Citation: *AG v Canada Employment Insurance Commission*, 2023 SST 512

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. G.
Representative:	M. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (478353) dated June 23, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	January 9, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	February 6, 2023
File number:	GE-22-2505

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven 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 was employed by a courier firm. The Claimant's employer brought in a policy requiring that all employees attest to their vaccination status. The Claimant's employer placed her on unpaid leave because she did not attest to her vaccination status.[2]

[4] The Commission looked at the reasons the Claimant was not working. It decided the Claimant was suspended from her job because of misconduct within the meaning of the EI Act.[3] Because of this, the Commission decided the Claimant is disentitled from receiving EI benefits.

[5] The Claimant does not agree with the Commission. She says her employer introduced polices all the time but did not act on them. She said the policy used the word "may" when speaking about what would happen if she did not comply. The Claimant says her employer did not reply to a letter she sent them about the vaccine and it did not approach her to see what her needs were. She said she does not have a crystal ball and could not predict that the employer would place her on a leave of absence. The Claimant's representative says the employer's policy does not comply with the Collective Agreement, the employer's code of ethics and is against the law. He argues that there can be no misconduct under an illegal policy.

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[1] Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[2] The Record of Employment issued to the Claimant shows that the last day for which she was paid was Friday, January 7, 2022. January 10, 2022 fell on a Monday.
[3] See section 31 of the EI Act

Matters I have to consider first

The Claimant’s two appeals were joined

[6] The Commission made two decisions about the Claimant’s application for EI benefits. It decided she was disentitled from receiving benefits because she was suspended due to her own misconduct and that she was also disentitled because she had not proven her availability for work.

[7] The Claimant appealed both decisions to the Tribunal. Tribunal staff numbered the appeal on misconduct GE-22-2505 and the appeal on availability for work GE-22-2506.

[8] I can deal with two or more appeals together if they involve a common question, but I can do that only if it would not be unfair to the people involved in the appeals.[4]

[9] I looked at the information in both appeals. I decided to join the two appeals because the facts related to the issues of misconduct and availability for work are similar.

The Claimant withdrew appeal GE-22-2506 at the hearing

[10] At the hearing I explained to the Claimant and the Claimant’s Representative that when the Commission reconsidered its decision to disentitle the Claimant from receiving EI benefits because she did not prove she was available for work it reversed its decision. This meant the Commission was no longer disentitling the Claimant from receiving EI benefits for the reason she was not available for work. It also meant she was appealing a decision the Commission had made in her favour.

[11] After consulting with her Representative, the Claimant and the Representative told me that she was withdrawing her appeal on the availability for work issue. As a

[4] Section 35 of the *Social Security Tribunal Rules* gives me this authority.

result, I will not issue a decision on the availability for work issue and I will only decide the misconduct issue.

The appeals were not summarily dismissed

[12] I initially sent a notice to the Claimant indicating the Tribunal's intent to summarily dismiss her appeals. The Clamant replied to the notice arguing that her appeal should not be summarily dismissed. From the Claimant's response, it appeared to me that the Claimant's Representative had not shared the reconsideration filed (GD3) or the Commission's submissions to the Tribunal (GD4) with the Claimant. I decided to have those documents sent directly to the Claimant and to hold a hearing to decide the appeals.

The employer is not an added party to the appeal

[13] Sometimes the Tribunal sends a claimant's employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[14] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a leave of absence

[15] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.[5]

[16] In the Claimant's case, her employer initiated the stoppage of her employment on January 10, 2022 when she was placed on unpaid leave.

[5] See section 32 of the EI Act.

[17] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of unpaid leave from her employment.

[18] The section of the EI Act on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.[6]

[19] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the vaccine policy that led to her not working from January 10, 2022. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances the period of unpaid leave from January 10, 2022 can be considered as a suspension.

I am accepting documents sent in after the hearing

[20] At the hearing the Claimant explained that she had sent letters to her employer with her questions about the COVID-19 vaccine and their liability. She also hand delivered a notice of liability to a manager. The Claimant also said that she received letters form her employer on November 7, 2022 and November 25, 2022. After the hearing, she sent in proof of delivery of the letter to her employer, a signed document from a person saying her witnessed her hand delivering the liability notice and the two letters she received from her employer.[7]

[21] The Claimant also sent in a copy of the employer's COVID-19 Safer Workplaces Policy update and the policy itself. These documents have sections underlined and handwritten notes on them. The notes are unsigned but are consistent with the evidence and argument the Claimant made at the hearing.

[22] I have decided to accept all the documents into evidence as the information contained in the documents was referenced in the hearing and is relevant to the issue of whether the Claimant lost her employment due to her own misconduct.

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[6] See section 31 of the EI Act.

[7] 19 pages of documents, including covering emails, were received on January 13, 2023. The document was coded as GDJ06.

[23] The Commission was sent a copy of the documents. It reviewed the documents and provided a submission to the Tribunal on January 17, 2023.[8] I have taken the Commission's submissions into consideration.

Issue

[24] Was the Claimant suspended from her job because of misconduct?

Analysis

[25] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has dismissed you or suspended you.[9]

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

Why did the Claimant lose her job?

[27] I find that the Claimant was suspended from her job because she did not comply with her employer's COVID-19 vaccination policy.

[28] The Claimant's employer adopted a COVID-19 Safer Workplaces Policy. The policy required all employees to attest to their vaccination status by October 15, 2021. Employees were also be vaccinated for COVID-19 by December 31, 2021. The policy said anyone who did not attest to their vaccination status or who refused to complete an attestation form would be in contravention for the policy and would be subject to discipline and unable to attend work.

[29] A representative of the employer spoke to a Service Canada officer on March 9, 2022. The representative said a final notice was sent out to employees on December 10, 2021 reminding unvaccinated employees of the obligation to get vaccinated by

[8] The Commission's submission was coded GDJ07
[9] See sections 30 and 31 of the EI Act.

January 1, 2022. He said the deadline to be fully vaccinated was extended to January 10, 2022.

[30] The Claimant testified she met with a manager on January 2, 2022. She was asked to sign a letter. She signed the letter and put "under duress" next to her signature. The letter said, in part, that she had not completed the COVID-19 attestation form as required, and asked her to complete the attestation immediately. The letter went on to say "Failure to complete this attestation immediately may result in you being prevented from accessing the workplace and being placed on an unpaid level of absence until we can determine your vaccination status."

[31] The Claimant testified she did not complete the attestation form. She went to work on January 10, 2022 and was told she was not allowed to work.

[32] The Claimant submitted a letter from her employer dated November 7, 2022. The letter says that because she did not complete the attestation form she was placed on unpaid administrative leave.

[33] The evidence tells me the Claimant was suspended from her job because she failed to complete the attestation form to disclose her vaccination status as required by the employer's policy.

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

[34] Yes, the reason for the Claimant's dismissal is misconduct under the law and within the meaning of the EI Act.

[35] The EI 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. Case law sets out the legal test for misconduct — the questions and criteria I can consider when examining the issue of misconduct.

[36] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[10] Misconduct also includes conduct that is so reckless that it is almost wilful.[11] 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.[12]

[37] There is misconduct if the Claimant knew or should have known 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.[13]

[38] A deliberate violation of the employer's policy is considered to be misconduct.[14]

[39] The Commission has to prove the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Claimant lost her job because of misconduct.[15]

[40] I only have the power to decide questions under the EI Act. I can't make any decisions about whether the Claimant has other options under other laws or the Collective Agreement. Issues about whether the Claimant's Collective Agreement was violated or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.[16] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[41] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[17] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed

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[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.
[11] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[12] See *Attorney General of Canada v Secours*, A-352-94.
[13] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[14] See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460
[15] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[16] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

because the drug test was not justified under the circumstances, which he said 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.

[42] In response to Mr. McNamara's arguments, the FCA stated that it has consistently 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 EI Act." The Court went on to note that the focus when interpreting and applying the EI 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.

[43] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[18] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed 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 EI Act.[19]

[44] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[20] 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

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[18] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[19] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[20] 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.[21]

[45] 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 placing the Claimant on an unpaid leave of absence (suspension), or failed to accommodate her or violated the Claimant's Collective Agreement. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the EI Act.

[46] The Commission says it concluded there was misconduct because the Claimant reasonably ought to have known her failure to comply with the employer's policy would result in her being suspended from her employment. It says that while the Claimant did not believe her employer would follow through with the consequences of noncompliance, due to the employer's use of words like "may" "might" and "maybe" this still demonstrates that the Claimant was aware that suspension from employment was a potential consequence of her failure to comply with the employer's policy. The Commission says being aware of potential consequences is enough to support a finding of misconduct under the EI Act. It says with this knowledge [knowing suspension was a potential consequence] the Claimant made the wilful and deliberate choice to not comply with the employer's policy.

[47] The Claimant testified that she worked for her employer for 28 years. She said lots of times the employer had changed its position on lots of things. She said the employer was required to abide by the Collective Agreement. The Claimant testified she read all the employer's policies. It kept saying "maybe." She said she does not have a magic ball to know if they would follow through. She said her union had put in a grievance that has not yet been heard at arbitration. She did not think her employer would push the policy until the grievance was heard at arbitration. The Claimant said she did not think her employer would suspend her when there were other alternatives.

[21] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[48] The Claimant said the policy said she could ask questions which she did. The Claimant asked questions about the legal status of the vaccine, if it was tested, its ingredients, adverse reactions to the vaccine, and its risks. She also asked her employer to confirm that she would not be under any duress from her employer in compliance with the Nuremberg Code. The Claimant sent a Notice of Liability to the President and CEO of the Company, Human Resources and to the doctor who ran the employer's General Medical Division. She said her questions were not answered and her Notice of Liability was not acknowledged.

[49] The Claimant testified she did not ask for an exemption to vaccination for religious or medical reasons. The Claimant said she put in her questions and her Notice of Liability. She said her employer should have come to her to discuss her needs.

[50] The Claimant testified she saw a manager going to employees on the floor using his phone to help them complete the attestation form. She said he did not ask her. The Claimant said she was never given an [attestation] form to fill out. When I asked her, the Claimant said that she did not ask for an attestation form. The Claimant said her employer is to come to her if they want something filled out.

[51] The Claimant testified when she met with a supervisor on January 2, 2022 and was asked to sign a letter about not attesting to her vaccination status she asked him if he was a medical doctor. She said her medical information is private and that she should not have to share it.

[52] The Claimant testified that her union has not filed a grievance concerning her being placed on an unpaid administrative leave.[22] She has filed a complaint of discrimination against her employer on the basis of disability.

[53] The Claimant argued the cases cited by the Commission in its submissions do not reflect the world today. The employer now allows customers to be unmasked in its

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[22] However, her union has filed a grievance concerning her dismissal from employment on November 25, 2022.

locations. The employer did not implement he policy in its locations in the United States.

[54] The Claimant's Representative, affirmed to give evidence said that he was employed by the same company as the Claimant. He said that he too was placed on an unpaid administrative leave he was told that a shop steward did not need to be present because it was not a disciplinary measure. He noted that the Claimant was put on the same type of leave yet the Record of Employment (ROE) said dismissal or suspension.

[55] The Claimant's Representative argued that there can be no misconduct when the employer's policy goes against its own code of ethics. He said that policies cannot go against the law. He said the policy violated international laws. The Claimant's Representative noted that the vaccine mandates have been dropped by the federal government and the crown corporation that owns the employer. He said the crown corporation has started to call unvaccinated employees to work. The employer's policy states it was to be reviewed and to date it has not been reviewed.

[56] The Claimant's Representative argued that the employer said the reason for the policy was because vaccines prevented infection and death. However, the Claimant's Representative says Health Canada has recently said that the vaccines do not prevent serious infection. The Claimant's Representative argues this means that the employer's policy goes against the government.

[57] I find the Commission has proven the Claimant was suspended from her job due to her own misconduct. My reasons for this finding follow.

[58] The Claimant's employer adopted a policy that said all employees had to attest to their vaccination status by October 15, 2021. Those who refused to complete an attestation form would be in contravention of the policy and subject to discipline and unable to attend work. The policy also had a deadline to be vaccinated for COVOD-19 that was extended to December 31, 2021. The policy allowed for employees to ask for an exemption to vaccination for medical or religious grounds.

[59] On December 7, 2021 the employer issued a message from the Senior Vice-President. Under the heading:

> Next steps for employees who have not attested to being fully vaccinated, effective January 10, 2022:
>
> After January 10, 2022, anyone who is not fully vaccinated, and without an approved exemption for medical or religious grounds, is in contravention of the COVID-19 – Safer Workplace Policy and will be placed on an unpaid leave of absence.

[60] On January 2, 2022 the Claimant met with a manager with a shop steward present. She was given a letter and asked to sign the letter. She did sign the letter putting "under duress" next to her signature. The letter stated the Claimant had not yet completed her COVID-19 attestation form and went on to say that "failure to complete this attestation immediately may result in you being prevented from accessing the workplace and being placed on an unpaid leave of absence until we can determine your vaccination status."

[61] The Claimant testified that she did not attest to being vaccinated and when she reported to work on January 10, 2022 she was told that she was unable to work.

[62] The evidence tells me the Claimant was aware of the employer's policy requirement that she attest to her vaccination status and the consequences for not attesting to her vaccination status. The Claimant testified that she read all the employer's policies. She said that the employer changed its mind all the time about its policies. She argued because the policy used words like "may" "might" and "maybe" she did not think the employer would act on its policy. She said that her union had grieved the policy and she did not think the employer would push the policy until an arbitration was held. The policy and the employer's communications, including the letter of January 2, 2022, which she signed were quite clear the consequences for not attesting were her being prevented from accessing the workplace and being placed on an unpaid leave of absence (suspended). In my opinion, thinking that an employer will

not carry through with the consequences for not complying with a policy does not mean that the Claimant did not have knowledge of the consequences. The Claimant was clear in her evidence that she read all the policies and was aware of the possibility that she would not be able to work if she did not complete an attestation form. As a result, I find that the Claimant knew she could be suspended (placed on an unpaid leave of absence) if she did not complete the vaccination attestation form.

[63] The Claimant argued that her employer did not give her an attestation form, she said if the employer wanted something filled out it should come to her. She also said, when I asked her, that she did not ask her employer for an attestation form. The notices from the employer gave a website address and QR code as ways to access the attestation form. The January 2, 2022 letter she signed said she could ask her manager or Human Resources if she had any questions about the form. The evidence is clear the Claimant did not want to complete an attestation form. The evidence is equally clear she did not complete an attestation form as required by her employer's policy. As a result, I find the Claimant made the conscious, deliberate and wilful choice to not complete the attestation form when she knew that by doing so there was a real possibility she could be suspended (placed on an unpaid leave of absence) and not be able to carry out the duties owed to her employer. Accordingly, I find that the Commission has proven the Claimant was suspended due to her own misconduct within the meaning of the EI Act and the case law described above.

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

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

Conclusion

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

[66] This means that the appeal is dismissed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section