Citation: *MS v Canada Employment Insurance Commission*, 2023 SST 962

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (465135) dated April 25, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	April 4, 2023
Hearing participant:	Appellant
Decision date:	April 11, 2023
File number:	GE-23-108

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 that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't get 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.

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

Matter I have to consider first

The Appeal Division returned the appeal to the General Division

[6] The General Division of the Tribunal dismissed the Appellant's appeal from the Commission's reconsideration decision. The Appellant appealed the decision of the General Division to the Appeal Division of the Tribunal. The Appeal Division found that the General Division should have addressed conflicting evidence. For this reason, it returned the appeal to the General Division for a redetermination.

Issue

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

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[1] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

Analysis

[8] The law says 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]

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

Why did the Appellant lose her job?

[10] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[11] The Appellant says she lost her job because she didn't get vaccinated.

[12] The Commission says the Appellant lost her job because she didn't comply with her employer's COVID-19 vaccine policy.

[13] The Appellant doesn't dispute the reason her employer dismissed her. She gave reasons why she decided not to take the vaccine. But I find that the Appellant lost her job because she went against her employer's COVID-19 vaccination policy.

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

[14] The reason for the Appellant'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 Appellant'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.

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

[16] 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 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.[5]

[17] 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.[6]

[18] The law doesn't say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[8]

[19] The Commission has to prove that the Appellant lost 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 lost her job because of misconduct.[9]

[20] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether her employer wrongfully dismissed her or should have made reasonable arrangements (accommodations) for her.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[21] In a Federal Court of Appeal (FCA) case called *McNamara*, the appellant argued that he should get EI benefits because his employer wrongfully let him go.[11] He lost his

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[22] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[12]

[23] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[13]

[24] In a more recent case called *Paradis*, the appellant was let go after failing a drug test.[14] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[15]

[25] Similarly, in *Mishibinijima*, the appellant lost his job because of his alcohol addiction.[16] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.[17]

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[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[26] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to dismiss the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[27] The Appellant says there was no misconduct. She says that when she was hired, her employer didn't require her to take any vaccine. She also says she has the right to decide what to put in her body.

[28] The Commission says there was misconduct because the Appellant didn't comply with her employer's COVID-19 vaccination policy. It says the Appellant knew what the consequences would be if she didn't take the vaccine.

[29] I find that the Commission has proven that there was misconduct, because the Appellant knew that she would lose her job if she didn't take the vaccine.

[30] The Appellant worked as a laser technician in a medical office. Her employer dismissed her on December 22, 2021, for not taking the COVID-19 vaccine.

[31] The Appellant sent the Commission an email her employer sent her on September 26, 2021, about the COVID-19 vaccination. The employer referred to a provincial mandate affecting all physicians, staff, and contracted employees. The employer asked all employees to have their first vaccination by the end of October 2021, and the second vaccination within four to six weeks of the first vaccination. The email didn't say anything about what would happen if employees didn't get the vaccine.

[32] The Appellant sent the Commission another email her employer sent her on October 26, 2021. The employer gave an extension until November 30, 2021, to be fully vaccinated. The employer said this was in line with the extension given by the provincial health authority. The email says that if the Appellant didn't take the deadline seriously, the employer would be forced to consider all options to meet patients' needs.

[33] I find from the emails the Appellant sent to the Commission that her employer required her to take the COVID-19 vaccine. I find that the employer was following the vaccine mandate put in place by the provincial health authority. So, I find that the details in the emails reflect the employer's policy that its employees had to be vaccinated against COVID-19.

[34] The Commission asked the Appellant if her employer or the policy explained that going against the policy requiring vaccination could result in her losing her job. The Commission's notes reflect that the Appellant said yes.

[35] After the Appellant asked the Commission to reconsider its initial decision, she spoke to the Commission again. The Commission's notes reflect that the Appellant said she understood that she could lose her job if she didn't get vaccinated.

[36] The Appellant testified that she didn't really have any conversations with her employer about the two emails she shared with the Commission. She said she thought the second email would have said what the consequences of not taking the vaccine were.

[37] The Appellant testified that the second email from her employer said there would be consequences, but it didn't say what they were. She said she never imagined she would lose her job for not getting vaccinated.

[38] I don't find that the Appellant knew or could have known from the employer's emails what would happen if she didn't get fully vaccinated. I find the language in the second email to be vague. The employer could have been referring to non-disciplinary or disciplinary options. But the Appellant could not know the possible options from the email.

[39] Despite the emails being unclear about consequences, the Appellant testified that her employer told her in November 2021 that she would be dismissed from her job because she was unvaccinated. I find this is consistent with her statements to the Commission that she did know that she could lose her job if she remained unvaccinated.

[40] I accept as fact that the Appellant continued to work until December 22, 2021, about three weeks beyond the employer's deadline to take the vaccine. The Appellant said that this delay showed that being unvaccinated wasn't really an issue. She testified that her employer allowed her to work because he needed her. But I find that the Appellant had time to comply with the requirement to get fully vaccinated to avoid losing her job.

[41] The Appellant said she was afraid of the vaccine's side effects. She also believes that the vaccine seems to be ineffective since her friends and family who were vaccinated got infected with COVID-19. I understand the Appellant's concerns. But it's not my role to decide if the employer's policy was reasonable or if the vaccine is safe and effective.

[42] The Appellant testified that when she started working for the employer, there was no obligation to take any vaccine. She said it's her right to decide what to put in her body.

[43] I have no reason to doubt that the Appellant's employer didn't require her to take any vaccines when she was hired. But I have already found that the employer's policy detailed in its emails to the Appellant changed this. And while it was open to the Appellant to decide not to take the COVID-19 vaccine, I find that this went against her employer's policy.

[44] I find that the Appellant's action, namely going against her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to take the vaccine. She did so, knowing that her employer would fire her. For these reasons, I find that the Commission has proven that there was misconduct.

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

[45] Based on my findings above, I find that the Appellant lost her job because of misconduct.

[46] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

[47] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[48] This means that the appeal is dismissed.

Audrey Mitchell
Member, General Division – Employment Insurance Section