an employer's orders if there was no lawful basis for the order.

[48] However, in subsequent decisions other tribunals found that employers can require employees to submit to medical examinations in certain circumstances, even if there is no statutory or contractual obligation.[21] So, I am not persuaded that an

[21] See *Bottiglia v Ottawa Catholic School Board,* 2015 HRTO 1178, and White v. Canadian Nuclear Laboratories Ltd., 2020 CHRT 37.

employer can only implement a policy if there is an existing legislative or contractual basis for that policy.

[49] Lastly, I do not agree with the Tribunal member's reasoning that AL's conduct of failing to be vaccinated cannot be considered misconduct because she was exercising her right to choose whether to accept a medical treatment. The member's characterization that misconduct for EI purposes requires a "wrongful act" or "conduct sufficient to conclude it is misconduct worthy of punishment" is flawed and goes against the previous guidance of the Courts.

[50] In *Canada (Attorney General) v Secours,* the FCA held that it was an error of law to limit misconduct to actions for which there was a wrongful intent.[22] In this matter, I do not agree with the Tribunal member's finding that a finding of misconduct requires a wrongful act or conduct worthy of punishment. The Courts have clearly stated it would be an error of law to interpret the legal test in that way.

- TC v Canada Employment Insurance Commission

[51] In this appeal, the claimant, TC, was put on leave from his job because he didn't comply with the vaccination policy at work. The Commission decided that he was suspended due to his own misconduct.

[52] Importantly in this case, the employer notified TC of the vaccination policy two days before the deadline to be vaccinated. He didn't see a copy of the policy and didn't know what the consequences were for not following the policy. He also didn't have a chance to ask for an exemption to the policy. Two days later, the employer put him on leave. The Tribunal member found that the employer had the right to develop and impose policies at the workplace, but employees should be given a chance to understand the policy, to know what is required, have an opportunity to review and/or ask questions and be given enough time to comply.

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[22] See *Attorney General of Canada v Secours*, A-352-94, at paras 9-10.

[53] The Claimant's appeal and TC's have the same question of law—whether they were suspended from their jobs because of misconduct. However, the important facts are different. In the Claimant's case, she was given notice of the employer's vaccination policy several months before the deadline to comply. She saw a copy of the policy and had the opportunity to apply for an exemption. She also had the chance to ask her employer and her union questions about the policy. I understand that she wasn't satisfied with the answers she received, but she did have that opportunity. She also had ample time to comply with the policy by getting vaccinated, if she so chose.

[54] Because of these differences, I find the case of TC is not persuasive in the question of whether the Claimant was suspended due to misconduct. The factors that the Tribunal member in TC relied on to allow his appeal are not present in the Claimant's case.

The Commission has proven she was suspended for misconduct

[55] I find that the Commission has proven that the Claimant was suspended for misconduct because it has shown:

- the employer had a vaccination policy that said employees had to attest to their vaccination status and provide proof of being vaccinated against COVID-19
- the Claimant knew about the vaccination policy and what the employer expected of its employees in terms of being vaccinated
- she knew that the employer could suspend her if she didn't get vaccinated before the deadline
- she applied for an exemption from the policy, which the employer refused
- she consciously, deliberately, and intentionally made a personal decision not to get vaccinated by the deadline
- she was suspended from her job because she didn't comply with the employer's vaccination policy

So, was the Claimant suspended because of misconduct?

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

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

Conclusion

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

[59] This means that the appeal is dismissed.

Catherine Shaw

Member, General Division – Employment Insurance Section