Citation: *PS v Canada Employment Insurance Commission*, 2023 SST 501

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	P. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (512006) dated August 17, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	January 19, 2023
Hearing participant:	Appellant
Decision date:	February 8 2023
File number:	GE-22-3051

Decision

[1] The appeal is dismissed. I disagree with the Appellant (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 disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Claimant was first suspended then terminated from her job. The Claimant's employer told the Commission that the Claimant was suspended without pay because she went against its vaccination policy: she refused to be vaccinated.

[4] The Claimant agrees this is the reason why she is no longer working. However, she does not agree it is misconduct.

[5] The Commission accepted the employer's reason for the suspension. The Claimant knew, or ought to have known, that the consequences of refusing to comply included unpaid leave. The Commission decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Issue

[6] Did the Claimant lose 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.[1]

[1] See sections 30 and 31 of the Act.

[8] An employee who loses their job due to “misconduct” is not entitled to receive EI benefits; the term “misconduct” in this context refers to the employee’s violation of an employment rule.

[9] 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?

[10] I find that the Claimant was put on a mandatory and unpaid leave of absence effective January 12, 2022, and then dismissed on January 27, 2022. This is because she did not comply with her employer’s vaccination policy.

[11] The Commission says the Claimant’s employer put her on leave without pay (suspension) as of January 12, 2022, because she failed to comply with the vaccine policy. The employer then dismissed her effective January 27, 2022, as she remained non-compliant with the policy. The employer had advised the Claimant that she would be dismissed if she continued not to be in non-compliance with the vaccination policy.

[12] The Claimant agrees this is the reason why she is no longer working there. However, she disagrees this is misconduct, and she should be entitled to employment insurance.

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

[13] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

What misconduct means under the EI Act.

[14] 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.

[15] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule. The Federal court of Appeal has stated that "the breach must have been performed or the omission made willfully, that is to say consciously, deliberately or intentionally."[3]

[16] 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] I have to focus on the EI 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.[9] I can

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[3] *Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*] at para 9
[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 *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[20] 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.[10]

What the Commission and the Claimant said

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

- The employer had a vaccination policy which states unpaid leave and termination for individuals who do not comply.
- The employer communicated the policy to all staff.
- The communication clearly notified the Claimant about its expectations regarding vaccination.
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[22] During the hearing, the Claimant agreed to the above. She agreed the policy was implemented, communicated and that it could result in suspension and/or termination. The Claimant, however, does not agree it was misconduct. She should not have been placed on unpaid leave and should not have been dismissed.

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

- She paid her dues.
- She was an outstanding employee for almost 20 years.

[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The employer changed a condition of employment. Had this policy been in place when she started, she would not have accepted the job.
- She believes in her own bodily autonomy.
- The vaccine was still experimental.
- Her collective agreement recognizes that employees have the right to refuse any recommended or required vaccination.[11]
- Her union was not consulted as part of this unilateral change.
- A Claimant in a similar situation was recently granted employment insurance by the General Division of the Tribunal. The Claimant provided Tribunal file number GE-22-1889.[12]

[24] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable. I also can't determine if a claimant's dismissal or suspension was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.[13]

[25] The same principle from the preceding paragraphs applies to religious beliefs and their exemptions. I can only consider one thing: whether what the Claimant did or failed to do is misconduct under the EI Act. The fact that the employer denied her religious exemptions is not something the Tribunal has any authority over. The recourse available to her is through the appropriate tribunal, collective agreement, or court.

[26] The Claimant says that the threshold for misconduct has not been met as she tried everything to comply. I accept the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have

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[11] See GD7.
[12] This is an unredacted full decision circulating on the internet. It includes the person`s name. The decision has now been translated and published on the Tribunal website. A neutral citation has been added to the file. On the Tribunal website, it is referred to as 2022 SST 1428. In the published decision, the individual`s name has been removed in favour of initials only. I will refer to it as the AL decision.
[13] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

ruled over the years that a person does not have to have wrongful intent for there to be misconduct.[14] It is sufficient that the conduct is conscious, deliberate, or intentional.

[27] The Claimant's also referred me to a recent decision of the Tribunal. I will refer to as the AL decision. In this decision, the Tribunal member reversed the Commission's finding of misconduct and said the claimant (AL) was not disentitled to EI benefits. The Claimant argued I should follow the AL decision.

[28] The facts in AL's case are similar to the Claimant's in that AL worked in a hospital and was suspended and later dismissed for non-compliance with her employer's mandatory Covid-19 vaccination policy.

[29] I am not bound by other decisions of Tribunal members. But I can rely on them to guide me where I find them persuasive and helpful.[15]

[30] I do not find the AL decision to be persuasive. I will not follow it. This is because the AL decision goes against binding case law from the Federal Court about misconduct.

[31] The Tribunal does not have jurisdiction to interpret or apply a collective agreement or employment contract.[16] Nor does the Tribunal have legal authority to

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[14] See Caul v Canada *(Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

[15] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to the courts and their decisions. And it applies to tribunals and their decisions. Under this rule, I must follow Federal Court decisions that are directly on point with the case I am deciding. This is because the Federal Court has greater authority to interpret the EI Act. But I don't have to follow Social Security Tribunal decisions, since other members of the Tribunal have the same authority I have.

[16] See Fakhari v. Canada (Attorney General), 197 N.R. 300 (FCA) and Paradis v. Canada (Attorney General), 2016 FC 1282. See also Canada (Attorney General) v. McNamara, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

Our Tribunal members' legal authority to make a decision in an appeal of the Commission's decision doesn't include interpreting or applying a collective agreement. This was recently confirmed by the Tribunal's Appeal Division in SC v Canada Employment Insurance Commission, 2022 SST 121.

The courts have clearly said that claimants have other legal avenues to challenge the legality of what the employer did or didn't do. Where an employee covered by a collective agreement believes their employer breached the collective agreement, they can file a grievance (or ask their union to file a grievance) under the collective agreement. This means that if the claimant (and her union) believes that workers had a right

interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act.[17]

[32] Said differently, it is not the Tribunal's authority to decide if the employer's policy was reasonable or fair, or a violation of the collective agreement. Nor can the Tribunal decide whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed was too severe. The Tribunal must focus on the reason the Claimant was separated from her employment and decide if the conduct that caused her to be suspended and dismissed constitutes misconduct under the EI Act.

[33] The Claimant submits her conduct was not misconduct because there was no provision for mandatory vaccination in the collective agreement that governed her employment from the time she was hired. This is not a persuasive argument, as there was no COVID-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as changing circumstances may require.

[34] I agree her collective agreement has a clause where she can refuse any vaccination. This has not been taken away. Under the COVID vaccination policy, the Claimant can refuse vaccination as well.

[35] The union contract itself goes on to give consequences if a person refuses an influenza vaccine. As stated above, I have no authority to decide whether the employer breached the Claimant's collective agreement or whether she was wrongfully dismissed. The Claimant's recourse for her complaints against the employer is to pursue her claims via her union via a grievance.

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to refuse COVID-19 vaccination in employment as part of their collective agreement, the grievance process was the proper legal avenue to make this argument.

[17] See Paradis v Canada (Attorney General), 2016 FC 1282; Canada (Attorney General) v McNamara, 2007 FCA 107; and Mishibinijima v Canada (Attorney General), 2007 FCA 36. The Tribunal can decide cases based on the Canadian Charter of Rights and Freedoms, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the Department of Employment and Social Development Act or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't

[36] In a recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[18] Paragraph 32 has the following:

> [32] 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 – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. 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.

[37] I therefore make no findings with respect to the validity of the policy or any violations of the Claimant's rights under the collective agreement or otherwise. She is free to make these arguments before the appropriate union or adjudicative bodies and seek relief there.

[38] However, none of the Claimant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that she was suspended and subsequently terminated because of conduct that is considered misconduct under the EI Act.

[39] I understand why the Claimant may not agree with my decision. I do not address the fundamental legal or factual issues that the Claimant raises, for example, regarding her collective agreement. This does not make the decision unreasonable. The key problem with such arguments is that I am not permitted, by law, to address.

[40] I have already found that the conduct which led to the Claimant's suspension and dismissal was her refusal to provide proof of vaccination as required by the policy (in the absence of an approved exemption).

[41] The evidence from the Commission, together with Claimant's evidence and testimony at the hearing, allow me to make these findings:

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[18] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

- The Claimant was informed of the policy and given time to comply with it.
- Her refusal to comply with the policy was intentional. This made her refusal wilful. I accept she has her own personal reasons for not wanting to be vaccinated.
- She knew or ought to have known that her refusal to comply, in the absence of an approved exemption, could cause her to be suspended and then dismissed from her job.
- Her refusal to comply with the policy was the direct cause of her suspension and subsequent dismissal.
- The Claimant knew or should have known about the consequence of not following the employer's vaccination policy.

[42] For reasons set out herein, I find the Claimant knew or ought to have known the consequences for non-compliance with the employer's vaccination policy. The Claimant acknowledged receipt of the policy and testified she had read it.

[43] I agree the Claimant can decline vaccination. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[44] I find the Claimant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issue. I have no doubt the Claimant was a valuable employee. She stated she had an excellent work history with no disciplinary record. Nothing in the file contradicts this.

[45] I understand the Claimant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't

rewrite the law or add new things to the law to make an outcome that seems fairer for the Claimant.[19]

[46] The evidence before me shows the Claimant made a personal and deliberate choice not to follow the employer's policy.

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

[47] Based on my findings above, I find that the Claimant lost her job because of misconduct. The Claimant's actions led to her suspension without pay. She acted deliberately. She knew that refusing to with the policy would likely cause her to lose her job.

Conclusion

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

[49] This means the appeal is dismissed.

Marc St-Jules
Member, General Division – Employment Insurance Section

[19] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.