



Citation: *RC v Canada Employment Insurance Commission*, 2022 SST 1744

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

# **Decision**

**Appellant:** R. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (464186) dated April 25, 2022  
(issued by Service Canada)

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**Tribunal member:** Catherine Shaw

**Type of hearing:** Teleconference

**Hearing date:** December 6, 2022

**Hearing participant:** Appellant

**Decision date:** December 9, 2022

**File number:** GE-22-2516

## Decision

[1] The appeal is dismissed.

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

## Overview

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

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

## Matters I have to consider first

[6] The Claimant has two separate appeal files. I chose to hear both appeals in the same hearing in the interest of proceeding as informally and quickly as circumstances, natural justice, and fairness permit.

[7] However, I did not join the appeals. I am only able to join appeals if a common question of law or fact arises in the appeals and no injustice is likely to be caused to any party.<sup>2</sup> In this case, the two appeals do not share a common question of law or fact. As such, I will issue two separate decisions.

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

<sup>2</sup> See section 13 of the *Social Security Tribunal Regulations*.

## **The employer is not a party to the appeal**

[8] 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.

## **Issue**

[9] Did the Claimant lose his job because of misconduct?

## **Analysis**

[10] 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>3</sup>

[11] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

## **Why did the Claimant lose his job?**

[12] Both the parties agree that the Claimant lost his job because he went against his 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?**

[13] The reason for the Claimant's dismissal 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 dismissal is misconduct under the Act. It sets out the legal test for

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<sup>3</sup> See sections 30 and 31 of the Act.

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.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant 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.<sup>6</sup>

[16] There is misconduct if the Claimant 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.<sup>7</sup>

[17] The Commission has to prove that the Claimant 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 Claimant lost his job because of misconduct.<sup>8</sup>

[18] 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.<sup>9</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[19] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.<sup>10</sup> Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

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

[20] 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.

[21] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.<sup>11</sup> 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.<sup>12</sup>

[22] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.<sup>13</sup> 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

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<sup>11</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

<sup>12</sup> See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

<sup>13</sup> See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

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.<sup>14</sup>

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

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

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

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

- the vaccination policy wasn't part of his employment contract when he was hired. So, the employer effectively changed his terms of employment.
- the employer's vaccination policy went against the law and his human rights
- the employer disregarded his religious exemption request

[26] The employer's vaccination policy said that employees were required to be vaccinated against COVID-19 by October 25, 2021.

[27] The Claimant told his employer that he didn't want to be vaccinated. He had objections to the vaccine on religious grounds. He said the policy didn't provide for an exemption for religious reasons. But, employees could apply for exemptions from the

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<sup>14</sup> *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

Provincial Health Office (PHO). He spoke to his manager and she said she would only consider an exemption request if it was approved by PHO. She said he could try asking the PHO for a religious exemption.

[28] The Claimant sent the PHO his religious exemption request. He forwarded his application to his manager so she knew that he applied. He didn't receive a response from the PHO about his request.

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

[30] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies or practices 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.<sup>15</sup>

[31] 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 dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.<sup>16</sup>

[32] The Claimant also said that the employer's policy violated the law and his human rights.

[33] 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.

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

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<sup>15</sup> See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

<sup>16</sup> See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[35] 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.

[36] 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.

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

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

- the employer had a vaccination policy that said employees had to be vaccinated against COVID-19
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated
- the employer spoke to the Claimant to communicate what it expected
- the Claimant was not approved for an exemption to the vaccine policy
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

### **So, did the Claimant lose his job because of misconduct?**

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

[40] This is because the Claimant'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.



## **Conclusion**

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

[42] This means that the appeal is dismissed.

Catherine Shaw  
Member, General Division – Employment Insurance Section