



Citation: *JC v Canada Employment Insurance Commission*, 2023 SST 221

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

Decision

Appellant: J. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (567414) dated February 3, 2023 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: In person

Hearing date: July 12, 2023

Hearing participant: Appellant

Decision date: July 17, 2023

File number: GE-23-591

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was suspended from his job. His employer says he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

Issue

[6] Was the Appellant suspended or dismissed from his job?

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

Analysis

Was the Appellant suspended or dismissed from his job?

[8] The employer suspended the Appellant from his job on November 1, 2021. It later dismissed the Appellant on January 3, 2022. The reason the employer gave for

¹ Section 31 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disentitled from receiving benefits.

the dismissal is that the Appellant didn't take COVID-19 vaccine. The employer issued a record of employment (ROE) on November 16, 2021, reflecting this.

[9] In an undated letter it sent to the Appellant, the employer said that it was suspending him without pay starting November 2, 2021. The reason given is that he didn't comply with a directive given in its COVID-19 vaccination policy.

[10] On December 22, 2022, the employer issued an amended ROE. The employer amended the reason for issuing the ROE from dismissal to leave of absence. The employer told the Commission that its COVID-19 policy had changed, and it changed its decision to dismiss the Appellant to a decision to place him on an unpaid leave of absence.

[11] The Appellant says his employer changed his dismissal to unpaid leave, which he did not request or consent to.

[12] I find that the employer changing its decision from dismissal to a leave of absence is the same as a change to a suspension. I find that the employer disciplined the Appellant because he didn't do something it required him to do. This is what the employer described in its letter to the Appellant.

[13] I find from the employer's amended ROE that it changed the form of discipline against the Appellant from dismissal to suspension. And I don't find that it matters that the Appellant didn't request or consent to the "leave of absence".

Why was the Appellant suspended from his job?

[14] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[15] 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

² See sections 30 and 31 of the Act.

[16] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

[17] The Appellant says he went against his employer's COVID-19 vaccination policy and gave reasons for not doing so. He says he wasn't given alternatives to taking the vaccine.

[18] The Commission says the Appellant didn't comply with his employer's COVID-19 vaccine policy due to personal reasons.

[19] The Appellant doesn't dispute the reason his employer suspended him. Even though he thinks his employer could have given him alternatives to taking the vaccine, I find that the Appellant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

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

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

[21] 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.

[22] 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

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

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁵

[23] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.⁶

[24] 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

[25] The Commission has to prove that the Appellant was suspended from his 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 his job because of misconduct.⁹

[26] 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 his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.¹⁰ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[27] 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 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

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.

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.

[28] 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

[29] 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

[30] 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

[31] 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

[32] 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

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.

what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[33] The Appellant says there was no misconduct because the employer didn't give alternatives to taking the vaccine. He also says the employer wasn't willing to accept liability if he experienced any adverse effects from the vaccine.

[34] The Commission says there was misconduct because the Appellant didn't comply with his employer's COVID-19 vaccination policy. It says the Appellant knew the consequences of non-compliance, but he made a personal decision not to get vaccinated, which led to his suspension.

[35] I find that the Commission has proven that there was misconduct, because the Appellant knew that he could lose his job if went against with his employer's COVID-19 vaccine policy. But he chose not to take the vaccine.

[36] In his application for benefits, the Appellant said he lost his job because he didn't take the COVID-19 vaccine. He said he has health issues and two young boys. The Appellant stated that his employer wasn't willing to allow for alternatives to taking the vaccine or to accept liability if he took the vaccine and something happened to him.

[37] The employer told the Commission that it created its COVID-19 vaccination policy in August 2021, and then amended it about a month later. According to the policy, employees had to be fully vaccinated by October 30, 2021.

[38] Under the policy, employees had to disclose their vaccine status by September 13, 2021, or they had to attend a mandatory education session. Employees who could not get vaccinated for a reason related to a protected human rights ground could ask the employer to accommodate them. But those who went against the policy could be disciplined, up to and including dismissal.

[39] The employer sent the Commission copies of messages about its COVID-19 vaccine policy it says it sent to its employees. One is a message from August 19, 2021. It says that all staff will have to disclose and provide proof of their vaccination status by

September 13, 2021, or attend an education session on the benefits of the vaccine. It says that as of October 30, 2021, staff have to be fully vaccinated.

[40] The second message from the employer sent on October 6, 2021, is about next steps. It says that starting the week of November 1, 2021, staff who aren't fully vaccinated will have to meet with their manager/supervisor and if they haven't received both doses of the vaccine, they will be suspended for six weeks without pay. After that, on December 13, 2021, if staff don't provide proof of full vaccination, they will be dismissed.

[41] The Appellant testified that he doesn't recall seeing either message. But he confirmed that he knew about the contents of the messages because the employer told employees about it. The Appellant said the employer made them do a "month and a half death march", where it said that if they didn't take the vaccine, they would be dismissed.

[42] I find from the Appellant's testimony that he knew about his employer's COVID-19 vaccination policy. He testified that from August 19 to October 31, 2021, the employer told them that if employees were unvaccinated, they would be dismissed. Even though the Appellant may not have seen the employer's written messages, I find that he knew about the deadlines and the consequences going against the policy.

[43] The Appellant testified that he spoke to his doctor about taking the vaccine due to his health conditions. He added that with his health issues, he wasn't willing to put an experimental vaccine into his body. He also said he knows many healthy people who got cancer and died within a month of taking the vaccine. But the Appellant said his doctor wasn't willing to put his medical license on the line to support a request for medical accommodation.

[44] The Appellant testified that his employer wasn't willing to sign his notice of liability or to give staff any proof that the vaccine was safe. He said the employer just said they had to take the vaccine, or they would be dismissed. The Appellant stated

there were employees who had medical or religious proof that they were unable to take the vaccine, but the employer didn't accommodate anyone.

[45] The Appellant said his job is done outdoors with very little contact with others. He added that he had always adhered to social distancing guidelines. The Appellant explained what his job involved. He testified that he could have continued to wear a mask when he was outside and maintained social distancing. He said that the only misconduct that happened was on the part of the employer.

[46] I understand that the Appellant had concerns about taking the COVID-19 vaccine. I also understand that he feels his employer could have offered alternatives to taking the vaccine, especially since he worked outdoors. But it's not my role to decide if the employer's policy was reasonable or if the employer could have accommodated the Appellant. It's also not my role to decide whether the vaccine is safe and effective.

[47] I find that the Appellant's decision not to take the COVID-19 vaccine and go against his employer's vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so, knowing that he would be suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

[49] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

Conclusion

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

[51] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section