



Citation: *JK v Canada Employment Insurance Commission*, 2023 SST 811

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: J. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (467978) dated May 11, 2022 (issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Teleconference

Hearing date: January 11, 2023

Hearing participants: Appellant

Decision date: April 14, 2023

File number: GE-22-3202

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant 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 Claimant is disentitled from receiving Employment Insurance (EI) benefits for the period of his suspension.¹

Overview

[3] The Claimant works in an adult long term care facility with vulnerable adults. The provincial government put in place a vaccination directive for employees of long-term care facilities. The Claimant's employer said that he was not allowed to work because he did not comply with the vaccination directive for long-term care home workers by the deadline set by the government.

[4] The Claimant doesn't dispute that he did not get vaccinated before the deadline. He says that he wanted to make sure that the vaccine would not cause a health crisis for him given his past medical history. He was not trying to go against the directive but had had a bad reaction to another vaccination in the past.

[5] The Commission accepted the employer's reason for why the Claimant was not allowed to work. It originally decided that the Claimant was dismissed from his job because of misconduct. The Claimant asked for his claim to be reviewed. The Commission noted that the Claimant had returned to work, so they changed their decision to say he was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits for the period of the suspension.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disqualified from receiving benefits.

Matter I have to consider first

The Employer is not a party to the appeal

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

[7] 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, as there is nothing in my file that suggests that my decision would impose any legal obligations on the employer.

Issue

[8] Was the Claimant suspended from his job because of misconduct?

Analysis

[9] 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.²

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

Why was the Claimant suspended from his job?

[11] I find that the Claimant was put on an administrative leave (suspended) from his job because he was not in compliance with the New Brunswick directive for employees of long-term care facilities. Specifically, he was not vaccinated against COVID-19 by November 19, 2021.

² See sections 30 and 31 of the Act.

[12] The Claimant says that he thought a lot about whether or not to get vaccinated but was worried because he had had a reaction to a vaccine in the past. He wanted more information about the vaccine and just did not have time to get it before the deadline.

[13] The Commission says the Claimant was put on administrative leave without pay due to his own misconduct. He refused to comply with the government's mandatory vaccination policy.

[14] I find that the Claimant was suspended because the New Brunswick government directive said that on November 19, 2021, employees who were not vaccinated against COVID-19 were not permitted to work in a long-term care facility.

[15] This is what happened with the Claimant. The Claimant admits that he was not vaccinated by November 19, 2021, and he did not have a medical exemption from being vaccinated. So, I find the Claimant was suspended from his job because he did not comply with the provincial health directive.

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

[16] The reason for the Claimant's suspension is misconduct under the law.

[17] 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 Claimant'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.

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

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

[19] There is misconduct if the Claimant 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 let go because of that.⁶

[20] The Commission has to prove that the Claimant had been suspended from 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 Claimant was suspended his job because of misconduct.⁷

[21] I only have the power to decide questions under the Act. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁸ I am not able to evaluate the wisdom or fairness of the government directives. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[22] 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.

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.

[23] 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 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.

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

[25] 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

[26] 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 the government policies and determine whether they were right in suspending the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

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.

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

- A government directive applicable to long-term care residences was in place
- the employer clearly notified the Claimant about his obligations under the government policy
- the Claimant knew or should have known what would happen if he didn't follow the policy

[28] The Claimant says that there was no misconduct because:

- He had valid health concerns related to the vaccine
- He was not able to get the information he needed to feel comfortable with being vaccinated before the deadline.

[29] The New Brunswick Vaccination directive for Long Term Care facilities¹⁴ says that employees will have until November 19, 2021, to provide their employer with proof that they have been fully vaccinated against COVID-19. An employee (without a valid medical exemption for the COVID-19 vaccine supported by a medical certificate) who is not fully vaccinated by November 19, 2021, **is not permitted to work in the facility.** (emphasis in original)

[30] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. He testified that he knew that if he wasn't vaccinated, he wouldn't be allowed to come into work. He knew he wouldn't have a job if he wasn't vaccinated.

[31] The Claimant argues that he wasn't really planning to refuse to be vaccinated. He had gone to a pharmacist where they were giving the vaccines, but when he saw the waiver that was required with the vaccine, he decided he would not do it that day.

¹⁴ A copy of this directive dated October 8, 2021 is in the evidence as GD3-34.

[32] I understand from the evidence that the Claimant has had severe issues with heavy metal toxicity in the past. This led him to be concerned about the ingredients in the vaccine. He was concerned about the vaccine causing him a severe health reaction.

[33] I note that before the November 19, 2021 deadline, the Claimant does appear to have made some efforts to find information about the ingredients in the vaccines. He consulted a nurse and a pharmacist and did research on the internet to find the information he needed.

[34] The Claimant also explains that he was sick after receiving a flu shot many years ago. However, he did not provide any evidence that the reaction he had was directly related to that shot.

[35] I can understand the Claimant's concern. I can also see that collecting the information he needed about the vaccine did take some time.

[36] However, I also note that when the Commission spoke to the Claimant on March 8, 2022, he told them that he had not consulted with his own doctor about his concerns about the vaccine for him personally. At the hearing, the Claimant said that he had talked to his doctor, but that she had not given him an exemption from being vaccinated despite his medical history. She had even told him that he should probably get the vaccine.

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

- the employer was subject to the provincial vaccination directive and risked losing provincial funding if the employees did not comply
- the employer clearly told the Claimant what was expected of employees in the directive in terms of getting vaccinated
- the employer held meetings several times that the Claimant attended, to communicate what was expected

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

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

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

[39] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that not getting vaccinated before November 19, 2021, was likely to cause him to be suspended from his job.

[40] Since the Claimant did return to work with his employer once the vaccine directive was lifted, his suspension ended at that time. So, his disentitlement would end on April 1, 2022.

Conclusion

[41] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[42] This means that the appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section