Citation: *XS v Canada Employment Insurance Commission*, 2023 SST 1138

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (485240) dated July 10, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	April 11, 2023
Hearing participant:	Appellant
Decision date:	May 4, 2023
File number:	GE-22-2634

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant (who is the Claimant).[1]

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from 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 disentitled from receiving Employment Insurance (EI) benefits.[2]

Overview

[3] The Appellant was suspended from her job. The employer suspended the Appellant as she did not comply with the employer's vaccination policy: she refused to be 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 reason for separation as suspension from work without pay. The Commission says that the Appellant knew, or ought to have known, that the consequences of refusing included unpaid leave. It decided that the Appellant was suspended from her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

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[1] In my decision, I use "Appellant," rather than the "Claimant." I am doing this because the Appellant is the person who requested the appeal. The Commission uses "Claimant" because the Employment Insurance Act (EI Act) uses the word "claimant," meaning a person who has made a claim for EI benefits.

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

Section 31 of the Act says that a claimant who is suspended from their employment due to misconduct is disentitled from receiving benefits.

Matter I have to consider first

The hearing was adjourned

[6] The hearing was originally scheduled for December 22, 2022. On December 15, 2022, the Appellant made a request to adjourn the hearing. The Appellant had not yet received documents she had requested as part of a privacy request. The Appellant also added that she had to deal with family issues in the first quarter of 2022 and wanted the appeal to be held in April 2023.

[7] A Case Conference was held on January 10, 2023. The purpose was to discuss possible hearing dates and the status of the access to information request. The Appellant attended as invited. The Appellant preferred an April 2023 hearing for the reasons mentioned above. The Tribunal offered to obtain the documents she is seeking if they are contained in her file with the Commission.[3] The Appellant declined this offer. She wanted to obtain the documents directly from the Commission.

[8] In the interest of natural justice, I agreed to a hearing in April 2023. A new hearing was scheduled on April 11, 2023.

[9] The hearing did proceed on April 11, 2023, with the Appellant in attendance.

I will accept the documents sent in after the hearing

[10] During the hearing, the Appellant referred to her documents and used these documents in her testimony. During the hearing, I agreed to accept the documents as I was satisfied that the documents have probative value to the issue.

[11] The documents were sent in as agreed and added to the appeal.[4] The documents were sent to the Commission to allow them the opportunity to provide any additional representations. The Commission elected to not provide any additional submissions.

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[3] The Tribunal has the authority to request file documents when an appeal has been filed with the Tribunal.
[4] See GD11.

Issue

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

Analysis

[13] 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.[5]

[14] To answer the question of whether the Appellant was suspended 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.

[15] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule.

Why was the Appellant on leave without pay?

[16] I find that the Appellant was suspended from her job because she did not comply with her employer's vaccination policy.

[17] The Appellant doesn't dispute that she was suspended because of the vaccination policy. The Appellant does not agree it was misconduct.

[18] The Commission says the Appellant was suspended for not following the employer's vaccination policy.

[19] The Appellant`s statements to the Commission and to the Tribunal are consistent. The Appellant consistently argued that she was placed on unpaid leave by the employer. The Appellant says the employer put her on unpaid leave through no fault of her own and has always been willing to work each day.

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

[20] I find that the Appellant was suspended for not following the vaccine policy implemented by the employer, I find that it is the employer who initiated the leave without pay. It was not initiated by the Appellant. It is not a situation of voluntary leave.

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

[21] The reason for the Appellant's suspension and termination is misconduct under the law.

[22] The *Employment Insurance Act* (EI 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 EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[23] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7] 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.[8]

[24] 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.[9]

[25] The law doesn't say I have to consider how the employer behaved.[10] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.[11]

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

[26] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[12] I can't decide whether a claimant was constructively or wrongfully dismissed under employment law. I can't interpret a collective agreement or employment contract. I can't decide whether an employer breached an employment contract.[13] I can't decide whether an employer discriminated against a claimant or should have accommodated them under human rights law.[14] And I can't decide whether an employer breached a claimant's privacy or other rights in the employment context, or otherwise.

[27] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable. I also can't determine if a claimant's dismissal or suspension was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.[15]

[28] 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 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.[16]

[29] Misconduct is any action that is intentional and likely to result in the loss of employment. This Tribunal cannot consider the merits of a dispute between an employee and their employer. This interpretation of the EI Act may seem unfair to the Appellant, but it is one that the courts have repeatedly adopted and that the Tribunal is bound to follow.

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[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where a claimant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Claimant isn't.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Canada (Attorney General) v Marion,* 2002 FCA 185.
[16] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[30] It is important to keep in mind that "misconduct" has a specific meaning for EI purposes that does not necessarily correspond with the word`s every usage. It is rather the test which is explained in the paragraphs above.

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

- The employer had a vaccination policy. The policy states that individuals who do not comply face possible suspension without pay for individuals.
- The employer communicated the policy to all staff.
- The communication clearly notified the Appellant about its expectations regarding the policy.
- The Appellant knew or should have known what would happen if she didn't follow the policy.

[32] The Appellant says that there was no misconduct because:

- The policy was not reasonable as the Appellant was working from home. The Commission did not provide any evidence the Appellant may be called back into the office.
- The Commission should not be using the Lemire decision to prove misconduct.[17] In that decision, it was an existing policy that was part of the employment contract. The Commission did not ask for the employment contract. It could therefore not prove there was an expressed or implied breach of duty for the Appellant to get vaccinated.
- The Appellant worked from home and exceeded her performance requirements.

[17] See GD4 page 5 and Canada (AG) v Lemire, 2010 FCA 314.

- The employer imposed a new essential condition of employment. It did so unilaterally. It was not a condition when hired. When such an essential condition is newly established, it opens the employment contract to negotiations.

- The *Digest of Benefit Entitlement Principles* (Digest) Chapter 7 states that in general, misconduct refers to ill-intentioned actions.

- Digest 7.2.4.2 states: "In order to arrive at a conclusion or finding of misconduct, … it must somehow interfere with the employee`s ability to perform job duties." The Appellant argues she was always able to perform her duties. Her vaccination status did not interfere with that in any way.

- Misconduct can only be found where there is clear evidence.

- Her exemption request was rejected by a third-party decision maker. The Appellant questions this third party`s qualifications to decide her exemption request.

- The third-party decision maker did not communicate with her doctor to make the decision. They cited privacy reasons for not doing so even though the Appellant had signed a waiver.

- Vaccination in Canada is not mandatory. The Appellant has the right to bodily autonomy. Exercising this right can not be misconduct.

- The vaccine policy is not justified. The vaccines do not prevent transmission.

- The Commission contradicted itself. It argued that that the policy was reasonable within the workplace context. It then it argues that the Tribunal does not have the jurisdiction to determine if the policy was in fact reasonable.

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

- The employer had a vaccination policy that said employees must comply or be placed on unpaid leave.
- The employer clearly advised the Appellant about what it expected of its employees in terms of getting vaccinated.
- The employer communicated the policy to all staff to explain what it expected.
- The Appellant knew or should have known the consequence of not following the employer's vaccination policy.

[34] The Appellant testified that the employer did communicate the mandatory vaccine policy to employees in October 2021. The Appellant did read it at the time. She agreed that the policy mentioned unpaid leave for individuals who do not comply. She also agrees the policy provided an option to request an exemption.

[35] The Appellant testified that she did in fact request an exemption in November 2021. On November 19, 2021, the Appellant was advised that her request was denied. On this day, the Appellant was also advised that in accordance with the policy, she would be placed on unpaid leave the next day.

[36] The Digest contains principles that are applied by the Commission when making decisions on EI claims. It is a reference tool. Digest principles are not law. This means that I am not bound by the Digest principles. I have to follow the EI Act and relevant Federal Court decisions that set out the legal test for misconduct. And I have in this decision.

[37] The Appellant ought to have known what she had to do under the vaccination policy and what would happen if she didn't follow it. She acted knowingly. I agree it was not with any wrongful intent, but it was knowingly.

[38] In a recent case called Parmar,[18] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to

[18] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[39] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[40] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[19] Paragraph 32 has the following:

> [32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[41] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws. The recourse available to an employee would be via another tribunal or court if the employer contravened the employment contract. Similarly, the recourse would be via another tribunal or court if the employer contravened her human rights as an example.

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[19] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

[42] I agree the Appellant can decline vaccination. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[43] I find the Appellant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issues. I have no doubt the Appellant was a valuable employee. Nothing in the file contradicts this.

[44] The Appellant says that the threshold for misconduct has not been met. I accept the Appellant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent for there to be misconduct.[20]

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

[45] Based on my findings above, I find that the Appellant was suspended from her job because of misconduct. The Appellant's actions led to her suspension. She acted knowingly. She knew that refusing to comply with the vaccination policy was likely to cause her to be suspended from her job.

Conclusion

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

[47] This means the appeal is dismissed.

Marc St-Jules

Member, General Division – Employment Insurance Section

[20] See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.