



Citation: *MD v Canada Employment Insurance Commission*, 2022 SST 1783

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

Decision

Appellant: M. D.
Representative: S. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (463746) dated April 13, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw

Type of hearing: Videoconference
Hearing date: September 27, 2022
Hearing participant: Appellant
Decision date: November 25, 2022
File number: GE-22-1664

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended and later dismissed from his job. The Claimant's employer says that he was let go because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He had religious and medical reasons for not getting vaccinated.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matters I have to consider first

The employer is not a party to this appeal

[6] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

The Claimant's representative was not present at the hearing

[7] On the Claimant's notice of appeal, he stated that he was being represented by a representative from his union. The representative did not appear at the hearing. I asked the Claimant if he would like to adjourn the hearing and arrange for his representative to attend. The Claimant said the union representative wasn't willing to attend the hearing.

[8] I told the Claimant that I would accept a written statement from his representative after the hearing, if he wished to provide evidence or submissions about the appeal. After the hearing, the Claimant told the Tribunal that the representative would not be providing a written statement.²

I have accepted the Claimant's post-hearing documents

[9] Following the hearing, the Claimant submitted several documents by email. This included information about his exemption request, his dismissal meeting, and his collective bargaining agreement. I have accepted these documents into evidence as they are relevant to the Claimant's appeal.

Issue

[10] Did the Claimant lose his job because of misconduct?

Analysis

[11] 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

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

² See GD10.

³ See sections 30 and 31 of the Act.

Why did the Claimant lose his job?

[13] I find that the Claimant lost his job because he went against his employer's vaccination policy.

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

[14] The reason for the Claimant's dismissal is misconduct under the law.

[15] 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 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.

[16] 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 Claimant doesn't have to have 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.⁶

[17] 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.⁷

[18] The Commission has to prove that the Claimant 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 Claimant lost his job because of misconduct.⁸

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 *Minister of Employment and Immigration v Bartone*, A-369-88.

[19] 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 dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] 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 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.

[21] 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.

[22] A more recent decision that follows 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

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

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

[23] Another similar case from 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

[24] 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 policies and determine whether they were right in dismissing 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.

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

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about getting vaccinated
- the employer spoke to the Claimant several times to communicate what it expected
- the Claimant knew or should have known what would happen if he didn't follow the policy

[26] The Claimant says that there was no misconduct because he is unable to get vaccinated due to his religious beliefs. He also had medical concerns about the COVID-

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.

19 vaccines. And he was experiencing depression at the time and feels that his mental state contributed to his ability to make a decision on whether to get vaccinated.

[27] The employer's vaccination policy says that staff must provide proof of full vaccination or have an approved exemption by October 15, 2021. Staff who do not meet these requirements may be disciplined up to and including termination of employment.¹⁵

[28] The employer sent emails to all staff announcing the policy on August 26, 2021 and September 3, 2021.¹⁶

[29] On August 30, 2021, the employer sent the Claimant an email stating that it respects his choice of vaccination and asking him to read the policy and understand the implications of the provincial directive. The Claimant said his supervisor also attempted to contact him by phone. However, the Claimant was on parental leave at the time. He sent the employer an email asking why the policy was being put in place so fast when the province hadn't passed the law yet. He said that he wanted time to do his homework and respond to his supervisor.

[30] The Claimant said that he became aware of the policy in September when his supervisor called him. But, he was on leave and wanted to deal with it when he returned to work. He was notified of the policy and the employer's expectations regarding vaccination when he returned from leave on October 11, 2021.

[31] On October 20, 2021, the employer sent the Claimant an email saying that he is not fully vaccinated as required by the policy. The deadline for his compliance was extended to November 15, 2021, to allow him time to be vaccinated, and that he is expected to be "in full compliance" with the policy by November 15, 2021. The email states that this is a "final reminder of his obligations as an employee" and that failure to comply could result in disciplinary action up to and including termination.¹⁷

¹⁵ See GD3-26 to GD3-29.

¹⁶ See GD3-41, GD3-51, and GD3-69.

¹⁷ See GD3-47 and GD3-49.

[32] On November 15, 2021, the employer placed the Claimant on unpaid administrative leave (suspension) for two weeks for failing to comply with the vaccination policy.¹⁸

[33] He was suspended again on November 29, 2021, January 14, 2022, and February 11, 2022. The employer sent him notices of suspension on each of these dates.¹⁹ On February 11, 2022, he was sent a “final notice of unpaid administrative leave.” It stated that his unpaid leave would continue until March 24, 2022, or he becomes compliant with the policy.²⁰ The employer dismissed the Claimant on March 25, 2022.

[34] On December 20, 2021, the Claimant asked for a religious exemption to the vaccination policy.²¹ The employer denied his exemption request on Jan 4, 2022.²²

[35] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Claimant about the requirements and the consequences of not following them.

[36] He argued that he didn't make a choice about vaccination, but that he wanted to be patient and wait for more information about the COVID-19 vaccines. However, the employer's policy required him to provide proof of his full vaccination by November 15, 2021. By not providing proof, he went against what was required by his employer's policy.

[37] 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 Claimant's employment.²³

¹⁸ See GD3-39.

¹⁹ See GD3-65, GD3-67, and GD3-75.

²⁰ See GD3-75.

²¹ See GD3-30 and GD3-31.

²² See GD3-62.

²³ See *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[38] The Claimant also said that he wasn't able to clearly make a decision whether to comply with the employer's policy because he was having mental health issues at the time. I accept the Claimant's testimony that he was experiencing depression, but the evidence supports that he did wilfully make a choice. He stated consistently throughout his appeal proceedings that he had valid medical and religious reasons for not wanting to be vaccinated at the time. The deadline to comply with the policy and the consequences of not being vaccinated were clearly communicated to him. Yet, he chose not to comply with the requirements of the employer's policy.

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

- the employer had a vaccination policy that said he had to be fully vaccinated or have an approved exemption
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated
- the employer sent letters to the Claimant several times to communicate what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

So, did the Claimant lose his job because of misconduct?

[40] Based on my findings above, I find that the Claimant lost his job because of misconduct.

[41] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to lose his job.

Conclusion

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

[43] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section