Citation: *HR v Canada Employment Insurance Commission*, 2023 SST 298

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (510403) dated August 10, 2022 (issued by Service Canada)

Tribunal member:	Susan Stapleton
Type of hearing:	Teleconference
Hearing date:	February 23, 2023
Hearing participant:	Appellant
Decision date:	February 28, 2023
File number:	GE-22-3043

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from her employment due to her own misconduct. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant's employer issued a policy that required her to attest to being fully vaccinated against Covid-19 (Covid). She refused to disclose her vaccination status, and was placed on unpaid leave (suspended) from her job.

[4] The Appellant doesn't dispute that this happened. However, she didn't agree with the employer's policy. She says the policy was unreasonable. Disclosing her medical information was not a requirement of her employment when she was hired. Her collective agreement does not state that she has to disclose private medical information to her employer. Her employer's request for her private medical information violates her rights. She has been a loyal employee for over 20 years, and has always excelled in her performance appraisals.[2] She had been working from home for many months when the vaccination policy was implemented, and could have continued to do so. She says there was no misconduct on her part.

[5] The Commission says there was misconduct, because the Appellant knew about the vaccination policy and the deadline to comply with it. She knew the consequence of not complying with the policy. She refused to disclose her vaccination status, and was suspended from her job as a result.[3]

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[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act addresses what happens when a Appellant is suspended for misconduct.
[2] See GD2-9-11.
[3] See GD4-3.

Issue

[6] Was the Appellant suspended from her job because of misconduct?

[7] To answer this, I have to decide two things. First, I have to determine why the Appellant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Analysis

Why was the Appellant suspended from her job?

[8] I find that the Appellant was suspended from her job because she didn't comply with the employer's mandatory Covid vaccination policy. She confirmed in her testimony that she was placed on an involuntary leave of absence from her job because she refused to disclose her vaccination status to her employer.

[9] The Appellant says that she was not suspended, but was forced by her employer to take a leave of absence because of her refusal to disclose her private medical information. The Commission considers that in such a case, the leave of absence is equivalent to a suspension for misconduct, since it was initiated by the employer. I agree, for the reasons detailed below.

[10] The Appellant told the Commission Officer on January 18, 2022, that the employer asked her for personal medical information, which she refused to provide for privacy reasons. The employer then put her on an unpaid leave of absence.[4]

[11] The Appellant spoke to the Commission's Reconsideration Officer on August 10, 2022. She confirmed that she was placed on an involuntary leave of absence from her job because she didn't comply with the employer's vaccination policy. She agreed that the employer clearly communicated the policy to employees. She said that she was fully aware of the requirements of the policy and that failure to comply with the policy would

[4] See GD3-21.

result in a loss of employment. She said that she wasn't willing to disclose her personal medical information to her employer.[5]

[12] The Appellant testified that she first learned that her employer would be implementing a mandatory vaccination policy in October, 2021. A staff meeting was held and management told employees about the impending policy. Employees were given information about the policy, and the consequences of not complying with the policy were explained. There was a "Manager's Toolkit" document made available to employees online, that answered questions about the vaccine requirement.

[13] The employer's vaccination policy states:

- All employees must be fully vaccinated by October 29, 2021.
- All employees must disclose their vaccination status by October 29, 2021.
- Employees must tell their manager if they require accommodation.
- Employees who refuse to disclose their vaccination status will be considered unwilling to be fully vaccinated.
- Employees who are unwilling to be fully vaccinated, or to disclose their vaccination status, within two weeks of the deadline, will be placed on administrative leave without pay and will be unable to continue to work.[6]

[14] The Appellant told the Commission Officer that she did not have an exemption from being vaccinated.[7]

[15] The employer told the Commission that the Appellant was placed on unpaid leave on January 18, 2022. She returned to work on June 20, 202, when the employer's policy was lifted.[8] At the hearing, I asked the Appellant why she worked until January, when the deadline to comply with the employer's policy was October 29, 2021. She said

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[5] See GD3-46-47.
[6] See GD3-30-45.
[7] See GD3-46.
[8] See GD3-29.

that she took a medical leave in October, 2021 and didn't return to work until December, 2021, so the deadline for her to disclose her vaccination status was moved out to January 18, 2022.

[16] The Appellant testified that nobody at her employer ever had a one-on-one conversation with her about the vaccination policy. She doesn't think the employer emailed or phoned her about it. Nobody from the employer called her when she didn't disclose her vaccination status by the deadline. She wasn't contacted by the employer about it while she was off on medical leave.

[17] The Appellant testified that she returned to work from her medical leave on December 20, 2021. She said she received an email from the employer on December 23, 2021, that said she had until January 18, 2022 to attend a training session, and receive the first dose of the vaccine. If not, she would be put on administrative leave without pay.

[18] The Appellant testified that she received an email from the employer on January 18, 2022, advising her that she was being placed on leave without pay. She said she was shocked that her employer actually put her on unpaid leave. After 20 years working in the same department, she was hopeful that they wouldn't suspend her.

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

[19] The reason for the Appellant's suspension is misconduct under the law.

[20] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal 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.

[21] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[9] Misconduct also includes

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

conduct that is so reckless that it is almost wilful.[10] The Appellant 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.[11]

[22] There is misconduct if the Appellant 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 suspended from her job because of that.[12]

[23] The Commission has to prove that the Appellant was suspended from 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 Appellant was suspended from her job because of misconduct.[13]

[24] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her.[14] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[25] In a Federal Court of Appeal (FCA) case called *McNamara*, the Appellant argued that he should get EI benefits because his employer wrongfully let him go.[15] 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.

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[10] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[11] See *Attorney General of Canada v Secours*, A-352-94.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[26] 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.[16]

[27] 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.[17]

[28] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[18] 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 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.[19]

[29] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[20] 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 isn't relevant that the employer didn't accommodate them.[21]

[30] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. The Appellant also said that no decision maker had addressed how a person could be

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[16] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[17] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[18] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[19] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[20] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[21] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[22]

[31] In dismissing the case, the Federal Court wrote:

> 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…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.[23]

[32] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[24]

[33] Case law makes it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to suspend the Appellant from her job. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- the employer had a mandatory Covid vaccination policy;
- the Appellant knew that she would be suspended if she didn't comply with the employer's vaccination policy; and
- The Appellant's non-compliance with the policy caused her to be suspended from her job.

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[22] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[23] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at para 32.
[24] See *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at para 47.

[35] The Appellant says that there was no misconduct because:

- disclosing her personal medical information to her employer was not a requirement of employment when she was hired;
- her collective agreement didn't state that she had to disclose her medical information;
- she worked from home before the vaccine mandate, and should have been allowed to continue to do so without having to disclose her vaccination status;
- her employer's request for her private medical information violated her rights; and
- she has been a loyal employee for over 20 years, and has always excelled in her performance appraisals.

[36] I find that the Appellant made a conscious and deliberate choice not to disclose her vaccination status, contrary to the employer's policy. She testified that she didn't disclose her vaccination status, and that she told her employer that she wasn't going to disclose her personal medical information.

[37] The Appellant knew that not disclosing her vaccination status meant that she couldn't do her job. She testified that she knew that she couldn't continue to work without attesting to being vaccinated by the deadline.

[38] I understand that the Appellant hoped that after working in the same department for 20 years, "reasonable heads would prevail," and her employer might not suspend her. But I find that she knew, or should have known, that not complying with the employer's vaccination policy could result in her being suspended from her job. She confirmed in her testimony that she received and read the policy. She said that the policy applied to her. She knew that she had to be vaccinated, or have an approved exemption from being vaccinated, to be in compliance with the employer's policy. She knew she had to disclose her vaccination status. She testified that she knew that the consequences of not following the policy included being suspended from her job.

[39] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated or have an approved exemption from being vaccinated;
- employees had to disclose their vaccination status;
- the employer communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated;
- the Appellant knew the consequence of not following the employer's vaccination policy;
- the Appellant didn't have an exemption from being vaccinated; and
- the Appellant didn't disclose her vaccination status to the employer, and was suspended from her job as a result.

[40] The Appellant referred to other decisions of the Tribunal, which she said "reversed" decisions that were made by the Commission in cases like hers. She specified one decision in particular.[25] In that case, the Tribunal found that that the Appellant's failure to follow the employer's mandatory vaccine policy didn't amount to misconduct. However, I am not bound by this decision, or other Tribunal decisions. I can choose to adopt their reasoning if I find them to be persuasive or helpful. I will not be adopting the reasoning in the case referred to by the Appellant. This is because the Federal Court of Appeal has said that this case doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.[26]

[41] I understand that the Appellant also feels she should get EI because she paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance

[25] See 2022 SST 1428.
[26] See *Cecchetto v Attorney General of Canada*, 2023 FC 102, at para 43.

plan, you have to meet certain requirements to qualify to get benefits. She has not met the requirements to be eligible for benefits.

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

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

[43] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that not disclosing her vaccination status to the employer would cause her to be suspended from her job.

Conclusion

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

[45] This means that the appeal is dismissed.

Susan Stapleton
Member, General Division – Employment Insurance Section