Citation: *DW v Canada Employment Insurance Commission*, 2023 SST 758

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. W.
Representative:	G. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (462005) dated March 30, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	January 31, 2023
Hearing participant:	Appellant Appellant's representative
Decision date:	February 10, 2023
File number:	GE-22-1396

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means she is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant lost her job. The employer says that she was suspended[1] and later dismissed for non-compliance with its vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. She had the right to make a personal choice about whether to get vaccinated. The expectation to be vaccinated was not a condition of her employment when she was hired and was not in her collective agreement. She was a good employee and saying she was fired for misconduct is incorrect.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job due to misconduct.[2] Because of this, it decided that she is disqualified from receiving EI benefits.

Matters I have to consider first

The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it had a direct interest in the appeal and wanted to be added as a party. The employer did not respond. As there is

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[1] The Appellant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Appellant's leave, this is considered a suspension.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add it as a party.

The Appellant is not advancing a Charter argument

[7] In her appeal to the Tribunal, the Appellant indicated she might be making an argument that the Commission's decision to deny her EI benefits was a violation of the *Canadian Charter of Rights and Freedoms* (Charter). Appeals alleging the *Employment Insurance Act* or its regulations violate the Charter require a process that is different from a regular appeal. So, her Notice of Appeal was reviewed by a Tribunal member who specializes in these matters.

[8] This Tribunal member wrote to the Appellant and asked her to clarify her argument about how her Charter rights were violated. The Appellant responded on October 18 and November 4, 2022. The Tribunal member reviewed her response and determined that her submissions did not meet the requirements to start a Charter challenge of the EI law or rules. So, the Appellant's appeal was assigned to me to proceed with a hearing as part of the regular appeal process. This decision is a result of that hearing.

Issue

[9] Did the Appellant lose her job because of misconduct?

Analysis

[10] 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]

[11] I have to decide two things to answer the question of whether the Appellant was lost her job because of misconduct. First, I must determine why the Appellant was

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

dismissed. Then, I must determine whether the law considers that reason to be misconduct.

Why was the Appellant dismissed?

[12] Both parties agree that the Appellant was dismissed because she didn't comply with the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

Is the reason for her dismissal misconduct under the law?

[13] The reason for the Appellant's dismissal is misconduct under the law.

[14] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law explains how to determine whether the Appellant'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.[4] Misconduct also includes conduct that is so reckless that it is almost wilful.[5] 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.[6]

[16] 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 the employer and that there was a real possibility of being let go from her job because of that.[7]

[17] The Commission must prove that the Appellant lost her job because of misconduct. The Commission must prove this on a balance of probabilities. This means

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

that it must show that it is more likely than not that the Appellant lost her job because of misconduct.[8]

[18] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[19] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[10] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner due to 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.

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

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[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[21] A more recent decision following the *McNamara* case is *Paradis v. Canada (Attorney General)*.[11] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that 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 Act.[12]

[22] Another similar case decided by the FCA is *Mishibinijima v. Canada (Attorney General)*.[13] 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 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.[14]

[23] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are 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. He also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[15]

[24] 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

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[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[13] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[15] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.

> decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[16]

[25] 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."[17]

[26] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in suspending the Appellant. Instead, I must focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

What the Commission and the Appellant say

[27] The Commission and the Appellant agree on the key facts in this case. The key facts are the facts the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

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

- the employer had a vaccination policy and communicated that policy to the Appellant
- the employer's policy required the Appellant to provide proof of vaccination or have an approved exemption.
- the Appellant knew what she had to do under the policy
- she made a personal choice to not get vaccinated

[16] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

- the employer suspended and later dismissed her because she did not comply with its vaccination policy

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

- the employer didn't have the right to force her to get a vaccination
- the employer's vaccination policy went against the law and her human rights
- she was a good employee and the employer didn't let her go for doing something wrong
- the vaccination policy was not a condition of employment when she was hired and was not part of her collective agreement. So the employer unilaterally changed her employment contract when it put the policy in place.

[30] The evidence is clear that the employer implemented a mandatory vaccination policy. The Appellant knew that she would be suspended if she did not receive the first dose of COVID-19 vaccination by October 25, 2021. And she would be terminated if she did not have at least one dose of COVID-19 vaccination by November 14, 2021.

[31] The employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[18]

[32] The Appellant submits the employer could not force her to get vaccinated. The choice to get vaccinated is personal.

[33] In a case called *Parmar*, the Court looked at whether an employer was allowed to suspend an employee for failing to comply with a mandatory vaccination policy.[19] The Court wrote:

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[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Parmar v Tribe Management Inc.,* 2022 BCSC 1675.

> Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. **They 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.** Ms. Parmar made her choice based on what appears to have been speculative information about the potential risks.
> *(emphasis added)*

[34] In other words, Ms. Parmar did have a choice: she could get vaccinated and keep working, or remain unvaccinated and be suspended from her job.

[35] The Lewis case involved a patient in the transplant program at an Albertan hospital.[20] The program required patients to get vaccinated against COVID-19 before getting a transplant. Ms. Lewis was unable to get an organ transplant because she refused to be vaccinated against COVID-19. Ms. Lewis argued that the vaccine requirement violated her Charter rights.

[36] The Alberta Court of Appeal agreed that Ms. Lewis had a right to refuse to be vaccinated against COVID-19. As a competent adult, she was entitled to decide what to put into her body. But exercising that choice came with consequences.

[37] These courts have found that the issue is not forcible vaccination but the consequences of a person's choice to remain unvaccinated. That is the issue here, too.

[38] The employer's vaccination policy required vaccination as a condition for continued employment. Employees, including the Appellant, were left with a choice. They could choose to remain unvaccinated, even if that meant losing their job.

[39] The Appellant submits that the employer's policy violated the law and her human rights.

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[20] See Lewis v Alberta Health Services, 2022 ABCA 359.

[40] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws, such as Bill C-45,[21] that protect rights and freedoms.

[41] These laws are enforced by different courts and tribunals.

[42] This Tribunal is able to consider whether a provision of the Act or its regulations or related legislation infringes rights that are guaranteed to a claimant by the Charter. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating his Charter rights.

[43] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act,* or any of the provincial laws that protect rights and freedoms.

[44] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's loss of employment was justified.[22]

[45] The Appellant may have other recourse to pursue her claims that the employer's policy violated her rights. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto.*[23]

[46] The Appellant submitted that she was not fired for doing something wrong, so her dismissal should not be considered misconduct.

[47] I want to address the specific word "misconduct." The Appellant expressed numerous times, both at the hearing and in written submissions, that this term is

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[21] The Appellant mentioned this a few times and submitted that it gave him the right to refuse unsafe work.
[22] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[23] *Cecchetto v. Attorney General of Canada,* 2023 FC 102.

inappropriate and offensive considering her conduct was refusing a vaccination. She said she considered using this word to describe her circumstances as “defamatory.” She was a good employee and had an excellent work record. She was well liked by the employer and other staff. The employer did not want to let her go, but was forced to because of its mandatory vaccination policy.

[48] I recognize that the term misconduct may sound harsh and that the Appellant doesn’t see how its plain language meaning relates to her circumstances. Misconduct is not defined in EI law or rules and, as noted above, the test we use to prove whether the Commission met its burden in misconduct cases comes from court decisions. It is called misconduct because that’s what the *Employment Insurance Act* and courts call it.

[49] I recognize that the Appellant’s experience of losing her job and being denied EI benefits has been difficult both financially and emotionally. I understand her reasons for disagreeing with the decision that she lost her job because of misconduct. However, my job is to apply the law as it is. The Federal Court has made it clear in recent weeks that my jurisdiction is narrow.

[50] The Appellant agreed that she was dismissed because she did not comply with the employer’s vaccination policy. She knew about the contents of the policy and the consequences for not following it. For the purposes of EI, that is misconduct.

So, was the Appellant dismissed because of misconduct?

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

[52] This is because the Appellant’s actions led to her dismissal. She acted deliberately. She knew or ought to have known that failing to comply with the employer’s policy was likely to cause her to be dismissed, and she chose not to comply.

Conclusion

[53] The appeal is dismissed.

[54] The Commission has proven that the Appellant was dismissed from her job because of misconduct. This means the Appellant is disqualified from receiving EI benefits.

Catherine Shaw
Member, General Division – Employment Insurance Section