



Citation: *HK v Canada Employment Insurance Commission*, 2023 SST 488

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

**Decision**

**Appellant:** H. K.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (542485) dated October 4, 2022  
(issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** In person

**Hearing date:** January 31, 2023

**Hearing participant:** Appellant

**Decision date:** February 6, 2023

**File number:** GE-22-3434

## 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 his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was suspended from his job. His employer says that he was suspended 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 suspension. It decided that the Claimant was suspended from his 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 his 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 his 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 his job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Claimant suspended from his job?**

[9] I find that the Claimant was suspended from his job because he went against his employer's vaccination policy.

[10] The Claimant says he refused to comply with his employer's COVID-19 vaccination policy. He says his employer violated his rights by denying his request for accommodation on religious grounds.

[11] The Commission says the Claimant's employer suspended him because he didn't comply with its COVID-19 vaccine policy.

[12] The Claimant doesn't dispute the reason his employer suspended him. He doesn't think his employer was right to deny his request for accommodation. But I find that the Claimant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

### **Is the reason for the Claimant's suspension misconduct under the law?**

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

[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>3</sup> Misconduct also includes

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

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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>5</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>6</sup>

[17] 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>

[18] The Commission has to prove that the Claimant was suspended from 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 was suspended from his job because of misconduct.<sup>9</sup>

[19] 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 his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.<sup>10</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] 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

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<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.

<sup>11</sup> 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.

[21] 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>

[22] 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>

[23] 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>

[24] 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 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>

[25] 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

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<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.

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

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

[26] The Claimant says there was no misconduct because his employer denied his request for accommodation on religious grounds with no explanation and without giving him a right to appeal the decision.

[27] The Commission says there was misconduct because the Claimant knew that he would be suspended due to his non-compliance with his employer's COVID-19 vaccination policy.

[28] I find that the Commission has proven that there was misconduct, because the Claimant knew that he would be suspended from his job if he went against his employer's COVID-19 vaccine policy. But he chose not to take the vaccine even after his employer denied his request for accommodation.

[29] The employer's policy says:

- employees must attest to their vaccination status by November 12, 2021,
- employees can request accommodation on one of the prohibited grounds of discrimination, and,
- employees who don't attest to their status will be considered unwilling to be vaccinated and placed on leave without pay after November 26, 2021.

[30] The Claimant told the Commission about his employer's COVID-19 vaccination policy. At the hearing, he said he understood when he had to attest to his vaccination status and what would happen if he was unwilling to be fully vaccinated.

[31] The Claimant asked his employer for an exemption from the requirement to take the COVID-19 vaccine. He did so on religious grounds. His request included an affidavit and two letters from his church confirming his membership and clarifying the church's position on COVID-19 vaccines.

[32] The Claimant's employer denied his request for religious accommodation. It said that the request didn't meet the threshold for an accommodation on the protected ground of religion. The letter gave instructions on next steps the Claimant had to take. It added that if the Claimant didn't comply with its COVID-19 vaccination policy by the timeframes outlined, he would be put on administrative leave without pay.

[33] The Claimant disagrees with his employer's decision to deny his request for accommodation. He says it assumed he doesn't hold sincere religious beliefs but doesn't have proof of this. He testified that he has the right as a person in Canada to get an explanation from his employer why they don't believe he holds sincere religious beliefs. He says his employer was just pretending that they wanted to give him an opportunity to be accommodated.

[34] I acknowledge the Claimant's frustration with his experience. This is especially so since he says two months after he was suspended, his employer said it's okay and recalled him to work. But I don't have the authority to decide whether the employer's decision to deny him a religious accommodation violated his rights. That's for another court or tribunal to decide.

[35] I find from the Claimant's testimony that he knew about his employer's COVID-19 vaccination policy. He knew about the deadlines and the consequences of not complying with the policy. The letter refusing the Claimant's request for exemption gave another opportunity for the Claimant to comply and reminded him that he would face leave without pay if he didn't. So, I find that the Claimant knew that his conduct, namely not taking the COVID-19 vaccine could result in his suspension.

[36] I find that the Claimant going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so, knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

**So, was the Claimant suspended from his job because of misconduct?**

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

[38] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

**Conclusion**

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

[40] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section