Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 589

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. M.
Representative:	H. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (521333) dated August 26, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	February 15, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	February 23, 2023
File number:	GE-22-3332

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant was suspended from his job.[1] The employer says that he was suspended for non-compliance with its vaccination policy.

[4] Even though the Appellant 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 Appellant was suspended due to misconduct.[2] Because of this, it decided that he is disentitled from receiving EI benefits.

Matters I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party. The employer did not respond. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

---

[1] The Appellant's employer put him on an unpaid leave of absence from work. Since the employer initiated the Appellant's separation from employment, this is considered a suspension.
[2] Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Issue

[7] Was the Appellant suspended from his 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] I have to decide two things to answer the question of whether the Appellant was lost his job because of misconduct. First, I must determine why the Appellant was dismissed. Then, I must determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended?

[10] Both parties agree that the Appellant was suspended from his job because he went against the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for his suspension misconduct under the law?

[11] The reason for the Appellant's suspension is misconduct under the law.

[12] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law explains how to determine whether the Appellant'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.

[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 Appellant doesn't have to have

---

[3] See sections 30 and 31 of the Act.
[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v his Majesty the Queen*, A-402-96.

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.[6]

[14] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward the employer and that there was a real possibility of being let go from his job because of that.[7]

[15] The Commission must prove that the Appellant lost his job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost his 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 Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant 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 policy. He argued that he should not have been dismissed 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 due to 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.

---

[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.

[18] In response to Mr. McNamara's arguments, the FCA stated that it has consistently found 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 following 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 decided by 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 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-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety

---

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

and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[15]

[22] In dismissing the case, the Federal Court wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises…the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[16]

[23] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[17]

[24] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[25] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

---

[15] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[16] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

[26] The Commission says that there was misconduct because:

- the employer had a vaccination policy and communicated that policy to the Appellant
- the employer's policy required the Appellant be vaccinated against COVID-19 or have an approved exemption.
- the Appellant knew what he had to do under the policy
- he made a personal choice to not get vaccinated
- the employer suspended him because he did not comply with its vaccination policy

[27] The Appellant says that there was no misconduct because:

- the employer didn't clearly communicate its vaccination policy
- the deadline for vaccination kept changing
- employer's vaccination policy went against the law and his human rights
- the employer didn't offer any alternatives to the vaccination, such as testing
- the employer unreasonably denied his religious exemption request
- the employer denied all exemption requests, showing that it did not actually consider the Appellant's request
- the COVID-19 vaccine isn't effective at reducing transmission of COVID-19, so mandating vaccination didn't improve employee health or safety
- the vaccination policy was not a condition of employment when he was hired
- his leave was not disciplinary, so it should not be considered misconduct for EI purposes

[28] The evidence is clear that the employer implemented a mandatory vaccination policy. The Appellant said that he was not given a written copy of the policy, but was aware of the policy and its requirements because it was announced during morning

meetings. Even though he wasn't given a copy of the policy, I find the Appellant was aware of the policy and knew that he would be put on unpaid leave if he was not vaccinated or had an approved exemption because he testified to that effect.

[29] The Appellant asked for an exemption to the policy on religious grounds, but the employer denied his request.

[30] The Appellant's representative said she is in contact with numerous employees who were suspended from their jobs with the same employer. She said that some of these employers had requested exemptions from the vaccination policy and all of their exemption requests were denied. She argues that this shows the employer was not approving any exemptions to the policy.

[31] I don't find this argument persuasive because the Appellant is basing her argument on the experience of employees who were suspended from their jobs because of the vaccination policy. It is plain and obvious that any employees who had requested an exemption and had later been suspended from their job for non-compliance with the vaccination policy would have had their exemption request denied. An employee who had their exemption request approved would not have been suspended because they would have been in compliance with the employer's vaccination policy. Therefore, they would not be part of the social media group that the Appellant had surveyed for this information. As this information is not probative, I have put no weight on this argument.

[32] I find the Appellant knew that his employer instituted a mandatory vaccination policy and knew what would happen if he didn't follow it because he testified that he was aware of the policy and the consequences of not complying. While exemptions were available, an exemption was never guaranteed to the Appellant.

[33] The Appellant's representative stated that the deadlines in the policy kept changing. The evidence supports that the policy changed its deadline for vaccination at least once. However, there is no indication that there were significant changes to the rest of the policy. While the policy deadline seems to have been extended at least one

time, it appears the conduct that would be required to be in compliance with the policy, getting vaccinated or having an approved exemption, stayed the same. So, I don't find that the deadline changes prevented the Appellant from being able to follow the policy.

[34] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies 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 Appellant's employment.[18]

[35] The Appellant submits that the employer's policy violated the law and his human rights.

[36] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45,[19] that protect rights and freedoms.

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

[38] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to a claimant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating his Charter rights.

[39] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

---

[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] The Appellant mentioned this a few times and submitted that it gave him the right to refuse unsafe work.

[40] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[20]

[41] The Appellant may have other recourse to pursue his claims that the employer discriminated against him. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[21]

[42] The Appellant also argued that the vaccine is not effective at reducing transmission of COVID-19. While the employer may have stated that the matter of health and safety was the purpose of its mandatory vaccination policy, I will make no findings about the effectiveness of the COVID-19 vaccine as it is beyond my scope and my expertise.

[43] I also understand that the employer didn't put the Appellant on disciplinary leave. He argues that because his leave was not disciplinary, it should not be viewed as misconduct for EI purposes.

[44] The Courts have considered this question and found that an employer's characterization of the grounds of an employee's dismissal is not determinative of whether the employee lost their job because of misconduct within the meaning of the Act.[22] As a result, the employer's characterization of the reason the Appellant was not working is not determinative of the issue.

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

- the employer had a vaccination policy that said employees had to be vaccinated or have an approved exemption
- the employer clearly told the Appellant about what it expected of its employees in terms of being vaccinated

---

[20] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[21] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102.
[22] See *Canada (Attorney General) v Boulton,* 1996 FCA 1682.

- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

So, was the Appellant suspended because of misconduct?

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

[47] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew or ought to have known that failing to comply with the employer's policy was likely to cause his to be dismissed, and he chose not to comply.

Conclusion

[48] The appeal is dismissed.

[49] The Commission has proven that the Appellant was dismissed from his job because of misconduct. This means the Appellant is disqualified from receiving EI benefits.

Catherine Shaw
Member, General Division – Employment Insurance Section