



Citation: *JW v Canada Employment Insurance Commission*, 2022 SST 1726

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

Decision

Appellant: J. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (464406) dated May 25, 2022 (issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Videoconference

Hearing date: September 27, 2022

Hearing participant: Appellant

Decision date: November 25, 2022

File number: GE-22-1991

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost 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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go 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. She couldn't be vaccinated because of her religious beliefs. She asked for a religious exemption, but the employer's policy didn't offer exemptions on religious grounds.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matters I have to consider first

The employer is not a party to this 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 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.

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

I accepted the Claimant's post-hearing document

[7] At the hearing, the Claimant stated that she was dismissed from her employment. She provided her letter of termination after the hearing. I have accepted this document into evidence because it is relevant to the Claimant's separation from employment.

Issue

[8] Did the Claimant lose her job because of misconduct?

Analysis

[9] 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

[10] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[11] Both parties agree that the Claimant lost her job because she went against her employer's vaccination policy: she wasn't vaccinated against COVID-19. I see no evidence to contradict this, so I accept it as fact.

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

[12] The reason for the Claimant's dismissal is misconduct under the law.

[13] 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

² See sections 30 and 31 of the Act.

misconduct—the questions and criteria to consider when examining the issue of misconduct.

[14] 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

[15] 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

[16] 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.⁷

[17] 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.⁸ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[18] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.⁹ Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed

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

⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ 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.

[19] 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.

[20] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.¹⁰ 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.¹¹

[21] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.¹² 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

¹⁰ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹¹ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

¹² 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.¹³

[22] 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 dismissing 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.

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

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about getting vaccinated
- the employer spoke to the Claimant several times to communicate what it expected
- the Claimant knew or should have known what would happen if she didn't follow the policy

[24] The Claimant says that there was no misconduct because she was unable to get vaccinated due to her religious beliefs. She asked the employer several times about getting a religious exemption, but the employer's communications were unclear about whether the policy would apply to her and if an exemption would be offered.

[25] The Claimant worked as a child care professional. On October 5, 2021, the provincial government put in place a Public Health Order that required employees of "care locations" to provide proof of full vaccination.

[26] The Claimant said her employer communicated this directive to the staff, but was uncertain about whether the Public Health Order (Order) would apply to them. She

¹³ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

spoke to the employer's Human Resources (HR) representative and was told that if they were covered by the Order, then she would face possible termination if she wasn't vaccinated.

[27] On October 22, 2021, the Claimant took a four-week stress leave from work due, in part, to the pressure she was feeling about the vaccine requirement.

[28] On October 25, 2021, the employer put in place its own policy requiring employees to be fully vaccinated against COVID-19 or have a medical exemption by October 26, 2021.¹⁴ The Claimant didn't get this email because she was on leave from work. However, her colleague forwarded the email to her on October 27, 2021. So, the Claimant was notified of the employer's policy on that date.

[29] The HR representative also called the Claimant on October 27, 2021, to tell her about the policy. She asked him for a religious exemption and he told her that he would give her one if he could, but

[30] The employer's vaccination policy says that staff can request a medical exemption through the Provincial Health Office (PHO). Staff who are not at least partially vaccinated will not be permitted to work as of October 26, 2021. And employees returning to work after a leave of absence would need to be in compliance with the policy at the time of their return.¹⁵

[31] The Claimant applied to the PHO for a medical exemption shortly after the employer's policy was announced. But, the PHO denied her request.

[32] The Claimant was scheduled to return to work on November 22, 2021. On November 17, 2021, the HR representative reached out to her by email reminding her that she will need her proof of vaccination or medical exemption by that date.

¹⁴ See GD6-5 to GD6-7. The Commission provided a copy of a different vaccination policy in the Reconsideration File. The Claimant testified that this was not the policy that was communicated to her and she had never seen that policy before her appeal to the Tribunal. She provided a copy of the employer's policy that was in place at the time she was let go. I have relied solely on the copy of the employer's policy provided by the Claimant in my decision.

¹⁵ See GD6-6.

[33] The Claimant responded to the HR representative by asking for a religious exemption to the vaccination requirement. But, the HR representative states that he can't consider her request for a religious exemption. Exemptions may only be granted by the PHO or a medical health officer. He says that by November 22, 2021, if she is not vaccinated and does not intend to be vaccinated then she will be "terminated effective immediately."¹⁶

[34] The Claimant says that she was denied the ability to apply for a religious exemption. When she spoke to the HR representative on October 27, 2021, he indicated that he would give her an exemption on religious grounds if it was up to him. But, then he refused to consider her request for a religious exemption to the policy.

[35] I don't find this argument persuasive. I understand that the HR representative expressed that he would give the Claimant a religious exemption if he could, but the employer's policy clearly sets out that only exemptions on **medical grounds** are available. The policy also states that exemptions have to be requested from the PHO. So, the HR representative was not able to apply for an exemption on religious grounds, because the employer's policy did not have any provisions offering exemptions on that basis.

[36] The Claimant was aware of the exemption provisions in the employer's policy. She asked for an exemption from PHO shortly after the policy came into effect. The PHO denied her exemption request. This tells me the Claimant knew that she was not exempted from the requirements of the employer's vaccination policy.

[37] The Claimant knew what she had to do under the vaccination policy 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 on October 27, 2021, November 17, 2021, and November 19, 2021.

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

¹⁶ See the email exchange from GD3-50 to GD3-52.

- the employer had a vaccination policy that said she had to be fully vaccinated or have a medical exemption.
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated
- the employer spoke to the Claimant several times to communicate what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

So, did the Claimant lose her job because of misconduct?

[39] Based on my findings above, I find that the Claimant lost her job because of misconduct.

[40] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

[41] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[42] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section