



Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1748

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (525835) dated September 1, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In person

Hearing date: July 5, 2023

Hearing participant: Appellant

Decision date: July 14, 2023

File number: GE-22-3244

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 doesn't know why her employer suspended her. She says her Record of Employment (ROE) doesn't give a specific reason why she was suspended. And she says she shouldn't have been suspended anyway because her employer unfairly denied her religious exemption request from their policy even though she gave them all the evidence they needed to approve it.

[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.

Issue

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

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

² Section 31 of the *Employment Insurance Act* says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Analysis

[7] 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?

[8] 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.

[9] The Appellant and the Commission don't agree on why the Appellant was suspended from her job. The Commission says there is evidence to show the Appellant was suspended for not following her employer's policy.³

[10] The Appellant disagrees. She says she doesn't know why she was suspended. She says her employer never gave a clear reason why she was suspended because they wrote "Other (K)" on her ROE in the "reason for issuing" box.⁴

[11] I acknowledge the Appellant feels the information on her ROE raises questions about why she was suspended from her job.

[12] But I disagree. I find that what is on the Appellant's ROE isn't actually relevant for understanding exactly why the Appellant was suspended. This is because the codes an employer can choose from to fill in the "reason for issuing" box on an ROE are very general and don't say anything about the **specific reason** why someone is no longer working.

[13] On the other hand, I find there is other evidence the Appellant was in fact suspended from her job for not following her employer's policy.

³ GD4-4 to GD4-5.

⁴ GD3-19.

[14] I note the Appellant's employer sent her a letter on March 9, 2022. It says their mandatory COVID-19 vaccination policy came into effect on November 8, 2021 and they reminded her on February 10, 2022 about her need to follow it. It also says since she hasn't attested to her vaccination status and isn't willing to be vaccinated, she hasn't followed their policy and therefore is being placed on unpaid leave, effective immediately.⁵

[15] So, while I acknowledge the Appellant says she's not sure why she was suspended from her job, I find the evidence (her employer's letter) show she was suspended for not following her employer's mandatory COVID-19 vaccination policy.

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

[16] The reason for the Appellant's suspension 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 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.

[18] 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

⁵ GD3-58.

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.

[19] 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.⁹

[20] 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.¹⁰

[21] 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.¹¹ 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 (Court) called *Canada (Attorney General) v. McNamara*.¹² 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 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.

[23] 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."

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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.

[24] 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.

[25] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.¹³ 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.¹⁴

[26] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General)*.¹⁵ 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 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.¹⁶

[27] 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 did not do and whether that amounts to misconduct under the Act.

¹³ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

¹⁴ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

¹⁵ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁶ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[28] 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.¹⁷

[29] The Appellant says there was no misconduct because her employer acted unreasonably in various ways, including by denying her religious exemption request and asking her to get vaccinated even though she worked from home.¹⁸ She also says the Commission failed to follow its policies about misconduct in her case and didn't consider her evidence about the sincerity of her religious beliefs.¹⁹

[30] The Appellant's employer's mandatory COVID-19 policy says the following:

- It takes effect as of November 8, 2021.²⁰
- All employees are required to attest to their COVID-19 vaccination status and provide proof of vaccination.²¹
- If an employee has asked for an exemption request from the policy but their request is denied, they have 2 weeks from the date that their request is denied to attest to their vaccination status.²²
- Beginning December 13, 2021, employees will be placed on unpaid leave if they're unwilling to be vaccinated or they're unwilling to attest to their vaccination status.²³

[31] The Appellant says²⁴:

- She knew about her employer's policy. It came out on November 8, 2021.

¹⁷ GD4-4.

¹⁸ GD2-1 to GD2-48.

¹⁹ The Appellant said this at the hearing. Some of her submissions also relate to this argument: see GD13-7 to GD13-13.

²⁰ GD6-84.

²¹ GD6-86.

²² GD6-86.

²³ GD6-86.

²⁴ The Appellant said these things at the hearing, in her conversations with the Commission, and/or in her submissions to the Tribunal and Commission. For the Commission's records of its conversations with the Appellant, see GD3-240 and GD3-252 to GD3-255. For the Appellant's submissions, see GD2-1 to GD2-48, GD3-21 to GD3-239, GD3-244 to GD3-250, GD6-1 to GD6-381, GD13-1 to GD13-20.

- She asked for a religious exemption from her employer's policy on November 17, 2021.
- She felt her religious exemption request would be approved. She can't get vaccinated because of her religious beliefs and she gave her employer all the evidence they needed to approve her request. The Canadian Bill of Rights and Charter of Rights and Freedoms also supports her choice to not get vaccinated.
- Her employer asked her more questions about her religious exemption request in early December 2021. This made her feel even more strongly that they would approve her request.
- Her employer denied her religious exemption request on February 10, 2021. Their decision shocked her. They also didn't explain in detail how they decided her religious beliefs aren't sincere.
- She attested to her vaccination status two different times: in November 2021 (when she submitted her religious exemption request) and in March 2021 (when she submitted a grievance regarding her employer's denial of her religious exemption request). By doing this, she followed their policy, which required employees to attest to their vaccination status.
- She didn't get vaccinated after her employer denied her religious exemption request. Her religious beliefs prevented her from getting vaccinated.
- Her employer's policy was unreasonable and conflicted with other legislation in Canada that protects human rights, including the Bill of Rights and Charter of Rights and Freedoms. It also wasn't part of her original work contract.
- Her employer acted unreasonably by asking her to follow their policy even though she had been working from home since the start of the COVID-19 pandemic.
- Her employer never mentioned misconduct to her before they put her on unpaid leave.

- She got an email from her employer saying she would be put on unpaid leave after they denied her religious exemption request.
- But she didn't think she would actually be put on unpaid leave. She felt her employer had a duty to accommodate her because she had asked for an accommodation based on her sincerely held religious beliefs.
- The Commission didn't follow its own guidelines (including the *Digest of Entitlement Principles*) relating to misconduct when it denied her claim. And it failed to consider all her evidence about what her religion says about the COVID-19 vaccines.

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

[33] 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.

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

[35] There is evidence that the Appellant knew about her employer's policy. She said she knew about it, as noted above. She also submitted a religious exemption request, which I find shows she was aware of the policy and its requirements.

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

[37] I acknowledge the Appellant says she did follow her employer's policy because she attested to her COVID-19 vaccination status on two different occasions. But I find her employer's policy says that employees whose exemption requests were denied had to attest **and get vaccinated**, as discussed above. Since the Appellant said she knew

about the policy's requirements and she didn't get vaccinated after her religious exemption was denied, I find she consciously didn't follow her employer's policy.

[38] I acknowledge the Appellant feels her employer should have approved her religious exemption request because she provided proof that her religious beliefs are sincere and prevent her from getting vaccinated.

[39] I also acknowledge the Appellant feels her employer didn't provide enough reasons for why they denied her exemption request.

[40] And I acknowledge the Appellant says her employer should have given her the choice of continuing to work from home without getting vaccinated because she had been doing this since the start of the pandemic without any issues.

[41] Unfortunately, I find these arguments aren't relevant here. 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 the steps the Appellant did or didn't take to follow her employer's policy.

[42] In other words, I can't look at whether the Appellant's employer acted unfairly 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.

[43] I also acknowledge the Appellant feels the Charter and the Bill of Rights gives her the right not to get vaccinated.

[44] Unfortunately, I find this argument isn't relevant here either. The Tribunal's jurisdiction is very narrow when it comes to looking at misconduct. As discussed above, I only have the power to decide questions under the Act and can't make any decisions about whether the Appellant has options under other laws, like the Charter and Bill of Rights. Instead, I can only look at the Appellant's actions (meaning what she did or didn't do) leading up to her suspension.

[45] In other words, I can't look at whether other legislation (like the Charter and Bill of Rights) gives the Appellant the right to not get vaccinated even though her employer

introduced a mandatory COVID-19 vaccination policy. If the Appellant wants to pursue these arguments, she needs to do that at another tribunal or decision-making body.

[46] I also acknowledge the Appellant says her employer never mentioned misconduct to her before they suspended her.

[47] Once again though, unfortunately, I find this argument isn't relevant here. Misconduct is part of the Act, and there are two sections about it.²⁵ As noted 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, not from whether an employer used the word "misconduct" to justify suspending or dismissing an appellant.

[48] In other words, the Commission's decision to disentitle the Appellant from receiving benefits due to misconduct had nothing to do with the fact that her employer never told her she was suspended for misconduct.

[49] I acknowledge the Appellant feels the Commission didn't follow its own guidelines (including the *Digest of Entitlement Principles*) relating to misconduct when it denied her claim and didn't consider all her evidence about what her religion says about the COVID-19 vaccines.

[50] To support this argument, at the hearing the Appellant played recordings of two conversations she had with Commission agents during its adjudication of her claim. The first took place during the Commission's initial decision phase: during the call, the Commission agent told the Appellant that her claim had a chance to succeed and referenced the Commission's internal guidelines. The second took place during the Commission's reconsideration decision phase: during the call, the Commission agent

²⁵ Section 30 of the Act says a person is **disqualified** from getting EI benefits if they **lose their job** due to misconduct. Section 31 says a person is **disentitled** from getting EI benefits if they are **suspended from their job** due to misconduct.

argued with the Appellant about her religious beliefs and what her religion says about COVID-19 vaccines.²⁶

[51] After listening to the recordings, I can understand why the Appellant is upset with the Commission for the reasons set out above. She had different experiences (and received different information) when she spoke to each Commission agent and the second Commission agent took an aggressive tone with her.

[52] But unfortunately, I find the Appellant's arguments relating to the Commission aren't relevant here. I make this finding for two reasons.

[53] First, the Commission's own guidelines (including the *Digest of Entitlement Principles*) aren't law, so I don't have to follow them. They are the Commission's internal policy. In other words, the *Digest* and other Commission guidelines are the Commission's rule book for staff to use when they decide EI claims. The *Digest* and other Commission guidelines can't tell me how to decide appeals.

[54] Second, I have to follow the Act, based on the plain meaning of the Act and what the Court says about the Act. My focus is only on applying the legal test for misconduct (based on the case law) here, which means looking at the Appellant's actions leading up to her suspension, as discussed above. This means that I can't consider the Appellant's religious beliefs as they relate to the COVID-19 vaccine here, even though the Commission did this, because the Court says that goes well beyond what I can look at in this case.

[55] In other words, I look to the Act and Court, not the Commission, for how to analyze misconduct. And for these reasons, I don't give the Commission's own guidelines (including the *Digest of Entitlement Principles*) much weight here.

[56] So, I acknowledge the Appellant feels she didn't do anything wrong by not getting vaccinated based on her religious beliefs. But I find her actions still meet the definition of misconduct in the case law, as discussed above. The evidence shows she made a

²⁶ See hearing recording.

conscious decision not to follow her employer's mandatory COVID-19 vaccination policy. She didn't get vaccinated even though her employer's policy required employees without an approved exemption to get vaccinated, which shows her actions were intentional.

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

[58] There is evidence the Appellant's employer told her she would be suspended for not following their policy after they denied her religious exemption request. This evidence is:

- An email to the Appellant, dated February 10, 2022. It says her exemption request is denied and she has 2 weeks to attest to her COVID-19 vaccine status and get vaccinated. If she doesn't do these things by March 9, 2022, she'll be placed on unpaid leave.²⁷

[59] I believe the Appellant when she says she didn't think she would actually be put on unpaid leave because she had asked for a religious exemption and felt her employer had a duty to accommodate her based on her sincerely held religious beliefs. I have no reason to doubt what she says.

[60] Unfortunately, I find this doesn't mean the Appellant also couldn't have known that she could be suspended for not following her employer's policy after her religious exemption request was denied. In my view, the evidence shows she should have known she could in fact be suspended for this reason.

[61] In other words, I find it was entirely possible for the Appellant to believe both things (that she would be able to keep working but could also be suspended) at the same time. She knew about her employer's policy and her employer told her she would be suspended after denying her religious exemption request, so she should have known that this scenario could also play out.

²⁷ GD3-49.

[62] So, while I acknowledge the Appellant didn't think she would be suspended for not following her employer's policy, I find the evidence shows she knew or should have known that she could still be suspended for this reason.

[63] 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?

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

[65] This is because the Appellant's actions led to her suspension. She acted deliberately by not getting vaccinated as her employer's policy required, even after her exemption request was denied. She knew or ought to have known that refusing to get vaccinated was likely to cause her to be suspended from her job.

Conclusion

[66] 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.

[67] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section