



Citation: *RS v Canada Employment Insurance Commission*, 2022 SST 1728

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

## Decision

**Claimant:** R. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (485953) dated July 11, 2022 (issued by Service Canada)

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**Tribunal member:** Bret Edwards

**Type of hearing:** Videoconference

**Hearing date:** December 7, 2022

**Hearing participant:** Claimant

**Decision date:** December 30, 2022

**File number:** GE-22-2679

## Decision

[1] The appeal is dismissed. I disagree 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 be suspended from his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was suspended from his job. The Claimant's employer said that he didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, he says that his employer's mandatory COVID-19 vaccination policy is illegal. He also says that he didn't have much time to follow their policy before his employer suspended him.

[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] 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 Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

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<sup>1</sup> Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

## **Why was the Claimant suspended from his job?**

[8] I find that the Claimant was suspended from his job because he didn't follow his employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission agree on why the Claimant was suspended from his job. The Claimant says that he was suspended because he didn't follow his employer's COVID-19 vaccination policy.<sup>2</sup> His employer also says that he was suspended for this reason.<sup>3</sup>

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

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

[11] 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.

[12] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.<sup>6</sup>

[13] 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 suspended because of that.<sup>7</sup>

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<sup>2</sup> GD3-40.

<sup>3</sup> GD3-46.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[14] 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.<sup>8</sup>

[15] The law doesn't say I have to consider how the employer behaved.<sup>9</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>10</sup>

[16] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>11</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*. 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 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.<sup>12</sup>

[18] In response to Mr. McNamara's arguments, the Court stated that it has constantly said that the question in misconduct cases is "not to determine whether the

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<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>9</sup> See section 31 of the Act.

<sup>10</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>12</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.”<sup>13</sup>

[19] 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.<sup>14</sup>

[20] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*. 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.<sup>15</sup>

[21] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*. 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.<sup>16</sup>

[22] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant here. My role is not to look at the employer’s conduct or policies and determine whether they were right in suspending the Claimant. Instead, I

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<sup>13</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>14</sup> *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>15</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>16</sup> *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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 Claimant's employer had a mandatory COVID-19 vaccination policy, the Claimant knew about the policy, and he knew that he could be suspended if he didn't follow it, but decided not to follow it anyway.<sup>17</sup>

[24] The Claimant says that there was no misconduct because his employer's mandatory COVID-19 vaccination policy is illegal and his employer didn't give him much time to follow it before they suspended him.<sup>18</sup>

[25] The Claimant told the Commission<sup>19</sup> and testified that:

- His employer's mandatory COVID-19 vaccination policy is illegal because they were trying to force people to take an experimental vaccine.
- His employer's policy is also illegal because his original work contract didn't have any vaccine requirements.
- He, not his employer, has the right to choose what he puts into his body, and his beliefs and freedom prevented him from following his employer's policy.

[26] The Claimant also testified that:

- His employer didn't give him much time to follow their mandatory COVID-19 vaccination policy before they suspended him.
- His employer announced their mandatory COVID-19 vaccination policy via email on September 28, 2021.
- He saw the September 28, 2021 email, but thought it applied to a different part of his workplace, so he didn't read all of it.

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<sup>17</sup> GD4-3.

<sup>18</sup> GD2-5.

<sup>19</sup> GD3-40, GD3-50.

- His employer had previously sent out lots of emails about COVID-19 protocols, like masking, but he still didn't think the September 28, 2021 email applied to him.
- On October 3, 2021, he put in a vacation pass for the Thanksgiving weekend.
- His boss then asked him if he had seen his employer's mandatory COVID-19 vaccination policy and when he would follow it (by declaring his vaccination status and getting vaccinated).
- He told his boss he hadn't seen the policy, so she sent him the September 28, 2021 email and he then realized the policy applied to everyone in his workplace.
- He went back and read the September 28, 2021 email, which said he had to declare his vaccination status by October 8, 2021 and if he didn't do this, he would be put on leave without pay.
- He was going to be on vacation by October 8, 2021, so he would have had to declare his vaccination status sooner than that.
- He didn't feel like he had a lot of time to decide what to do (about 72 hours at that point) and ultimately decided not to declare his vaccination status, so he was put on leave without pay.

[27] I find that the Commission has proven there was misconduct for the following reasons.

[28] I find the Claimant committed the actions that led to his suspension, as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[29] I further find the Claimant's actions were intentional as he made a conscious decision not to follow his employer's mandatory COVID-19 vaccination policy.

[30] There is clear evidence that the Claimant knew about his employer's policy and chose not to follow it. He testified that he was made aware of it and decided not to declare his vaccination status by the deadline they gave him, as mentioned above.

[31] I note that there is evidence that the Claimant's employer announced their mandatory COVID-19 vaccination policy on September 28, 2021 by emailing employees, including the Claimant. The Claimant's employer told the Commission that they did this.<sup>20</sup> The Claimant also testified that he received this email, as mentioned above.

[32] I acknowledge that the Claimant thought the September 28, 2021 email didn't apply to him personally, so he didn't read the entire thing and wasn't aware his employer's policy affected him until he spoke with his boss a few days later.

[33] Unfortunately though, I don't accept the Claimant's explanation. His employer's mandatory COVID-19 vaccination policy clearly states that all existing and future employees must provide proof of full COVID-19 vaccination.<sup>21</sup> This information is near the beginning of the policy (in the first full paragraph), so I find it is reasonable to believe the Claimant would have at least read that far, which means he should have known that it did in fact apply to him.

[34] I also note that the Claimant testified that his employer had previously sent out information about COVID-19 safety protocols, like masking, as mentioned above. Since he says his employer did this, I find that it's reasonable to believe that he should have realized that the mandatory COVID-19 vaccination policy they announced on September 28, 2021 might have applied to him and therefore taken the time to at least read their entire email to confirm whether this was in fact the case.

[35] So, I find that the Claimant could have read his employer's entire email on September 28, 2021 to confirm whether their mandatory COVID-19 vaccination policy applied to him, but simply chose not to, which shows that his actions were intentional.

[36] In other words, I find that the Claimant was solely responsible for only finding about his employer's policy on October 3, 2021, which could have been avoided if he had read his employer's entire email on September 28, 2021.

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<sup>20</sup> GD3-46.

<sup>21</sup> GD3-52.



[37] Even if I were to accept the Claimant's explanation that he didn't find out about his employer's policy sooner because he misunderstood the September 28, 2021 email, I note that he told the Commission and testified that he wouldn't share his vaccination status with his employer even if he was fully vaccinated.<sup>22</sup> I find this this statement shows that he had no intention of following his employer's policy no matter how much time he had to do that.

[38] I also acknowledge that the Claimant feels that his employer's policy is illegal because it wasn't part of his original work contract and he didn't consent to it.

[39] Unfortunately, I find the Claimant's argument about their employer's policy being illegal isn't relevant here. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I need to focus on the Claimant's actions leading to his suspension and whether he knew his actions could lead to him being suspended. If the Claimant wants to pursue this argument, he needs to do that through another forum.

[40] So, while I acknowledge the Claimant's concerns about his employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that he made a conscious decision not to follow the policy. He chose not to fully read their September 28, 2021 email announcing the policy and then didn't declare his vaccination status by the deadline they gave him, which shows that his actions were intentional.

[41] I also find the Claimant knew or should have known that refusing to follow his employer's mandatory COVID-19 vaccination policy could lead to him being suspended from his job.

[42] I acknowledge that the Claimant feels his employer didn't give him enough time to follow their policy before they suspended him. But, unfortunately, I disagree.

[43] I note that the Claimant's employer told the Commission that employees were required to get their first dose of the COVID-19 vaccine by October 8, 2021 and be fully

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<sup>22</sup> GD3-40.

vaccinated by the end of October 2021 or they would be put on an unpaid leave of absence.<sup>23</sup>

[44] I also note that the Claimant's employer told the Commission that the Claimant was put on leave after October 11, 2021 because he didn't declare his vaccination status by October 8, 2021 (so say he was vaccinated) and didn't indicate that he was going to change his position.<sup>24</sup>

[45] I further note that the Claimant confirmed that his employer's September 28, 2021 email said that employees who didn't declare their vaccination status by October 8, 2021 would be put on unpaid leave and that his boss also told him this when they spoke on October 3, 2021, as mentioned above.

[46] I have already found that the Claimant could or should have known about his employer's mandatory COVID-19 vaccination policy (and the consequences of not following it) on September 28, 2021 if he had read their entire email sent that day, but simply chose not to, as mentioned above.

[47] I have also already found that the Claimant indicated that he wouldn't tell his employer his vaccination status even if he was fully vaccinated, which shows that he wasn't going to follow their policy no matter how much time he had to do that, as mentioned above.

[48] So, while I acknowledge the Claimant's arguments, I find that the evidence clearly shows that the Claimant knew or should have known that he could be suspended if he didn't follow his employer's mandatory COVID-19 vaccination policy.

[49] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his suspension (he refused to follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being suspended.

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<sup>23</sup> GD3-46.

<sup>24</sup> GD3-46.

**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.

**Conclusion**

[51] 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.

[52] This means that the appeal is dismissed.

Bret Edwards  
Member, General Division – Employment Insurance Section