



Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1117

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

Decision

Appellant: M. M.
Representative: R. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (475179) dated May 25, 2022
(issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In person
Hearing date: July 26, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: August 3, 2023
File number: GE-23-1266

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant was suspended¹ from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means the Appellant is disentitled from receiving Employment Insurance (EI) benefits.²

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said she was suspended because she didn't follow their mandatory COVID-19 vaccination policy: she didn't get vaccinated.

[4] Even though the Appellant doesn't dispute this happened, she says she was dismissed, not suspended. She also says her actions aren't misconduct.

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

Matter I have to consider first

The Appellant asked for an interpreter

[6] The Appellant asked for an interpreter as English isn't her first language. At the hearing, the Appellant confirmed she understands some English and only needed the interpreter to translate things she didn't understand. So, the hearing was partially conducted through an interpreter to ensure the Appellant could understand the proceedings.

¹ In this decision, suspension, leave of absence, unpaid leave of absence, and indefinite unpaid leave of absence all mean the same thing.

² Section 29 of the *Employment Insurance Act* says appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Issue

[7] Was the Appellant suspended from her job because of misconduct?

Analysis

[8] 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?

[9] I find the Appellant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy: she didn't get vaccinated.

[10] The Appellant doesn't agree that she was suspended from her job. She argues that she was actually dismissed because a suspension should include conditions on how an employee can return to work, but her employer didn't give her any conditions when they put her on unpaid leave, such as saying she could go back to work if she got vaccinated or giving a date when her suspension would end.³

[11] I acknowledge the Appellant feels she was dismissed, not suspended, from her job for the reasons she says.

[12] But I find the evidence shows the Appellant was in fact suspended from her job. This evidence is:

- An email to the Appellant from her employer, dated September 16, 2021. It says if she doesn't follow their policy by October 30, 2021, she will be placed on an indefinite unpaid leave of absence until she is fully vaccinated or until the COVID-19 vaccine is no longer required.⁴

³ GD7-3 and Appellant's testimony.

⁴ GD3-23.

- An email to the Appellant from her employer, dated October 31, 2021. It says the Appellant is now placed on an indefinite unpaid leave of absence as of October 31, 2021 for not following their policy.⁵

[13] I find this evidence shows the Appellant's employer did explain to the Appellant how an employee who was placed on indefinite unpaid leave for not following their policy could return to work, which was to either get vaccinated or be reinstated once vaccination was no longer required. They then later placed the Appellant on indefinite unpaid leave for not following their policy.

[14] I also asked the Appellant if she has received a termination letter from her employer. She testified that she has not.

[15] Taken together, I find the evidence shows the Appellant was in fact suspended, and not dismissed, from her job. The Appellant may feel she was dismissed, but there is no evidence to show that is what happened.

[16] So, for the rest of this decision, I will refer to the Appellant's loss of work as a suspension because this is what the evidence shows.

[17] As for **why** the Appellant was suspended, I find it was because she didn't follow her employer's mandatory COVID-19 vaccination policy. The Commission says this is the reason the Appellant was suspended.⁶ And the Appellant agrees this is why she was suspended.⁷

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

[18] The reason for the Appellant's suspension is misconduct under the law.

[19] 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

⁵ GD3-39.

⁶ GD4-3.

⁷ GD3-48 and Appellant's testimony.

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.

[20] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.⁹ 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.¹⁰

[21] 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 suspended because of that.¹¹

[22] The Commission has to prove the Appellant was suspended from 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 was suspended from her job because of misconduct.¹²

[23] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹³ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[24] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*.¹⁴ Mr. McNamara was dismissed from his job under his

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁰ See *Attorney General of Canada v Secours*, A-352-94.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.

[25] In response to Mr. McNamara's arguments, the Court 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."

[26] In the same case, 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.

[27] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.¹⁵ 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 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.¹⁶

[28] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General)*.¹⁷ 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

¹⁵ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹⁶ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

¹⁷ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

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.¹⁸

[29] 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 Appellant. Instead, I have to focus on what the Appellant did or didn't do and whether that amounts to misconduct under the Act.

[30] The Commission says there was misconduct because the Appellant knew her employer had a mandatory COVID-19 vaccination policy and knew she could be suspended for not following it, but she chose not to follow it anyway.¹⁹

[31] The Appellant says that there was no misconduct because she wasn't breaking any laws by choosing not to get vaccinated. She also says her employer acted unfairly by denying her religious exemption request, asking her to follow their policy even though she wasn't a threat to co-workers or the public, and refusing to give her other options besides vaccination to keep working.²⁰

[32] The Appellant's employer told the Commission²¹:

- They adopted a mandatory COVID-19 vaccination policy and announced it to employees on September 7, 2021.
- The policy said that employees had until October 30, 2021 to either get fully vaccinated or be put on unpaid leave of absence for not following the policy unless they had an approved exemption.
- The Appellant asked for a religious exemption and submitted a note from her church as part of it.

¹⁸ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁹ GD4-3 to GD4-4.

²⁰ GD2-1 to GD2-33, GD7-1 to GD7-4, Appellant's testimony.

²¹ GD3-50.

- Their internal committee reviewed the Appellant's religious exemption request on September 28, 2021, and concluded her situation didn't meet the criteria for a religious exemption because she was unable to draw a connection between her Roman Catholic faith and her personal faith.
- They told the Appellant on October 22, 2021 that her religious exemption request was denied.
- They then put the Appellant on unpaid leave indefinitely on October 30, 2021 for still refusing to follow their policy.
- She's still on unpaid leave and her status hasn't changed.

[33] The Appellant says²²:

- She knew about her employer's policy and its vaccination requirement.
- She asked for a religious exemption from the policy, but her employer denied it. This happened even though she gave them evidence that her religious beliefs are sincere.
- She didn't get vaccinated after her employer denied her religious exemption request. The vaccine goes against her religious beliefs.
- She has a right to not get vaccinated and exercising this right isn't misconduct.
- Her employer's policy wasn't part of her original work contract.
- Her employer didn't give her any alternatives to vaccination to allow her to keep working.
- Her employer's policy shouldn't have applied to her. She mostly worked one-on-one with patients in their homes, so she wasn't a threat to her co-workers or the broader public.
- She knew she could be suspended if she didn't follow her employer's policy.

²² GD2-1 to GD2-33, GD3-48 to GD3-49, GD3-51, GD7-1 to GD7-4, Appellant's testimony.

- She has been a good employee and never had any issues with her employer before.

[34] I sympathize with the Appellant, but I find the Commission has proven there was misconduct for the following reasons.

[35] I find the Appellant committed the actions that led to her suspension, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[36] I further find the Appellant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[37] There is evidence that the Appellant knew about her employer's policy. She said she knew about it. She also asked for a religious exemption, which shows that she knew about the policy and its requirements.

[38] There is also evidence that the Appellant chose not to follow her employer's policy. She said she didn't get vaccinated after her employer denied her religious exemption request.

[39] I acknowledge the Appellant says her employer should have approved her religious exemption request because she gave them evidence that her religious beliefs are sincere.

[40] I also acknowledge the Appellant says her employer's policy shouldn't have applied to her because she mostly worked one-on-one with patients in their own homes and wasn't a threat to her co-workers or the broader public.

[41] And I acknowledge the Appellant says her employer's policy wasn't part of her original work contract and her employer should have given her other options to keep working besides getting vaccinated.

[42] Unfortunately, I find these arguments aren't relevant here because they relate to things the Appellant's employer did or didn't do. As discussed above, the Act and the

Court say that I must focus on the Appellant's (and not the employer's) actions when analyzing misconduct. This means I can only look at what the Appellant did or didn't do leading up to her suspension.

[43] In other words, I can't look at whether the Appellant's employer acted unreasonably for the reasons she says. If the Appellant wants to pursue these arguments, she needs to do that at another tribunal or decision-making body.

[44] I also acknowledge the Appellant says that she has the right not to get vaccinated and that exercising this right isn't misconduct.

[45] I agree with the Appellant that she does have the right to choose whether to get vaccinated. But I find that her decision to exercise this right is still misconduct. I see her decision as willful since it involved a conscious and intentional choice on her part to not get the COVID-19 vaccine even though her employer's policy required it, and the Court says a willful action can be considered misconduct, as discussed above.

[46] Additionally, I acknowledge the Appellant says she has been a good employee and never had any issues with her employer before.

[47] I believe the Appellant when she says this. I have no reason to doubt her testimony.

[48] But unfortunately, I find this argument isn't relevant here either. Misconduct is part of the Act. As discussed above, the Act doesn't say specifically what misconduct means, but case law has helped to clarify its meaning, which focuses on an appellant's actions leading up to their suspension or dismissal. This means that when the Commission makes a finding of misconduct, it comes from what the Act and case law say.

[49] In other words, the Commission's decision to disentitle the Appellant from receiving benefits due to misconduct has nothing to do with the fact that she has been a good employee. Instead, it relates only to the Appellant's actions (so what she did or didn't do) leading up to her suspension.

[50] So, while I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence shows she made a conscious decision not to follow it. She didn't get vaccinated as the policy required, even after her religious exemption request was denied, which shows her actions were intentional.

[51] I also find the Appellant knew or should have known that not following her employer's policy could lead to her being suspended.

[52] There is evidence the Appellant knew she could be suspended for not following her employer's policy. She said she knew this.

[53] There is also other evidence that shows the Appellant's employer made her aware that she could be suspended for not following their policy. This evidence is:

- An email to the Appellant, dated September 16, 2021. It says their policy requires all employees to be fully vaccinated by October 30, 2021. It also says for any employees who don't follow the policy, they'll be placed on an indefinite unpaid leave of absence until they are fully vaccinated or until the COVID-19 vaccine is no longer required.²³
- An email to the Appellant, dated September 17, 2021. It reiterates the policy requirements, including that any employee who doesn't follow it will be placed on an indefinite unpaid leave of absence as of October 31, 2021.²⁴
- An email to the Appellant, dated October 22, 2021. It says her religious exemption request is denied. It also says if she doesn't get vaccinated by October 30, 2021, she'll be placed on an indefinite unpaid leave of absence as of October 31, 2021.²⁵
- An email to the Appellant, dated October 25, 2021. It reiterates the policy requirements. It also says she hasn't provided proof she's fully vaccinated, so

²³ GD3-23.

²⁴ GD3-24 to GD3-25.

²⁵ GD3-36.

she'll be placed on an unpaid leave of absence as of October 31, 2021 unless she provides proof before then.²⁶

[54] I therefore find the Appellant's conduct is misconduct under the law since she committed the conduct that led to her suspension (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being suspended.

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

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

[56] This is because the Appellant's actions led to her suspension. She acted deliberately by not getting vaccinated as her employer's policy required. She knew or ought to have known that not getting vaccinated was likely to cause her to be suspended from her job.

[57] The Appellant says she's entitled to EI because she has been contributing to it for many years. She says she now faces financial challenges because she hasn't gotten a paycheque since being suspended.

[58] I understand the Appellant's argument and truly sympathize with her situation. But unfortunately, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. In this case, the Appellant doesn't meet those requirements as she was suspended from her job because of misconduct.

Conclusion

[59] The Commission has proven the Appellant was suspended from her job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

²⁶ GD3-37.

[60] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section