



Citation: *TM v Canada Employment Insurance Commission*, 2023 SST 412

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

Decision

Appellant: T. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (488552) dated June 30, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: December 20, 2022

Hearing participant: Appellant

Decision date: January 25, 2023

File number: GE-22-2572

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 lose his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been 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.²

[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

¹ Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disentitled from receiving benefits.

² 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 was pressuring him to provide his private health information under threat of losing his job.

[11] The Commission says the Claimant didn't comply with his employer's COVID-19 vaccine policy. It concluded that this led to his suspension.

[12] The Claimant doesn't dispute the reason his employer suspended him. I will look at his reasons for why he thinks his employer was wrong to do so. But, I find that the Claimant lost 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.³ Misconduct also includes

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[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.⁶

[17] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[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.⁹

[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 let him go (or in this case wrongfully suspended him) or should have made reasonable arrangements (accommodations) for him.¹⁰ 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.¹¹ He lost his job because of his employer's drug testing policy. He argued that he should not have

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

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

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

been let go, since the drug test wasn't justified in the circumstances. He said that there 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.¹²

[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.¹³

[23] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹⁴ 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.¹⁵

[24] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.¹⁶ 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.¹⁷

[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

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

determine whether it was right to suspend the Claimant. Instead, I have to focus on 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 breached his employment contract when it enacted its COVID-19 vaccination policy,
- his employer could have allowed him to continue to work from home with no undue hardship to the employer, and,
- his employer could have allowed testing or considered natural immunity as alternatives to having to give proof of vaccination.

[27] The Commission says there was misconduct because the Claimant went against his employer's COVID-19 vaccination policy. It says the Claimant knew about the policy and the consequences of not following it, so his conduct constitutes misconduct under the Act.

[28] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could be suspended from his job if he didn't comply with his employer's COVID-19 vaccine policy.

[29] The Claimant's employer spoke to the Commission about its COVID-19 vaccine policy and said:

- it put in place a vaccine mandate as a condition of continued employment,
- employees had to disclose their vaccine status and to be fully vaccinated to continue working after December 14, 2021,
- employees could get medical or religious exemptions, and,

- anyone who didn't report their vaccine status or reported that they were unvaccinated would be placed on a leave of absence.

[30] The Claimant testified that he got an email communication with the details of the employer's COVID-19 vaccination policy. He said that he was on leave for all of October 2021 when his employer sent the email. But he had occasionally checked his emails online and knew that there were emails about the policy. The Claimant confirmed that he understood that if he didn't disclose his vaccine status by December 14, 2021, he would be placed on a leave of absence.

[31] The Claimant testified that he wasn't comfortable with the vaccine and wasn't sure if it was safe. He explained that he had COVID-19 and so had natural immunity. He said that he didn't say if he was vaccinated or not because he felt that this was his personal information.

[32] The Claimant says his employer's COVID-19 vaccine policy is a breach of his initial employment contract. He says that the initial contract he signed didn't refer to any vaccine or disclosure of a vaccine as a job requirement.

[33] The Claimant testified about an unpublished decision of the General Division of the Tribunal that he says is similar to his case.¹⁸ He sent a copy of the decision after the hearing.

[34] I am not bound by decisions made by other General Division Tribunal Members. I can adopt the reasoning of such decisions if I find them persuasive. But I don't in this case.

[35] In the case noted above, the claimant worked in an administrative role in a hospital. She decided not to take the COVID-19 vaccine because she has a health condition. Her employer suspended and later dismissed her. The claimant's collective

¹⁸ See *A.L. v. Canada Employment Insurance Commission*, GE-22-1889.

agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[36] The Tribunal Member in the *A.L.* case found that the Commission had presented no evidence that there was an expressed requirement arising out of the claimant's employment agreement that she take the COVID-19 vaccine. The Member also decided that no evidence had been presented that would suggest that the Claimant had an implied duty arising from her employment agreement to be vaccinated.

[37] I find the Claimant's case is different from the *A.L.* case. The Claimant testified that there is no union at his job. He added that his employment agreement with his employer was 25 years ago when he was hired and there is nothing about health concerns, medical interventions or vaccinations. I find that this is different than having a collective agreement with a specific clause related to vaccinations.

[38] Despite the difference in the two cases, it is not my role to decide whether the Claimant's employer breached his collective agreement by unilaterally changing the terms and conditions of his employment. As noted above, in *McNamara*, *Paradis* and *Mishibinijima*¹⁹ these Court cases make it clear that the focus must be on what a claimant has or has not done.

[39] The Claimant referred to three Canadian Umpire Benefits (CUB) decisions. In the first, the Umpire found that the Board of Referees found that there had been a change in the claimant's terms and conditions of employment but didn't address whether she had just cause to voluntarily leave her job. The Umpire found that it was unfair to expect the claimant to continue to work under terms and conditions that were markedly different from what she agreed to and overturned the Board's decision.²⁰

[40] In the second CUB decision, the claimant had agreed to a six-month probationary period. His employer wanted to add another three months to the period. The claimant thought that was excessive and he and the employer mutually agreed to

¹⁹ See paragraphs 20 to 24 of this decision above.

²⁰ See *Wentzell* CUB 15298.

end the employment relationship. The Umpire found that the employer had breached the terms of employment that had called for a six-month probationary period.²¹

[41] In the third CUB decision, the claimant attended an orientation session. When he reported to work the next day, he was told that there was an exercise program and that he either had to do the exercise program or leave. The Umpire found that the claimant was not completely employed by the employer and that there was no agreement between him and the employer about the conditions of employment.²²

[42] Just as with decisions made by other General Division Tribunal Members, I am not bound by CUB decisions. I note that the issue in each of the CUB decisions the Claimant raised is whether the claimants voluntarily left their jobs with just cause.

[43] I don't find that not having an agreement about vaccinations or medical interventions in his initial employment agreement means that the Claimant's employer could not create and implement a policy to address an unprecedented pandemic. And the Claimant can seek recourse at another court or tribunal if he thinks his employer has breached a term and condition of his employment.

[44] The Claimant said his employer could have let him work from home. He said he had proven this in the 20 months from March 2020 to November 2021. He also said his employer could have allowed an alternative to providing proof of vaccination or could have considered his natural immunity from having COVID-19.

[45] As already noted, it's not my role to decide if the Claimant's employer could have accommodated him or given him alternatives to proving that he had taken the COVID-19 vaccine.

[46] I understand that the Claimant was concerned about taking the COVID-19 vaccine, and that he didn't think he should have to give his medical information to his employer. But I find from his testimony that he knew about his employer's COVID-19 vaccination policy. He knew about the deadlines and what would happen if he went

²¹ See *McDermid* CUB 41225.

²² See *MacLeod* CUB 58443

against the policy. And the Claimant testified that he didn't pursue a medical or religious exemption.

[47] I find that the Claimant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to say if he was vaccinated. 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.

[48] The Claimant asked in his notice of appeal what the point is to pay into the EI program when he can't get benefits when he truly needs them.

[49] I sympathize with the Claimant in the circumstances. But the purpose of the Act is to compensate claimants who lose their jobs involuntarily and are out of work.²³ The Act is an insurance plan. Like an insurance plan, a claimant has to meet the conditions of the plan to get EI benefits.²⁴

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

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

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

²³ See *Caron v Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.

²⁴ See *Pannu v. Canada (AG)*, 2004 FCA 90.

Conclusion

[52] 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.

[53] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section