



Citation: *IT v Canada Employment Insurance Commission*, 2023 SST 603

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

Decision

Appellant: I. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (490428) dated June 22, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: January 24, 2023

Hearing participant: Appellant

Decision date: February 9, 2023

File number: GE-22-2343

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from her job. The Claimant's employer says she was suspended because she went against its vaccination policy: she didn't say whether she was vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says going against her employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant lost her 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 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.²

[8] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the

¹ Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disentitled from receiving benefits.

² See sections 30 and 31 of the Act.

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

Why was the Claimant suspended from her job?

[9] I find that the Claimant was suspended from her job because she went against her employer's vaccination policy.

[10] The Claimant says she refused to disclose her vaccination status. But she says her employer didn't suspend her; rather she points to her record of employment (ROE) which says leave of absence.

[11] The Commission says the Claimant didn't comply with her employer's COVID-19 vaccine policy. It concluded that this caused her employer to place her on unpaid leave, which is a suspension.

[12] The Commission's file includes a notice from the website of the Claimant's employer. It says in part that employees who aren't fully vaccinated by October 30, 2021, will face consequences including unpaid leave or termination. The Claimant's employer placed her on unpaid leave on October 30, 2021.

[13] The Claimant said she didn't disclose her vaccination status to her employer. She gave reasons for not doing so. In her notice of appeal, the Claimant said that her leave of absence was a forced lay-off. She referred to a recall date, which she said proves that she is entitled to EI benefits.

[14] I don't agree that the Claimant's unpaid leave is a lay-off. I find that the Claimant's employer placed her on unpaid leave because she didn't do something it required her to do. The Claimant did not give evidence that she stopped working for economic reasons; rather, she acknowledges she stopped working because she didn't disclose her vaccination status.

[15] The Claimant doesn't think her collective agreement allows her employer place her on unpaid leave. But I find that the employer doing so is the same as suspending

her from job. I find the employer suspended the Claimant because she went against its COVID-19 vaccination policy.

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

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

[17] 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.

[18] 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

[19] 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

[20] 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

[21] The Commission has to prove that the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of

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 section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended from her job because of misconduct.⁹

[22] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it is not for me to decide whether her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[23] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.¹¹ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[24] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹²

[25] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹³

[26] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹⁴ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹⁵

[27] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.¹⁶ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.¹⁷

[28] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to suspend the Claimant. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[29] The Claimant says there was no misconduct because her employer has breached conventions and contracts by requiring her to disclose her vaccination status. Her reasons include that:

- her employment contract doesn't have clauses about forced mandatory medical procedures or breaking confidentiality,
- she has paid into the EI fund, so she meets the criteria to receive it,
- her employer hasn't answered questions she asked about confidentiality, privacy, and side effects of the vaccine, and,
- the forced unpaid leave of absence is actually a lay-off.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[30] The Claimant also submitted a document with reasons why she thinks her actions don't constitute misconduct.¹⁸

[31] The Commission says there was misconduct because the Claimant didn't comply with her employer's COVID-19 vaccination policy. It says the Claimant knew about the policy and the consequences of non-compliance, but she chose not to comply with it due to her personal beliefs.

[32] I find that the Commission has proven that there was misconduct, because the Claimant knew that she could be suspended from her job if she went against her employer's COVID-19 vaccine policy.

[33] The Commission's file has a copy of the employer's COVID-19 vaccination policy. It states that employees:

- must get a first dose of the COVID-19 vaccine by September 8, and a second dose by October 16, 2021, if required,
- must report their vaccination status by October 30, 2021,
- who don't report their vaccination status will be considered unvaccinated and in non-compliance with the policy,
- can apply for accommodation based on prohibited grounds of discrimination, and,
- who aren't fully vaccinated or don't disclose their vaccination status will be placed on unpaid leave.

[34] The Claimant testified that she knew about her employer's policy and the consequences of going against it. She said she believes she found about the policy around the time it was issued, in August or September 2021. The Claimant said she asked her employer for an accommodation, not an exemption. She explained that she

¹⁸ See GD9.

just didn't want to disclose her status, because she felt that was between her and her doctor.

[35] The Claimant said she sent a letter to her employer in February 2022 asking for a meeting. She said her employer replied in an email saying that "the policy is what it is". The Claimant testified that she asked about health risks of the vaccine, but the employer told her to go to her doctor or her health professional. She added that the employer gave no alternatives to taking the vaccine.

[36] The Claimant sent copies of a letter she sent to her employer, and another that she sent to her union. Both refer to the Claimant's concerns with her employer's vaccine requirement. But both are dated February 18, 2022, which is after the Claimant was suspended.

[37] I don't find the letters helpful in deciding whether the Claimant was suspended because of misconduct. And it is not my role to decide whether the Claimant's employer should have offered her alternatives to taking the vaccine. I understand that the Claimant has questions and concerns. But I find that she made a personal choice not to tell her employer if she was vaccinated against COVID-19.

[38] In her submission, the Claimant refers to and includes excerpts from international instruments, the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, the *Canadian Charters of Rights and Freedoms* (Charter), and the *Non-Genetic Discrimination Act*. The submission also includes articles, reports, court decisions, a Memorandum of Agreement between her union and employer about arbitration of grievances relating to the COVID-19 vaccination policy, and an excerpt from her collective agreement.

[39] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Claimant has cited some of these in her submission.

[40] I understand that the Claimant believes that her employer's vaccine policy is unconstitutional and unlawful. But I am not allowed to consider whether an action taken by an employer violates a claimant's rights. I am also not allowed to make rulings on

the other laws referred to above, or any of the provincial laws that protect rights and freedoms. The Claimant must go to a different tribunal or a court to address that.

[41] The Claimant says her employer unilaterally changed her employment conditions without consulting her bargaining agent. She argues that the Commission hasn't proven that her actions constituted a breach of an expressed or implied duty to her employer arising out of her employment agreement.

[42] The referred to a recent, unpublished decision made by a Tribunal Member of the General Division in support of her argument.¹⁹

[43] I am not bound by decisions made by other General Division Tribunal Members. I can adopt the reasoning of such decisions if I find them persuasive. But I don't in this case.

[44] In the *A.L.* case, the claimant worked in an administrative role in a hospital. She decided not to take the COVID-19 vaccine because she has a health condition. Her employer suspended and later dismissed her. The claimant's collective agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[45] The Tribunal Member in *A.L.* found that the Commission had presented no evidence that there was an expressed requirement arising out of the claimant's employment agreement that she take the COVID-19 vaccine. The Member also decided that no evidence had been presented that would suggest that the Claimant had an implied duty arising from her employment agreement to be vaccinated.

[46] I find the Claimant's case is different from that in the case she submitted. Whereas in the case noted above, the claimant's collective agreement refers to recommended and required vaccines, the Claimant testified that there's nothing in the agreement that she has to disclose medical information or take vaccines as a condition of employment. She said the condition that brought about the COVID-19 vaccine

¹⁹ See *A.L. v Canada Employment Insurance Commission*, GE-22-1889.

requirement was brought on by policy, and her employment contract is stronger than policy.

[47] Despite the difference in the two cases, it is not my role to decide whether the Claimant's employer breached her collective agreement by unilaterally changing the terms and conditions of her employment. As noted above, in *McNamara, Paradis* and *Mishibinijima*²⁰ these Court cases make it clear that the focus must be on what a claimant has or has not done.

[48] I don't find that not having an article in her collective agreement about vaccinations in her initial employment agreement means that the Claimant's employer could not create and implement a policy to address an unprecedented pandemic. And I find that going against that policy got in the way of the Claimant carrying out her duties. This is because by not saying if she was vaccinated, she was prohibited from entering her employer's workplace.

[49] Concerning her belief that her employer breached her employment contract, again, the Claimant can seek recourse at another court or tribunal.

[50] I find from the Claimant's testimony that she knew about her employer's COVID-19 vaccination policy. She knew about the deadlines and the consequences of going against it. So, I find that the Claimant knew that her conduct, namely not saying if she took COVID-19 vaccine would likely lead to her suspension.

[51] I find that the Claimant going against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to say if she was vaccinated. She did so, knowing that she would be placed on an unpaid leave absence. I find that this means that she was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

[52] The Claimant believes she should get EI benefits because she has paid into the EI fund and meets the criteria to get benefits. But the purpose of the Act is to

²⁰ See paragraphs 23 to 27 of this decision above.

compensate claimants who lose their jobs involuntarily and are out of work.²¹ The Act is an insurance plan. Like an insurance plan, a claimant has to meet the conditions of the plan to get EI benefits.²² I don't find that the Claimant has met those conditions.

So, was the Claimant suspended from her job because of misconduct?

[53] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[54] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to say if she was vaccinated was likely to cause her to be suspended from her job.

Conclusion

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

[56] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section

²¹ See *Caron v Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.

²² See *Pannu v. Canada (AG)*, 2004 FCA 90.