



Citation: *PP v Canada Employment Insurance Commission*, 2023 SST 529

**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 (473561) dated May 20, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: January 4, 2023

Hearing participant: Appellant

Decision date: January 25, 2023

File number: GE-22-2526

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 lose 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 say whether she had been 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 the reason her employer placed her on unpaid leave is because she made the personal decision not to tell her employer if she was vaccinated against COVID-19. She told her employer that she couldn't adhere to its COVID-19 policy. But she says her leave of absence against her will is actually a forced, unpaid lay-off.

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

[12] The Claimant's employer issued a record of employment. It listed the reason for issuing it as a leave of absence.

[13] I don't agree with the Claimant's statement that she was laid off. Her employer issued the record of employment using the code for a leave of absence, not the code for a shortage of work or end to a contract. There is no suggestion that the Claimant stopped working for economic reasons.

[14] The Claimant agrees that she was placed on a leave of absence because she didn't say if she was vaccinated against COVID-19. I find that she didn't do something her employer asked her to do. This led the employer to place her on a leave of absence. So, 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?

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

[16] 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.

[17] Case law says, 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

[18] 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

[19] 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

[20] 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

[21] 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 her employer wrongfully let her go (or in this case wrongfully suspended her) or

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.

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.

[22] 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.

[23] 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

[24] 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

[25] 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

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

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.

[26] 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

[27] 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.

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

- vaccination was not a condition of employment when she was first hired, and it isn't in her collective agreement,
- her employer denied her information that would have allowed her to make an informed decision, which is her right by law, and,
- her employer can't institute a policy that requires a medical treatment or else she would face termination.

[29] The Commission says there was misconduct because the Claimant was made aware of her employer's COVID-19 vaccination policy. It says the Claimant knew that going against the policy would lead to her suspension.

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

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

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

[31] The Claimant worked as a service director for an airline. Her employer put in place a COVID-19 vaccination policy effective September 10, 2021. According to the policy:

- all employees had to be fully vaccinated by October 31, 2021,
- proof of full vaccination had to be recorded in the employer's tool by October 30, 2021, otherwise employees would be considered unvaccinated and in non-compliance with the policy,
- employees could apply for accommodation for reasons including medical, religious, or other prohibited grounds of discrimination, and,
- unvaccinated employees who didn't upload proof of vaccination in the employer's tool would be placed on unpaid leave without benefits for six months as of October 31, 2021.

[32] The Claimant said her employer announced its COVID-19 vaccine policy by email on August 25, 2021. She said it issued a letter on September 9, 2021, outlining the consequences of not reporting vaccine status by the deadline. In response, the Claimant sent her employer a request for accommodation and other documents on October 29, 2021.

[33] The Claimant asked her employer for a "spiritual accommodation". But in the same letter, she asked her employer to respond to a Notice of Potential Liability and Notice(s) to Disclose if no reasonable accommodation was available. The Claimant testified that her employer denied her request for accommodation.

[34] The Claimant said she chose not to get vaccinated because of a real fear for her health and life. But she testified that she didn't speak to a doctor so she could request accommodation on medical grounds. She said her decision on vaccination was based on her own research. She said this led her to insist that her employer disclose the contents of the COVID-19 vaccine to her.

[35] I accept the Claimant's testimony as fact and find that her employer didn't approve her request for accommodation on religious grounds. I also find that she didn't ask for accommodation on medical grounds. The Claimant testified about the details of her employer's COVID-19 vaccination policy. So, I find that she knew what her employer required her to do, but she didn't follow the policy even after her employer denied her request for accommodation.

[36] The Claimant appealed the Commission's reconsideration decision using a 190-page submission. She argues in the submission that her employer broke conventions and contracts, that the employer's and union's actions may be illegal, and that her conduct should not be considered as misconduct.

[37] In her submission, the Claimant refers to and/or includes excerpts from international instruments, the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, the *Canadian Charters of Rights and Freedoms* (Charter), and the *Non-Genetic Discrimination Act*. The submission also includes articles, reports, court decisions, a Memorandum of Agreement between her union and employer about arbitration of grievances relating to the COVID-19 vaccination policy, and an excerpt from her collective agreement.

[38] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Claimant has cited some of these in her submission.

[39] I understand that the Claimant believes that her employer's vaccine policy is unconstitutional and unlawful. But I am not allowed to consider whether an action taken by an employer violates a claimant's rights. I am also not allowed to make rulings on the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant must go to a different tribunal or a court to address that.

[40] The Claimant argues that the Commission has to prove and establish that she breached her employment contract. She referred to a recent, unpublished decision made by a Tribunal Member of the General Division in support of her argument.¹⁸

[41] 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.

[42] In the *A.L.* case, 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 agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[43] The Tribunal Member in *A.L.* 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.

[44] I find the Claimant's case is different from that in the case she submitted. Whereas in the case noted above, the claimant's collective agreement refers to recommended and required vaccines, the Claimant testified that there is no language in her collective agreement for a vaccination policy. She said that when she was hired, vaccinations were never a requirement, and it is not in the collective agreement.

[45] 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 and arbitrarily changing the terms and conditions of his employment. Nor is it my role to determine whether the employer's policy is invalid or unlawful because it isn't legislated or enforced by law or provincial or federal health order. As noted above, in *McNamara*,

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

*Paradis and Mishibinijima*¹⁹ these Court cases make it clear that the focus must be on what a claimant has or has not done.

[46] I don't find that not having an article in her collective agreement about vaccinations in her 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 she thinks his employer has breached her employment contract.

[47] 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. So, I find that the Claimant knew that not saying if she was vaccinated against COVID-19 vaccine would likely result in her suspension.

[48] The Claimant sent the Tribunal a statement from her employer issued on September 26, 2022. She said the statement contradicts its policy that led to her "lay-off status". The Claimant quoted the employer as saying that air travel was safe, and the measures it had in place were not justified by science.

[49] I note that the employer's statement relates to the lifting of masking, testing and other measures imposed by the Government of Canada. It does not speak to its COVID-19 vaccination policy. So, I don't find that it is contradictory.

[50] The Claimant testified that she had always acted in good faith with her employer and tried to find a resolution in as respectful a way as she could. She said her employer was very disrespectful in ignoring her requests.

[51] I understand that the Claimant had concerns about taking the COVID-19 vaccine. I understand that she feels her employer was wrong to suspend her. I also accept as fact that the Claimant has now returned to work.

[52] Despite the Claimant's concerns, I find that going against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional

¹⁹ See paragraphs 22 to 26 of this decision above.

choice not to say if she was vaccinated. 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?

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

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

Conclusion

[55] 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.

[56] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section