Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 1006

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. C.
Representative	M. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (514929) dated September 8, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Videoconference
Hearing date:	January 13, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	February 14, 2023
File number:	GE-22-3321

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Appellant isn't disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from her job. The Appellant's employer says that she was suspended and then let go because she didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that not getting vaccinated isn't misconduct.

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

Matter I have to consider first

Addition of a representative

[6] In her notice of appeal, the Appellant said she didn't have a representative. She later asked to reschedule her hearing because she had a representative. The hearing was rescheduled to allow for a fair hearing.[2]

[7] At the hearing, the representative clarified her role. She said that the Appellant asked her to be her representative, but she would help with answering questions. For this reason, I had the representative take a solemn affirmation along with the Appellant.

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[1] Section 31 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disentitled from receiving benefits.
[2] See section 43 of the Social Security Tribunal Rules of Procedure.

Issue

[8] Was the Appellant suspended from her 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.[3]

[10] To answer the question of whether the Appellant was 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.

Why was the Appellant suspended from her job?

[11] I find that the Appellant was suspended from her job because she didn't get vaccinated as required by her employer's COVID-19 vaccination policy.

[12] The Appellant says her employer suspended her because of her immunization status. She didn't take the COVID-19 vaccine because of her religious beliefs.

[13] The Commission says the Appellant didn't comply with her employer's COVID-19 vaccine policy. It says this led to her suspension.

[14] The Commission spoke to three representatives of the employer. The information each provide was somewhat different. Each said, respectively, that:

- the Appellant was dismissed from her job because she wasn't vaccinated;
- the employer wasn't able to allow the Appellant to continue working if the reason she couldn't take the COVID-19 vaccine was based on religious grounds, so to accommodate her, it wouldn't consider dismissal; and,

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

- the Appellant isn't suspended, but the employer can't give her shifts because the provincial health order says employees in her position have to be vaccinated, and the Appellant's exemption request didn't meet the standard.

[15] The Appellant asked her employer to exempt her from having to take the COVID-19 vaccination. She said taking the vaccine would violate the tenets of her religious beliefs as a Christian. She testified that her employer said it couldn't consider her request. The Appellant said she wondered about this since she works for a Christian organization.

[16] The employer's COVID-19 vaccine policy has a section about accommodation. It states:

- the employer doesn't have the authority to grant any exemptions to the Provincial Health Officer (PHO) order for unvaccinated staff,

- re-deployment to another position that isn't covered by the PHO order isn't possible, and

- for employees who ask for accommodation on a protected ground other than medical, the employer has no choice but to place them on unpaid leave.

[17] I give more weight to the reason given by the employer's representative who said the employer couldn't allow the Appellant to continue working if she had asked for accommodation on religious grounds than to the statements of other two representatives. I do so because it is consistent with what the employer's COVID-19 vaccination policy states. It is also more consistent with the Appellant's testimony that her employer told her it couldn't consider her request.

[18] I accept as fact that the Appellant asked her employer for an exemption on religious grounds, but her employer didn't consider the request. I also accept as fact that the Appellant didn't take the vaccine due to her religious beliefs. So, I find that the employer suspended the Appellant because didn't get vaccinated as required by its policy.

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

[19] The reason for the Appellant's suspension isn't misconduct under the law.

[20] 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.

[21] 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]

[22] 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]

[23] 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]

[24] The Commission has to prove that the Appellant was suspended from her job because of misconduct. The Commission has to prove this on a balance of

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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.

probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from her job because of misconduct.[10]

[25] 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 let her go (or in this case wrongfully suspended her) or should have made reasonable arrangements (accommodations) for her.[11] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[26] 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.[12] He lost his 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.

[27] 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.[13]

[28] 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.[14]

[29] In a more recent case called *Paradis*, the appellant was let go after failing a drug test.[15] He argued that he was wrongfully let go, since the test results showed that he

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[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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.[16]

[30] Similarly, in *Mishibinijima*, the appellant lost his job because of his alcohol addiction.[17] 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.[18]

[31] 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 suspend 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.

[32] The Appellant says there was no misconduct because her refusal to take the COVID-19 vaccine isn't the same as refusing to perform an aspect or her duties or refusing to attend work. Her representative clarified at the hearing that the Appellant felt that the government had pushed a vaccine mandate that went against her strong religious beliefs.

[33] The Commission says there was misconduct because the Appellant knew that she would be subject to unpaid leave if she didn't comply with her employer's COVID-19 vaccine policy. It says the Appellant's behaviour was willful, deliberate or intentional.

[34] I don't find that the Commission has proven that there was misconduct. I find that the Appellant knew she couldn't do her job if she didn't get vaccinated and didn't have an approved or pending medical exemption. But I find that the employer

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[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

accommodated the Appellant's choice not to be vaccinated by placing her on unpaid leave and not considering dismissal.

[35] The work that the Appellant did for her employer is funded by an outside agency. The employer included details of the vaccination requirement in a letter to the Appellant. It says the PHO issued an order requiring staff of service providers funded by the outside agency to confirm they are fully vaccinated against COVID-19 or have an exemption by January 14, 2022. The funder required service providers, to prepare and implement plans and not to permit staff to work unless staff:

- report their vaccination status to the employer by December 3, 2021,
- have received and prove they had a first dose of the vaccine by December 10, 2021, and,
- have received and prove that they have had their second dose of the vaccine by January 14, 2022.

[36] The letter referred to above notified the Appellant that the employer was placing her on an unpaid leave of absence effective December 10, 2021. It did so because the Appellant had not given proof of taking the first dose of the COVID-19 vaccine.

[37] The Appellant testified that she remembered getting emails from her employer about the vaccination orders. She said that she understood that if she didn't show proof of vaccination, she would be placed on unpaid leave.

[38] The Appellant asked her employer to accommodate her based on her religious beliefs, so she wouldn't have to take the COVID-19 vaccine. I asked the Appellant about this. She said her employer said it could not take this into consideration.

[39] The Appellant's employer created and implemented its own policy consistent with what its funder required. As noted above, it has a section on accommodation. It states that the employer doesn't have the authority to grant any exemptions to the PHO order

for unvaccinated staff. Staff who want an exemption can do so to the PHO and can only do so on medical grounds.

[40] The employer's policy also says it doesn't have the authority to grant accommodation under other protected grounds. It says since it can't re-deploy staff to other positions, it has no choice but to place employees seeking accommodation on an unpaid leave of absence, but the employer may not terminate their employment depending on the grounds.

[41] As noted above, the Commission spoke to three employer representatives. I gave more weight to the statements of the Chief Financial Officer (CFO) than to the other representatives. According to the Commission, the CFO said, "to accommodate the client requesting a religious exemption, the employer is not considering dismissal and only suspension". Again, I find that this is consistent with the language of the employer's policy.

[42] I asked the Appellant about the CFO's statement. She said she and her employer didn't have much conversation about this. She said the employer's president said that the fight over vaccines is not with the employer and employees; rather it was between the employees and the province.

[43] I find from the employer's policy that it didn't have the authority to exempt the Appellant from having to take the COVID-19 vaccine. I also find that it didn't have another position to re-deploy the Appellant to. So, I find from the CFO's statement that because the Appellant asked for accommodation on religious grounds, it accommodated her by not considering dismissal. I don't find that this is misconduct within the meaning of the Act, even though the Appellant knew that not taking the vaccine would effectively result in her suspension.

So, was the Appellant suspended from her job because of misconduct?

[44] Based on my findings above, I find that the Appellant wasn't suspended from her job because of misconduct.

Conclusion

[45] The Commission hasn't proven that the Appellant was suspended from her job because of misconduct. Because of this, the Appellant isn't disentitled from receiving EI benefits.

[46] This means that the appeal is allowed.

Audrey Mitchell
Member, General Division – Employment Insurance Section