



Citation: *HN v Canada Employment Insurance Commission*, 2023 SST 427

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

Decision

Appellant: H. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (560025) dated December 16, 2022 (issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Teleconference

Hearing date: July 10, 2023

Hearing participant: Appellant

Decision date: July 17, 2023

File number: GE-23-751

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 his job because of misconduct (in other words because he did something that caused him to lose his job). This means the Appellant is disqualified from receiving EI benefits.¹

Overview

[3] The Appellant lost his job. The Appellant's employer said he was let go because he didn't follow its mandatory Covid-19 (Covid) vaccination policy: he didn't disclose his vaccination status.

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He says the employer illegally fired him. Requiring him to disclose his vaccination status was an egregious crime, and in breach of his human rights. His vaccination status is his private medical information. When he didn't disclose his vaccination status, the employer discriminated against him and caused him undue mental and financial stress.²

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

Issue

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

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

² See GD2-29.

Analysis

[7] 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.³

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

Why did the Appellant lose his job?

[9] The parties agree that the Appellant lost his job because he went against the employer's vaccination policy: he didn't disclose his vaccination status. I see no evidence to contradict this, so I accept it as fact.

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

[10] I find that the reason for the Appellant's dismissal is misconduct under the law.

[11] The Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal 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.

[12] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ The Appellant doesn't have to have 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.⁶

³ See sections 30 and 31 of the Act.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

[13] 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 dismissed from his job because of that.⁷

[14] The Commission has to prove that the Appellant was dismissed 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 dismissed from his job because of misconduct.⁸

[15] 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 isn't for me to decide whether his employer wrongfully dismissed him or should have made reasonable arrangements (accommodations) for him.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[16] 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.¹⁰ 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 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.

[17] 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.¹¹

[18] 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

⁷ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹²

[19] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.¹³ 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.¹⁴

[20] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.¹⁵ 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 isn't relevant that the employer didn't accommodate them.¹⁶

[21] These cases aren't about Covid vaccination policies. But what they say is still relevant. In a recent decision, which did relate to a Covid vaccination policy, the Appellant argued that his questions about the safety and efficacy of the Covid vaccines and the antigen tests were never satisfactorily answered. The Appellant also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.¹⁷

[22] In dismissing the case, the Federal Court wrote:

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...the key problem with the Applicant's argument is that he is criticizing

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

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

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

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

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

¹⁷ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.¹⁸

[23] The Court also wrote:

The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."¹⁹

[24] Case law makes it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to dismiss the Appellant from his job. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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

- The employer had a mandatory Covid vaccination policy that required the Appellant to be vaccinated and attest to his vaccination status;
- The Appellant knew that not complying with the policy could lead to him losing his job;
- The Appellant didn't attest to his vaccination status; and
- The Appellant lost his job because he refused to comply with the employer's vaccination policy.²⁰

[26] The Appellant says that there was no misconduct on his part, because:

- The employer's policy was illegal and in breach of his human rights;

¹⁸ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

¹⁹ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

²⁰ See GD4-3.

- His vaccination status is his private medical information, and he wasn't legally required to disclose it to the employer;
- The employer discriminated against him when he refused to disclose his vaccination status; and
- The employer broke his employment contract when it illegally fired him.²¹

[27] The employer's mandatory vaccination policy said that all employees had to be vaccinated and attest to their vaccination status. Employees had until October 29, 2021, to attest to their vaccination status, and until November 15, 2021, to be fully compliant with the policy.²²

[28] The Appellant testified as follows:

- The Covid vaccine was untested, and not proven safe or effective.
- The employer's vaccination policy was illegal.
- He knew about the employer's vaccination policy. The policy applied to all employees, including him. The policy said that he had to be vaccinated against Covid and attest to his vaccination status via the employer's "Monitor MASS" system.
- He received a written warning, as part of the employer's Remedial Measures process, that said if he didn't attest to his vaccination status, he was going to lose his job.
- The employer warned him verbally on numerous occasions that if he didn't attest to his vaccination status on Monitor MASS, he was going to lose his job.

²¹ See GD2-29.

²² See GD3-48.

- He asked for an accommodation based on human rights grounds, but the employer denied his request.
- Disclosing his vaccination status went against his conscience and beliefs. It went against his privacy and Charter rights.
- He didn't disclose his vaccination status to the employer. He told his employer that he wasn't going to attest to his vaccination status, because it was his personal medical information and protected under the law.
- He was dismissed because he didn't attest to his vaccination status.

[29] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated, and attest to their vaccination status;
- the employer clearly communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated and attesting;²³
- the Appellant knew the consequence of not following the employer's vaccination policy;
- the Appellant didn't attest to his vaccination status, and was dismissed from his job as a result.

[30] At the hearing, the Appellant cited a recent finding of the Military Grievance External Review Committee, in which it found that the Canadian Armed Forces' vaccination policy infringed on the protected human rights under section 7 of the Canadian Charter of Rights and Freedoms, namely the right to the liberty and security of the person. The Committee also found similarly in two other cases.²⁴ The Appellant

²³ See GD3-47-111.

²⁴ See GD9.

submitted that these decisions prove that the employer's policy was illegal and violated his rights, and that he had every right not to comply with it.

[31] The Military Grievance External Review Committee is an administrative tribunal. It provides its findings and recommendations to the Chief of the Defence Staff, who is the final decision maker and "is not bound by any finding or recommendation of the Grievances Committee."²⁵ The Committee's findings are not binding, not even on the Canadian Armed Forces.

[32] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. These laws are enforced by different courts and tribunals.

[33] This Tribunal is allowed to consider whether a provision of the Act or its regulations (or related legislation) infringes rights that are guaranteed to a Appellant by the Charter.

[34] But this Tribunal is not allowed to consider whether an action taken by an employer violates an Appellant's Charter rights. This is beyond my jurisdiction.

[35] The Appellant may have other recourse to pursue his claims that the employer's policy violated his rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

[36] I understand that the Appellant hoped that the employer might not go through with actually dismissing him for not following its vaccination policy. But I find that he knew, or should have known, that not complying with the policy could result in him losing his job. He confirmed in his testimony that the employer "made it very apparent" that he was going to lose his job if he didn't comply with the policy. He knew that he had to attest to his vaccination status to be in compliance with the employer's policy.

²⁵ See section 29.13(1) of the *National Defence Act*.

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

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

[38] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that not attesting to his vaccination status would cause him to be dismissed from his job.

Conclusion

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

[40] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section