Citation: *DG v Canada Employment Insurance Commission*, 2023 SST 850

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (552121) dated November 14, 2022 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	In person
Hearing date:	April 17, 2023
Hearing participant:	Appellant
Decision date:	April 25, 2023
File number:	GE-22-4124

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 his job because of misconduct. In other words, because he did something that caused him to be suspended from his job. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from his job. The Appellant's employer says that he was suspended without pay because he did not comply with the vaccination policy which required all employees to attest to being fully vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy wasn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant was disentitled from receiving EI benefits during his suspension.

Matters I Must Consider First

I will accept documents sent in just before the hearing

[6] The Appellant advised me at the hearing that he had sent in more documents just before the start of the hearing. The Appellant told me about the content of these additional documents and that they were a guide for his presentation before the Tribunal. Since these documents were referred to during the hearing, I will accept them. The Commission was afforded a reasonable amount of time to review the Appellant's submissions and did not respond with additional representations of its own.

[1] Section 31 of the *Employment Insurance Act* (EI Act) says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Issue

[7] Did the Appellant get suspended from his job because of misconduct?

Analysis

[8] The law says that you can't get EI benefits if you are suspended from your job because of misconduct. This applies when the employer has let you go or suspended you.[2]

[9] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant get suspended from his job?

[10] The parties agree that the Appellant was suspended from his job because he chose not to comply with his employer's COVID vaccination policy. I find that this is the case. There is no evidence before me to contradict this finding.

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

[11] The reason for the Appellant's suspension is misconduct under the EI Act.

[12] The EI Act doesn't say what misconduct means. But case law shows us how to determine whether the Appellant's suspension is misconduct. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[13] Case law says that to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] The Appellant doesn't have to have

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[2] See sections 30 and 31 of the EI Act.
[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent, in other words, he doesn't have to mean to be doing something wrong, for his behaviour to be misconduct under the law.[5]

[14] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended because of that.[6]

[15] The Commission has to prove that the Appellant lost his 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 his job because of misconduct.[7]

[16] I only have the power to decide questions under the EI Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues such as whether the employer should have made reasonable accommodations for the Appellant aren't for me to decide.[8] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the EI Act.

[17] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[9] 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 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.

[18] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of

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[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.

[19] A more recent decision that follows the McNamara case is *Paradis v. Canada (Attorney General).*[10] 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.[11]

[20] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General).*[12] 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.[13]

[21] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. Further, these same principles have been affirmed in a recent Federal Court case dealing directly with misconduct based on failure to follow an employer's vaccine policy: *Cecchetto v. Canada (Attorney General).*[14]

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[10] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[12] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[13] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] *Cecchetto v. Canada (Attorney General),* 2023 FC 102 at paras. 12, 15, 16, 17, 24.

[22] My role is not to look at the employer's conduct or policies and determine whether the employer was right in suspending the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

[23] The Commission says that the employer instituted a COVID vaccination policy that required all employees to attest that they had been fully vaccinated by October 29, 2021. The Appellant applied for a religious exemption. That request was denied on January 11, 2022. The Appellant was then given until February 8, 2022 to comply with the policy. He failed to attest to being fully vaccinated by that date. He was then placed on leave without pay.

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

- The employer had a vaccination policy
- The employer clearly notified the Appellant about its expectations that all employees without an approved exception were required to be fully vaccinated according to the policy
- The employer communicated with the Appellant directly numerous times to communicate what it expected
- The employer denied the Appellant's request for a religious exemption prior to the deadline for compliance with the vaccination policy. The employer reminded that Appellant of his obligations under the policy, the consequences if he did not comply, and further invited him to speak with his employer about the issue
- The Appellant knew he could be suspended for not complying with the vaccination policy.

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

- The employer’s vaccination policy was based on out-dated information and compliance would not prevent the spread of the disease
- The Appellant is a data scientist, and he says that by the time it was implemented, the policy was out of date and relied on old data.
- The Appellant used public data to question the COVID vaccine efficacy and safety.
- The Appellant presented his information to the employer in the hopes that the policy would be changed, but it was not altered.
- The Appellant felt unable to comply with the policy in the absence of his employer providing him with better information about the vaccine.
- The Appellant worked entirely from home and did not need to interact in person with his colleagues or the public
- The Appellant’s strongly held belief that the vaccine was more damaging to his health than the disease
- The Appellant felt that he already had immunity because he had received one does of the vaccine and had also contracted Covid and recovered without issue
- The Appellant did not truly believe the employer would enforce its right to suspend the Appellant under the vaccination policy because that action was so immoral
- The employer’s vaccination policy was a violation of the Appellant’s rights
- The employer’s vaccination policy was forcing a medical procedure without consent and that was equivalent to an assault under the *Criminal Code*

- The employer's suspension of the Appellant without pay for misconduct was the equivalent to torture under the *Criminal Code.*

[26] The Appellant knew what he had to do under the vaccination policy and what could happen if he didn't follow it. The Appellant agreed that he had been told about the policy and the consequences of not following it. The Appellant communicated with his employer on numerous occasions to try to get the employer to alter its policy or provide a testing exemption for those unwilling to be fully vaccinated. Those efforts were unsuccessful.

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

- The employer had a vaccination policy that said all employees were required to attest to being fully vaccinated unless they had an approved accommodation or exemption

- The Appellant applied for an exemption for religious reasons but was denied

- The Appellant did not meet the definition of fully vaccinated according to the policy

- The employer told the Appellant about what it expected of its employees in terms of what it meant to be fully vaccinated and the process for attesting

- The employer provided a training video on COVID vaccine fundamentals to the Appellant

- The employer communicated frequently with the Appellant and spoke with him in person about his concerns and what it expected

- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

[28] The Appellant raised several past Tribunal decisions that he said were similar to his.[15] I find that the facts in those cases are not the same as those in this case. In *AL*, the Tribunal found that the AL was a unionized employee and the employer had not incorporated the vaccine policy into the employment contract. AL was dismissed from her job. This case is different. Here, the Appellant was not dismissed but suspended. Further, the policy was implemented pursuant to law. The Appellant grieved his suspension and was unsuccessful at the first level. There is no evidence before me that the union rejected the policy as not being part of the employment contract.

[29] In Both *TC* and *CG,* the issue was whether the appellants in those cases had been given proper notice of their employer's vaccine policy and notice of the consequences of not complying. That is not the case here, where the Appellant was aware of the policy and knew he could be suspended if he did not comply.

[30] The Appellant was clearly frustrated and upset with the employer's vaccination policy. I understand that the Appellant felt he had a right to refuse the vaccination. Nevertheless, the matter of whether the employer was unfair or unreasonable in adopting its vaccination policy is beyond my jurisdiction.[16] In short, other avenues exist for the Appellant to make those arguments.

[31] The Appellant's reasons for not complying with his employer's vaccine policy may be good reasons why the Appellant did not wish to be vaccinated, but that does not mean it isn't misconduct under the EI Act. What matters in this case is that the Appellant made the deliberate choice not to comply with the employer's policy knowing that he could be suspended according to the policy.

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

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[15] *AL v Canada Employment Insurance Commission*, 2022 SST 1428 (AL), *TC v Canada Employment Insurance Commission*, 2022 SST 891, and *CG v Canada Employment Insurance Commission*, 2022 SST 356.

[16] *Cecchetto v. Canada (Attorney General),* 2023 FC 102

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

[33] This is because the Appellant's choice not to follow his employer's vaccination policy led to his suspension. He acted deliberately. He knew that refusing to get fully vaccinated could result in his suspension from his job.

Conclusion

[34] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits for the period of his suspension.

[35] This means that the appeal is dismissed.

Marisa Victor

Member, General Division – Employment Insurance Section