Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 559

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (512635) dated September 1, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Videoconference
Hearing date:	January 5, 2023
Hearing participant:	Appellant
Decision date:	February 2, 2023
File number:	GE-22-3241

Decision

[1] The appeal is dismissed with modification. I disagree with the Appellant (Claimant).

[2] The modification is explained here. Previously the Claimant was disentitled from October 17, 2021, onward. The new decision is that the Claimant is disentitled from receiving benefits from October 17, 2021, until March 25, 2022.[1] This coincides with her suspension. Another part of this modification is that effective March 28, 2022, the Claimant is disqualified from receiving benefits following her termination from employment.[2]

[3] 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

[4] 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.

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

[6] 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

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[1] Section 31 of the Employment Insurance Act says a claimant who is suspended from her employment because of her misconduct is not entitled to receive EI benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits

[2] Section 30 of the Employment Insurance Act says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

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

[7] Did the Claimant lose her 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] 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.

[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] I find that the Claimant was put on a mandatory and unpaid leave of absence effective October 19, 2021, and then dismissed on March 28, 2022. This is because she did not comply with her employer's vaccination policy.

[12] The Commission says the Claimant's employer put her on leave without pay (suspension) as of October 19, 2021, because she failed to comply with the vaccine policy. The employer then dismissed her effective March 28, 2022, as she was still 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.

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

[13] 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?

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

What misconduct means under the EI Act.

[15] 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.

[16] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[4] 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."[5]

[17] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] 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.[7]

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[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] *Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*] at para 9
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.

[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.[8]

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

[20] 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.[11] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[21] 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.[12]

What the Commission and the Claimant said

[22] 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.

[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See section 30 of the Act.
[10] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Minister of Employment and Immigration v Bartone*, A-369-88.

- 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.

[23] During the hearing, the Claimant agreed to the above. The only exception to this is the part of knowing what would happen if she didn't follow the vaccine policy. To this, she argues that she believed her human rights would prevail and her religious accommodations would be granted. For this reason, the Claimant argues she had no reason to believe she would be at risk of losing her job.

[24] 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.

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

- She never refused to comply with the policy. She requested an accommodation based on protections afforded by the Ontario Human Rights Code which was denied.

- Following the employer's initial rejection of her exemption request, she submitted a temporary accommodation request. She did so as she was willing to take a new vaccine which should become available soon as it was being sent for approval.[13] It was rejected as well.

- She remained available under the same terms and conditions that she was hired under.

[13] The Claimant testified she was terminated on March 28, 2022, which before this new vaccine obtained approval.

- The Healthcare Consent Act, Section 11 has the required elements for consent which should apply to this case.

- Digest 7.1.0[14] Misconduct refers to ill-intentioned actions by an employee.[15]

- Digest 7.2.3.1. When there is an issue of disqualification and evidence is equally balanced, the benefit of the doubt is given to the Claimant.[16]

- Digest 7.2.5 “to be considered misconduct under the EI Act, the actions must be intentional or negligent to the point of being deemed a breach of an obligation arising explicitly or implicitly from the contract of employment; otherwise there is no misconduct.”[17]

- Digest 7.3.4. Breach of rules an employer has the right to establish rules as long as they comply with legal requirements or the collective agreement.[18]

[26] 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.[19]

[27] 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.

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[14] The Digest refers to the *Digest of Benefit Entitlement Principles*. It is an internal document to the Commission which is publicly available. It is meant for guidance to Commission employees. It is not law or precedent setting. I do not have to follow it but can find persuasive arguments which I can consider.
[15] See GD2 page 10.
[16] See GD2 page 12.
[17] See GD2 page 9.
[18] See GD2 page 11.
[19] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

[28] The Health Care Consent Act is not something I can consider. I am limited to the EI Act. I am not able to consider other laws or contracts. This is outside my jurisdiction. See paragraph 11.

[29] 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 ruled over the years that a person does not have to have wrongful intent for there to be misconduct.[20] It is sufficient that the conduct is conscious, deliberate, or intentional.

[30] The Digest is not binding on the Tribunal but can be used as an interpretive guide[21], if and when the text of the Act or the jurisprudence is not clear on a specific point. Courts have determined it can't be relied upon to overturn the recognized interpretation of a specific section of the Act.[22]

[31] Digest section 7.1.0 is the introduction to *Chapter 7 – Misconduct*. It says, "In general, misconduct refers to ill-intentioned actions by an employee." I accept it says this. However, courts have said ill intention is not required as mentioned above. I accept the Claimant never had any ill intention. Nothing in the file suggests this. For this reason, I do not find this argument persuasive.

[32] Digest 7.2.3.1 is about benefit of the doubt and weighing the evidence.[23] It explains when there exist contradictory statements or evidence, benefit of the doubt goes to the Claimant when the evidence is equally balanced. In this case, there is undisputed evidence that the Claimant was advised of the policy, knew about the policy and the Claimant made the conscious decision not to comply. For this reason, I do not find this argument persuasive.

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[20] See Caul v Canada *(Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.
[21] *Canada (Attorney General)* v. *Talbot*, 2013 FCA 53 at para 14; *Canada* v. *Greey*, 2009 FCA 296, at para. 28.
[22] *Sennikova* v. *Canada (Attorney General)*, 2021 FC 982 at para 60 .
[23] This guidance relates to section 49(2) of the EI Act – which is an obligation imposed on the Commission. The provision does not say the Tribunal must give the claimant the benefit of the doubt.

[33] Digest 7.2.5 mentions that "misconduct under the EI Act, the actions must be intentional **or** (my emphasis) negligent to the point of being deemed a breach of an obligation arising…" I agree the claimant was not negligent in this case but her decision was intentional. She knew or ought to have known she would be placed on unpaid leave and face possible dismissal if she did not comply with the vaccine policy.

[34] Digest 7.3.4 says that an "employer has the right to establish the rules in an employment relationship, as long as they comply with any legal requirements set out by legislation (provincial and federal labour laws or immigration laws, for example) and those set out in a collective agreement." I agree. However, if an employer does establish a rule which contravenes any of those, the recourse available to the employee is via the appropriate venue. This may be another tribunal, court, or union grievance. It is not in the Tribunal's jurisdiction to consider this matter.

[35] In addition to this, the Federal Court of Appeal, says that the focus of the misconduct analysis is on the behaviour of the Claimant. The possibility that the Claimant's rights under another law may have been infringed is not a relevant consideration.[24] This is another reason why I do not find Digest 7.3.4 to be persuasive.

[36] The Claimant's also referred me to a recent decision of the Tribunal (which I will refer to as the AL decision), in which a Tribunal member reversed the Commission's finding of misconduct and said the claimant (AL) was not disentitled to EI benefits.[25] The Claimant argued I should follow the AL decision.

[37] 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.

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[24] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107

[25] The decision had not been published, so it did not have a neutral citation and it refers to the claimant by their name. To respect the claimant's privacy, I am going to cite the decision as: *AL v CEIC* (SST file GE-22-1889). The claimant in the AL decision made similar arguments to the Claimant in this decision, namely that the employer breached the collective agreement because mandatory COVID vaccination wasn't part of the collective agreement when she was hired. She also argued she had a right to refuse to get vaccinated.

[38] 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.[26]

[39] 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.

[40] The Tribunal does not have jurisdiction to interpret or apply a collective agreement or employment contract.[27] Nor does the Tribunal have legal authority to interpret or apply privacy laws, human rights laws, international law, the Criminal Code or other legislation to decisions under the EI Act.[28]

[41] 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

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[26] This rule (called *stare decisis*) is an important foundation of decision-making in our legal system. It applies to 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.

[27] 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 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.

[28] 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

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.

[42] 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.

[43] 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.

[44] The union contract itself goes on to give consequences if a person refuses a 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 in court or before another tribunal that deals with such matters.

[45] 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 adjudicative bodies and seek relief there.

[46] 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.

[47] 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, religious accommodations. This does not make the decision unreasonable. The key problem with such arguments is that I am not permitted, by law, to address.

[48] 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).

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

- 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.

[50] 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.

[51] I agree the Claimant can decline vaccination. That is her own personal decision. In her case, her reason is religious. This is her right. 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.

[52] In a recent case called *Parmar*,[29] the issue before the Court was weather an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[53] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[54] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[30] 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.

[55] 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.

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[29] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[30] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

[56] 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.[31]

[57] 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?

[58] 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 get vaccinated was likely to cause her to lose her job.

Conclusion

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

[60] This means the appeal is dismissed with modification. The Claimant is disentitled from receiving benefits from October 17, 2021, until March 25, 2022. This coincides with her suspension. Effective March 28, 2022, she is disqualified from receiving benefits following her termination from employment.

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

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