



Citation: *PP v Canada Employment Insurance Commission*, 2023 SST 462

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

Decision

Appellant: P. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (512848) dated August 18, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: In person

Hearing date: January 11, 2023

Hearing participant: Appellant

Decision date: January 27, 2023

File number: GE-22-3095

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 her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from her job. The Claimant's employer says that she was suspended because she went against its vaccination policy: she didn't get 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 lost her 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 her 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 her 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 her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from her job?

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

[10] The Claimant says her employer required employees to be fully vaccinated in order to work. She says she didn't want to get vaccinated because of her religious beliefs. So, her employer put her on a forced leave of absence.

[11] The Commission says the Claimant didn't comply with her employer's COVID-19 vaccine policy. It decided that the Claimant was suspended as a direct result of this.

[12] The Claimant's employer issued a record of employment (ROE). In the comments section, it says that it put the Claimant on an involuntary leave of absence due to non-compliance with its COVID-19 vaccine policy.

[13] Although she says it was forced, the Claimant doesn't dispute the reason her employer put her on a leave of absence. I find that the involuntary leave of absence is the same as a suspension. The Claimant didn't do what her employer required to do. Even though she says her employer violated her human rights, I find that the Claimant was suspended from her job because she went against her employer's COVID-19 vaccination policy.

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

[14] The reason for the Claimant's suspension is misconduct under the law.

[15] 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.

[16] 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 conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[17] 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.⁶

[18] 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

[19] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.⁹

[20] 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 her go (or in this case wrongfully suspended her) or should have made reasonable arrangements (accommodations) for her.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

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

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 *Mishibinijima 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.

[21] 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 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.

[22] 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

[23] 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

[24] 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

[25] 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

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

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.

employee did or failed to do; it is not relevant that the employer didn't accommodate them.¹⁷

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

[27] The Claimant says there was no misconduct for several reasons, including that:

- Health Canada and the province didn't mandate vaccines; they only recommended them,
- there is no segregation between the vaccinated and unvaccinated in public,
- her employer ignored recommendations from her doctor and proof from her faith leader to support her request for accommodation, and,
- her union supports her and requests that she get EI benefits.

[28] The Commission says there was misconduct because the Claimant willfully decided not to comply with her employer's COVID-19 vaccine policy. It says the Claimant was aware of the policy and the consequences if she didn't comply.

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

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

[30] The Claimant attached a copy of her employer's COVID-19 vaccine policy to her notice of appeal. She said her employer started speaking about it in the fall of 2021.

The policy says that:

- employees must provide proof of full COVID vaccination no later than February 25, 2022,
- employees must request accommodation before February 25, 2022, if doing so,
- employees who refuse to provide their vaccination status will be deemed unvaccinated, and,
- employees who aren't fully vaccinated or don't say if they're vaccinated can't enter the workplace, will be placed on indefinite administrative leave without pay, and are subject to discipline up to and including termination.

[31] The Claimant told the Commission that she didn't want to get vaccinated due to her religious beliefs. She asked her employer to exempt her from having to take the COVID-19 vaccine. She supported her request with a letter from her faith leader. The letter says that the Claimant's religion precludes her from accepting any products that have any relation to abortion or other derivatives that benefit from it. The letter also states, "[b]elow is a statement which either forbids totally or recommends against receiving the COVID-19 [v]accine".

[32] The Claimant said her employer denied her request for accommodation. She said her employer chose to discriminate against her sincerely held religious beliefs.

[33] The Claimant also sent her employer a letter from her doctor. She testified that she had COVID-19 but didn't get tested formally at the time. Later, her doctor sent her for a specific test that measures antibodies. The results showed that she had about 30 times the antibodies of a normal person. She said this proved that she's not a danger. But she said her employer rejected that as well.

[34] I accept as fact that the Claimant's employer denied her request for accommodation. I understand that she doesn't agree with her employer's decision not to approve her religious-based request. She says her employer didn't prove that she doesn't have a sincerely held religious belief. I also understand that she disagrees with her employer's decision not to consider her immunity to COVID-19 from a previous infection.

[35] As noted above, it's not my role to decide if the Claimant's employer should have accommodated her or to decide if her employer discriminated against her religious beliefs. I can only look at what the Claimant did and whether that's misconduct under the Act. I note that the Claimant has filed a grievance with her union and is in the process of starting an application with the Ontario Human Rights Tribunal where she can address her concerns about discrimination and wrongful suspension.

[36] I asked the Claimant about what her employer's COVID-19 vaccine policy says about employees who aren't fully vaccinated or don't disclose their vaccination status. She said she knew what would happen if she didn't get vaccinated, but she was convinced she would be accommodated because the grounds she presented deserve accommodation.

[37] I find from the Claimant's testimony that she knew about her employer's COVID-19 vaccination policy. She knew about the deadlines and the consequences of not complying with the policy. Even though she says she was convinced her employer would accommodate her, her employer denied her request. So, I find she should have known that not taking the vaccine would result in her suspension.

[38] The Claimant doesn't agree with her employer's COVID-19 vaccine policy. She testified that when her employer created the policy, maybe the pandemic was strong. But she said that at the end of April 2022 when she was suspended, restrictions had been lifted because the emergency was no longer there. She also said that she was working online then, so maybe her employer could have suspended her when in-person work resumed.

[39] Again, whether the Claimant's employer was right to create and implement a policy to deal with COVID-19 without a government mandate isn't for me to decide. It is also not my role to decide if her employer was wrong to suspend her at a time when COVID-related restrictions for the public were being lifted.

[40] The Claimant also testified about her experience as a single mother of a daughter who has mental health challenges. She said she's the sole breadwinner for herself, her daughter, and her retired mother. She said it isn't right that she's in this position and that now she can't get EI benefits because of an arbitrary demand from, and decisions made by her employer.

[41] I sympathize with the Claimant in the circumstances. I acknowledge that the last year or so must have been very difficult for her and her family. But the purpose of the Act is to compensate claimants who lose their jobs involuntarily and are out of work.¹⁸ The Act is an insurance plan. Like an insurance plan, a claimant has to meet the conditions of the plan to get EI benefits.¹⁹ In this case, I don't find that the Claimant does.

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

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

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

¹⁸ See *Caron v Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.

¹⁹ See *Pannu v. Canada (AG)*, 2004 FCA 90.

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

Conclusion

[45] 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.

[46] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section