



Citation: *NZ v Canada Employment Insurance Commission*, 2023 SST 1210

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

Decision

Appellant: N. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (553757) dated December 22, 2022 (issued by Service Canada)

Tribunal member: Paula Turtle

Type of hearing: Videoconference

Hearing date: May 8, 2023

Hearing participants: Appellant
Appellant's Witness

Decision date: June 21, 2023

File number: GE-23-277

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.

[6] The Appellant has a strong religious belief. So, she can't get vaccinated. Other organizations, like schools and camps, have accommodated her family's religious beliefs. The Appellant says her employer should have accommodated her religious beliefs.

[7] The Appellant asked for an exemption from the vaccination policy because of her religion. The employer did not grant her an exemption. And she says the process her employer followed was unfair.

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

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] During the hearing, the Appellant said that she wanted to give me some documents related to the employer's decision not to grant her an exemption from the vaccination policy. She submitted those documents after the hearing.

[9] I have decided to accept the documents because they relate to the Appellant's argument that the exemption process was unfair. I have considered those documents in making this decision.

Issue

Did the Appellant lose her job because of misconduct?

Analysis

[10] 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.²

[11] 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?

[12] The Appellant lost her job because she did not comply with her employer's vaccination policy.

[13] The Appellant did not get vaccinated. And she did not get an exemption from the vaccination policy. So, the employer put the Appellant on unpaid leave on October 19, 2021.

² See sections 30 and 31 of the Act.

[14] The employer wrote to the Appellant on March 29, 2022. They said she was being terminated because she did not get vaccinated. The Appellant agrees that she lost her job because she did not get vaccinated.

[15] I find that the Appellant lost her job because she was not granted an exemption from the policy and she did not get vaccinated.

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

[16] The reason for the Appellant's dismissal is misconduct under the law.

[17] 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 a Claimant's dismissal is misconduct under the Act. The law sets out the legal test for misconduct—the questions and factors to consider when examining the issue of misconduct.

[18] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ A Claimant 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.⁴

[19] There is misconduct if a Claimant 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.⁵

[20] 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.⁶

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] I only have the power to decide questions under the Act. I can't decide whether the Appellant has other options under other laws. Issues about whether the employer should have granted an exemption to the Appellant or accommodated the Appellant aren't for me to decide.⁷ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.⁸ 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. And that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[23] In response to Mr. McNamara's arguments, the FCA stated that the question in misconduct cases is "to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." And not whether an employer's decision to terminate an employee was wrongful or not. The Tribunal's focus when interpreting and applying the Act should be "not on the behaviour of the employer, but rather on the behaviour of the employee." The FCA pointed out that employees who have been treated unfairly by their employer have other remedies available to them. Those other remedies sanction an employer's behaviour without transferring the costs of that behaviour to Canadian taxpayers through EI benefits.

[24] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.⁹ 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 Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding if there was misconduct under the Act.¹⁰

⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹⁰ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[25] These cases are not about COVID vaccination policies. But, the principles in the cases are still relevant. My role is not to determine whether the employer was right in denying the Appellant an exemption (or not accommodating her) and terminating her. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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

- The employer had a vaccination policy.
- The policy said if employees were not vaccinated or given an exemption, they could be let go.
- The Appellant did not have an exemption and she did not get vaccinated.
- She knew or should have known what would happen if she didn't follow the policy.

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

- She should have been exempted from the vaccination requirement or accommodated in another way by the employer.
- She did not think she would lose her job if she didn't get vaccinated

[28] The employer's vaccination policy says that these important things:

- All employees must be fully vaccinated by October 19, 2021.
- Employees who were not fully vaccinated could apply for an exemption from the policy. All the exemption requests would be reviewed in accordance with the employer's accommodation protocols.
- If employees were not fully vaccinated by October 19, 2021, and did not have an exemption, they could be terminated.

[29] I find that the Appellant knew the policy said she had to be fully vaccinated by October 19, 2021. And that if she did not have an exemption she could be terminated. The Appellant did not get vaccinated and did not get an exemption.

[30] Even though she knew what the policy said, the Appellant says she did not think the employer would let her go. She thought the employer told employees that they might get fired to pressure them into getting vaccinated.

[31] Other employees were terminated for not being vaccinated. The Appellant knew about this.

[32] The Appellant told me that the employer had not terminated employees who did not get vaccinated against other illnesses. During the SARS pandemic, people worked from home for a month and then came back to work. No one was let go for not being vaccinated. The Appellant's husband testified that no one was let go for not getting the flu vaccine. So, the Appellant did not think it would happen this time.

[33] There are at least three reasons why the Appellant should have known she could be let go. The Appellant should have known it was a real possibility for any one of these reasons:

- The policy clearly said employees might be terminated if they did not get vaccinated.
- The Appellant knew other employees were terminated.
- Even if the employer did not terminate employees for not getting vaccinated before, the employer decided to treat COVID differently, to protect employees, patients, and visitors.

[34] The Appellant asked for an exemption. She gave the employer written information about her objection to vaccinations. She also had an interview with her employer.

[35] The employer denied the Appellant's exemption request on October 8, 2021. The letter denying the exemption said:

- The employer had carefully reviewed the Appellant's exemption request.
- The vaccination policy was in place because employer wanted to provide a safe environment for everyone.
- The Appellant's exemption request was denied.

[36] The Appellant replied to the letter. She said the employer did not properly consider her request. She asked the employer how she could appeal the decision. The employer said there was no appeal process.

[37] Then, the employer told the Appellant how it considered her request. The employer said they consulted with their spiritual and legal advisors.

[38] The Appellant says that the employer's spiritual advisors are antagonistic to traditional churches. She asked me to look at a printout from the employer's website. She says they have a conflict of interest. The printout does not support the Appellant's description of the spiritual advisors.

[39] The Appellant says that the exemption process was unfair for these reasons:

- It was not clear what criteria were applied.
- There was no appeal process.
- Some of the people involved in applying the policy were biased against organized religion.

[40] The Appellant also argued that the employer could have accommodated her without undue hardship. The Appellant would do other things, like getting tested, instead of getting vaccinated.

[41] The Appellant's arguments about the fairness of the exemption process and the employer's duty to accommodate do not matter to the issues I have to decide. What matters is that she was denied an exemption on October 8, 2021, and she did not get vaccinated before October 19, 2021. She did not follow the policy.

[42] The Appellant was put on an unpaid leave of absence. Then, the employer sent the Appellant a warning letter on February 28, 2022. The Appellant did not get the letter because her address had changed. The employer sent the Appellant a termination letter on March 29, 2022. The Appellant did not get that letter either.

[43] The Appellant told me even if she had received the letters, it would not have mattered. She would not get vaccinated because of her religious beliefs. Her beliefs were more important than the employer's policy.

[44] As discussed above, I have to look at the decisions the Appellant made.

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

- The employer's policy said unvaccinated employees could be terminated.
- The policy said she had to get vaccinated or get an exemption.
- The Appellant did not get an exemption.
- The Appellant had strong religious convictions. So, she did not get vaccinated. This was a deliberate choice by the Appellant.
- The Appellant knew or should have known the consequence of not following the employer's vaccination policy.

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

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

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.

Paula Turtle

Member, General Division – Employment Insurance Section