Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 1737

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (477173) dated June 30, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	December 12, 2022
Hearing participant:	Appellant
Decision date:	December 19, 2022
File number:	GE-22-2489

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant was suspended from her job.[2] The Claimant's employer says that she was suspended because she went against its vaccination practice: she didn't prove she was vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination practice isn't misconduct. She says the employer's policy was illegal and changed her employment conditions. She asked the employer to show that it had the right to require employees to be vaccinated. Then she asked for an exemption to the policy on religious grounds. But, the employer denied her request.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended because of misconduct. 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

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

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

[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 suspended from her job because she didn't meet the expectations set out in the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for the Claimant's 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

[3] See sections 30 and 31 of the Act.

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 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. 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.[8]

[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.[9] 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*.[10] Mr. McNamara was dismissed from his job under his employer's drug testing practice. He argued that he should not have been dismissed

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[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] 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.

[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)*.[11] 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.[12]

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

[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[13] 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.[14]

[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 suspending 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 practice
- the employer clearly notified the Claimant about its expectations about proving that she was vaccinated
- the employer communicated to the Claimant what it expected
- the Claimant knew or should have known what would happen if she didn't follow the practice

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

- the employer's vaccination policy went against the law and violated her human rights
- the vaccination policy was not part of her terms of employment at the time she was hired.
- she hadn't thought that she would be suspended if she didn't follow the policy

[24] The employer's vaccination policy said that employees had to provide proof of their vaccination against COVID-19 by a certain date.

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[14] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[25] The Claimant knew what she had to do under the vaccination practice 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.

[26] The Claimant argued that her vaccination status shouldn't matter because she works from home. Employees had not returned to in-office work at the time the employer put the policy in place. She doesn't think employees have returned to in-office work even now, over a year later.

[27] The Claimant also argued that the employer didn't have the right to unilaterally put this policy in place. It wasn't part of her terms of employment at the time she was hired, so she shouldn't be expected to comply with it. Further, being expected to disclose her personal medical information violates her right to privacy, and being required to get vaccinated violates the law.

[28] 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.[15]

[29] 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.

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

[31] 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.

[32] 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

[15] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.

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.

[33] 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.

[34] The Claimant said that she didn't think she would be suspended if she didn't follow the policy, because she thought the employer's policy was illegal.

[35] She submitted several laws which she said the employer's policy violated, including the *Criminal Code of Canada* and the Ontario *Employment Standards Act*.[16] I have reviewed the laws and her submissions and see no convincing evidence that the employer's policy was unlawful. My reasons are as follows:

[36] First, she refers to several laws that state collection of private information, medical records, or medical interventions cannot take place without consent. But, the employer's policy did not force employees to disclose their vaccination status, or get vaccinated, if they didn't want to. Employees could choose whether to follow the policy.

[37] Second, she says the employer's statements encouraging employees to get vaccinated or asking for their vaccination status amounts to extortion, threats, and public incitement of hate. I don't think this argument has merit. The employer is able to put in place a policy and communicate the requirements of that policy to its employees. Nothing the Claimant has provided in documentary or oral evidence shows that the employer was engaging in threatening or extortionate behaviour. Further, it is not reasonable to view an employer asking for an employee's vaccination status, in accordance with the policy requiring employees to provide proof of their vaccination, as a public incitement of hate. The Claimant may have felt that an employee's vaccination status may stigmatize them in the workplace, but there is no evidence that the

[16] See the Claimant's submissions in her notice of appeal, GD2.

employer's intention in asking for their vaccination status was to encourage hatred against them.

[38] I acknowledge that the Claimant felt she would not be suspended if she didn't follow the vaccination policy. However, the consequence of not following the employer's policy was clearly set out in the policy itself. This tells me she could have normally foreseen that by going against the policy it would be likely to result in her suspension.

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

- the employer had a vaccination practice that said employees had to prove they were vaccinated.
- the employer clearly told the Claimant about what it expected of its employees
- the employer communicated to the Claimant what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination practice

So, was the Claimant suspended because of misconduct?

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

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

Conclusion

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

[43] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section