Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 800

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (488869) dated July 6, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	February 22, 2023
Hearing participant:	Appellant
Decision date:	March 28 2023
File number:	GE-22-2604

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant (who is the Claimant).[1]

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

Overview

[3] The Appellant was suspended then dismissed from her job. The employer suspended the Appellant as she did not comply with the employer's vaccination policy: she refused to be vaccinated.

[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 tried to comply with the policy.

[5] The Commission accepted the reason for separation as suspension from work without pay. The Appellant knew, or ought to have known, that the consequences of refusing included unpaid leave and termination. It decided that the Appellant was suspended and terminated from her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

Issue

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

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[1] In my decision, I use "Appellant," rather than the "Claimant." I am doing this because the Appellant is the person who requested the appeal. The Commission uses "Claimant" because the Employment Insurance Act (EI Act) uses the word "claimant," meaning a person who has made a claim for EI benefits.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

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.[3]

[8] To answer the question of whether the Appellant suspended from her job because of misconduct, 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.

[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.

Why was the Appellant on leave without pay then terminated by her employer?

[10] I find that the Appellant was suspended then terminated from her job because she did not comply with her employer's vaccination policy.

[11] The Appellant doesn't dispute that she was suspended and terminated because of the vaccination policy. The Appellant does not agree it was misconduct.

[12] The Commission says the Appellant was suspended and then terminated for not following the employer's vaccination policy.

[13] The Appellant`s statements to the Commission and to the Tribunal are consistent. The Appellant consistently argued that she was placed on unpaid leave by the employer. The Appellant says the employer put her on unpaid leave through no fault of her own and has always been willing to work each day.

[14] I find that the Appellant was suspended and terminated for not following the vaccine policy implemented by the employer, I find that it is the employer who initiated

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

the leave without pay. It was not initiated by the Appellant. It is not a situation of voluntary leave.

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

[15] The reason for the Appellant's suspension and termination is misconduct under the law.

[16] 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 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.

[17] 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]

[18] 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 let go because of that.[7]

[19] The law doesn't say I have to consider how the employer behaved.[8] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[9]

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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.
[8] See section 30 of the Act.
[9] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[20] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[10] I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or employment contract. I can't decide whether an employer breached an employment contract.[11] I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.[12] And I can't decide whether an employer breached a claimant's privacy or other rights in the employment context, or otherwise.

[21] 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.[13]

[22] 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.

[23] The Commission has to prove that the Appellant suspended then terminated 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 suspended from her job because of misconduct.[14]

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

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[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. 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.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[12] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[14] See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The employer had a vaccination policy which involved suspension and termination without pay for individuals who do not comply.
- The employer communicated the policy to all staff.
- The communication clearly notified the Appellant about its expectations about getting vaccinated.
- The Appellant knew or should have known what would happen if she didn't follow the policy.

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

- The mandatory vaccine policy is a violation of her Human Rights.[15]
- She has the right to refuse vaccination.
- There are adverse effects to the vaccine.
- The employer tried to coerce her to take the vaccine.
- The vaccine policy is not law.
- Horrific terms and conditions on the Google APP (APP).[16]
- Her record with the employer was perfect with a perfect driving record with awards given to her for her job.
- In a letter dated May 20, 2022, where a termination agreement was offered or negotiated with the union.[17] The Appellant told the Commission that this letter should allow for the payment of EI Benefits.[18]

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[15] See GD3 page 9.
[16] As an alternative to vaccination, employees could submit regular test results, but it had to be done via a Google APP. The terms and conditions the Appellant objected to are the ones associated with the APP. It gave developers access to personal information on her phone to which she objects.
[17] See GD3 page 42.
[18] See GD3 page 62.

[26] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said employees must be in compliance or be placed on unpaid leave and in.
- The employer clearly advised the Appellant about what it expected of its employees in terms of getting vaccinated.
- The employer communicated the policy to all staff to explain what it expected.
- The Appellant knew or should have known the consequence of not following the employer's vaccination policy.

[27] The Appellant testified that she had received the policy. She understood the policy but could not believe it had come to this. She left in August 2021 for vacation and when she returned in September 2021, the policy had been announced. Everyone needed to be vaccinated by October 31, 2021. If an employee did not want to become vaccinated, they had to submit negative test results at their own cost. This is what the Appellant wanted. However, she objected to the transmission of these test results via the APP.

[28] She read the terms and conditions of the APP and disagreed with them. Applications (APP) on a person`s phone enable the APP developer to get all the user`s information on their phone. She objected to this. The Appellant tried to send the negative tests information via email, but the employer would not accept it.

[29] The employer sent at least three letters to the Appellant.

- In a letter dated November 4, 2021,[19] the employer informed the Appellant that "As you have not provided proof that you will be fully vaccinated by November 15, you were placed on the COVID-19 Rapid Testing Program." The letter then continues to say, "... you have not confirmed that you are prepared to comply with the testing requirements in the Rapid Testing Program. As a result of your

[19] See GD3 page 19.

refusal to follow Management`s safety-related direction arising from … you will be placed on leave of absence without pay effective from the date of this letter through to and including November 30, 2021."

- In a letter dated December 14, 2021,[20] the employer informed the Appellant that "As you did not contact us by or before December 14, 2021, to indicate you are prepared…. you are being placed on a six (6) week disciplinary suspension without pay from December 15, 2021, until January 26, 2022.

- In a letter dated January 26, 2022, the employer informed the Appellant that "On November 30, 2021, your leave was extended to and including December 14, 2021, to provide you … As you did not comply by December 14th, you were placed on a six (6) week disciplinary suspension…. Your continued unwillingness to comply… a decision has been made to terminate your employment with the City of… immediately."

[30] The policy mentions that non-compliance may lead in discipline up to and including termination. The employer also made a statement to support this fact effect to the Commission.[21]

[31] The Appellant ought to have known what she had to do under the vaccination policy and what would happen if she didn't follow it. The Appellant acknowledged she received communication regarding the policy and subsequent emails. She chose not to become vaccinated and chose not to submit the test results as required by the employer in the method required by the employer.

[32] The Appellant knew that if she did not get vaccinated or submit test results via the APP, she faced suspension and termination. She acted knowingly. I agree it was not with any wrongful intent, but it was knowingly.

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[20] See GD3 page 21.
[21] See GD3 page 31.

[33] In a recent case called Parmar,[22] the issue before the Court was whether 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.

[34] 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 then 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 …

[35] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[23] 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.

[36] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws. The recourse available to an employee would be via another tribunal or court if the employer contravened the

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

employment contract. Similarly, the recourse would be via another tribunal or court if the employer contravened her human rights as an example.

[37] The termination agreement referred to in the May 20, 2022, letter does not change this decision. The Appellant knew about the policy and the consequences of non-compliance. This negotiated settlement after the fact does not change this.

[38] I agree the Appellant can decline vaccination. I also agree that the Appellant can also refuse to transmit her medical information via the APP. That is her own personal decision. 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.

[39] The Appellant also argues that the policy violates her human rights. My role is to make decisions based on the EI Act, Regulations and related case law. The Appellant may have recourse under other forums but my jurisdiction is limited as stated above.

[40] I find the Appellant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issues. I have no doubt the Appellant was a valuable employee. Nothing in the file contradicts this.

[41] The Appellant says that the threshold for misconduct has not been met. I accept the Appellant 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.[24]

So, did the Appellant lose her job because of misconduct?

[42] Based on my findings above, I find that the Appellant was suspended and terminated from her job because of misconduct. The Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

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[24] See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

Conclusion

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

[44] The Appellant is be disentitled from regular benefits from November 1, 2021, because she was suspended due to misconduct. The Appellant would then be disqualified from receiving regular benefits effective January 23, 2022, because she was terminated from her job due to misconduct.

[45] As the benefit period began on February 20, 2022, benefits are refused from this date only.

[46] This means the appeal is dismissed.

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