Citation: *ES v Canada Employment Insurance Commission*, 2023 SST 1666

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (501748) dated August 11, 2022 (issued by Service Canada)

Tribunal member:	Bret Edwards
Type of hearing:	Videoconference
Hearing date:	February 14, 2023
Hearing participant:	Appellant
Decision date:	March 1, 2023
File number:	GE-22-3040

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[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 be suspended from her job).[1] This means that 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 that she was suspended because she didn't follow their mandatory COVID-19 vaccination policy.

[4] The Appellant disagrees that she was suspended for this reason. She says that she was suspended because she continued to remind her employer of her right to have her religious accommodation request approved after they had denied it because she followed all the steps their policy required.

[5] The Commission accepted the employer's reason for the suspension. 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.

Issue

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

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

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[1] In this decision, suspension, leave of absence, and unpaid leave of absence all 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.

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 that the Appellant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy.

[9] The Appellant and the Commission don't agree on why the Appellant was suspended from her job. The Appellant's employer says she was suspended for not following their mandatory COVID-19 vaccination policy.[3]

[10] The Appellant disagrees. She says that the real reason she was suspended is that she continued to reminder her employer of her right to have her religious accommodation request approved after they had denied it because she followed all the steps that their policy required.[4]

[11] I note that the Appellant's suspension letter, dated December 17, 2021, says that she was suspended for not following her employer's mandatory COVID-19 vaccination policy.[5]

[12] On the other hand, I find that the Appellant hasn't shown that her employer suspended her specifically because she continued to reminder her employer of her right to have her religious accommodation request approved after they had denied it because she followed all the steps that their policy required. She hasn't provided any evidence that this is specifically why her employer suspended her.

[13] I acknowledge that the Appellant believes her employer should have approved her religious accommodation request because she followed all the steps that their policy required. But in this section, I am only looking at why she was suspended from her job, so I will address this aspect of her argument later in this decision.

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[3] GD3-26, GD3-48.
[4] GD2-9.
[5] GD3-48.

[14] So, while I acknowledge that the Appellant believes her employer suspended her for the reason she says, I find that evidence (her termination letter) shows that 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?

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

[16] 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.

[17] 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]

[18] 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]

[19] 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]

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

[20] 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.

[21] 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.

[22] 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."

[23] 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.

[24] 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

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[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

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]

[25] 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]

[26] 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.

[27] The Commission says that 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]

[28] The Appellant says that there was no misconduct because she followed her employer's policy by submitting a religious accommodation request. She says that her employer should have approved her request because she followed all the required steps when submitting it.[18]

[29] The Appellant's employer told the Commission that[19]:

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[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.
[17] GD4-9.
[18] GD2-9, GD2-23 to GD2-24.
[19] GD3-26.

- They introduced a mandatory COVID-19 vaccination policy.
- The policy gave employees a deadline to declare their vaccination status or get vaccinated.
- The Appellant didn't declare her vaccination status or get vaccinated by the policy deadline.
- Employees were made aware that not following the policy would mean they would lose their employment.
- Employees could request a medical or religious accommodation under the policy.
- To be accommodated, an employee had to show their religious or spiritual belief was the reason they couldn't get vaccinated. If that was found to be the case, they would be offered a duty-to-accommodate and could keep working while unvaccinated.
- To request an accommodation, an employee could submit required documents, which also require being notarized. They would then be provided to a committee for review and could then be recommended to the manager.
- The Appellant requested a religious accommodation, but it was denied.

[30] The Appellant's employer's mandatory COVID-19 vaccination policy[20] says the following:

- It takes effect on October 6, 2021.[21]
- It applies to all employees regardless of where they work.[22]
- The employer has the duty to accommodate employees when their needs relate to one or more prohibited grounds of discrimination under the Canada Human Rights Act up to the point of undue hardship.[23]

[20] GD3-49 to GD3-87.
[21] GD3-49.
[22] GD3-56.
[23] GD3-71.

- Employees without an approved accommodation are required to disclose their vaccination status by October 29, 2021.[24]
- Employees without an approved accommodation who aren't fully vaccinated or didn't disclose their vaccination status will be placed on administrative leave without pay on November 15, 2021 (2 weeks after the attestation deadline).[25]

[31] The Appellant testified that:

- She knew about her employer's mandatory COVID-19 vaccination policy and first became aware of it in October 2021.
- She submitted a religious accommodation request as the policy allowed her to do in October 2021.[26]
- In early November 2021, she met with her employer about her religious accommodation request. Her employer asked her some more questions about it, and she submitted a response to these questions on November 12, 2021.[27]
- On November 17, 2021, her employer sent her a letter saying they had denied her religious accommodation request.[28]
- She then wrote to her employer to ask who had made the decision to deny her request and if she could ask for a reconsideration. Her employer responded that they would reconsider their decision even though that wasn't in the policy.
- On November 23, 2021, she submitted a letter formally requesting reconsideration, and three days later (November 26, 2021), they replied that her request was still denied.[29]

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[24] GD3-59.
[25] GD3-57.
[26] GD3-31 to GD3-35.
[27] GD3-36 to GD3-37.
[28] GD3-38.
[29] GD2-45 to 50, GD2-34.

- She knew that she could be suspended if she didn't follow the policy. After refusing her religious accommodation request, they told her she would be put on leave on December 17, 2021, if she hadn't followed the policy by then.[30]
- But she didn't think she would be suspended because she couldn't believe they denied her request and thought someone would look at it again.
- Her employer should have approved her religious accommodation request. She gave them all the evidence that they needed (including a sworn affidavit) in order to approve it. They failed to follow their policy in refusing to accommodate her.
- Her employer had a duty to accommodate employees under the Canadian Human Rights Act, but they didn't do that in her case.
- It hasn't been proven that she owes a legal duty to her employer to get the COVID-19 vaccine, so she didn't commit misconduct.
- The Commission improperly applied internal guidelines on "exemptions" rather than properly assessing her claim for "accommodation" in accordance with her employer's policy framework.
- The Commission breached administrative fairness by not providing reasons for their decision or considering all relevant evidence.

[32] Additionally, the Appellant says that another Tribunal decision (A.L. v. *Canada Employment Insurance Commission*) shows that she didn't commit misconduct. I will refer to this decision as A.L.

[33] The Appellant testified that A.L. helps to support her appeal because it relies on another Court analysis of misconduct that goes beyond what I have already discussed above. It says that misconduct must not only include the things I've already mentioned, but also show a causal link between the employee's misconduct and their employment. In other words, for misconduct to occur, there must be a breach of an express or implied duty on the employee's part.

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[30] GD2-34.

[34] The Appellant argues that if this analysis is applied to her situation, it shows she didn't commit misconduct. She argues that the Commission hasn't proven that she had a workplace duty to get the COVID-19 vaccine, so since this hasn't been proven, there's no breach of that duty and no misconduct on her part.

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

[36] I find that 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.

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

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

[39] There is also clear evidence that the Appellant chose not to follow her employer's policy. She said that she didn't disclose her vaccination status or get vaccinated after her employer refused her religious accommodation request, as noted above.

[40] I acknowledge that the Appellant feels her religious accommodation request should have been approved because she provided proof of her religious belief. I also acknowledge that she feels her employer didn't follow their own policy by denying her request even though she gave them all the information about her religious belief that the policy required her to do.

[41] Unfortunately, I find this argument isn't relevant here. As mentioned 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 that what is relevant here is not why

the Appellant's employer denied her religious accommodation request, but what she did or didn't do to follow her employer's policy after her request was denied.

[42] In other words, I can't look at whether the Appellant's employer acted fairly in denying her religious accommodation request. If the Appellant wants to pursue this argument, she needs to do that through another forum.

[43] I acknowledge that the Appellant feels that the Commission breached administrative fairness by improperly applying internal guidelines on "exemptions" rather than properly assessing her claim for "accommodation" as per her employer's policy.

[44] Unfortunately, I find this isn't relevant here either. I can't consider the Commission's decision to rely on internal guidelines, whatever they may be. The Act and Court say that I must focus on the Appellant's actions leading up to her suspension, as noted above. In this case, I find the Appellant's argument relates to an issue that falls outside the scope of this analysis.

[45] In other words, I find the Commission interpreting the Appellant's religious accommodation request as an "exemption" instead of an "accommodation" has no bearing on what I can consider here. If the Appellant is upset with the Commission and wants to pursue this issue further, she needs to contact the Commission directly.

[46] I will now turn to the Appellant's reliance on another Tribunal decision (A.L.). I acknowledge that she feels this decision shows that she didn't commit misconduct for the reasons outlined above.

[47] I note that I'm not bound by prior decisions of the Tribunal. This means that I can decide for myself if I agree with these decisions and choose how much weight to give them if an appellant brings them up in their own appeal.

[48] I acknowledge that the Appellant believes that if the misconduct analysis the Tribunal Member in A.L. used is applied to her situation too, it shows that she didn't commit misconduct because there was no breach of an express or implied duty on her part.

[49] Unfortunately, I disagree. Even if I apply A.L.'s misconduct analysis here, I still find that the Appellant committed misconduct. This is because there is clear evidence that her employer introduced their mandatory COVID-19 vaccination policy as a requirement for all its employees, as noted above. Since this is what happened, I find that the policy did become an express condition of the Appellant's employment. She then later breached the policy when she chose not to follow it after her religious accommodation request was denied.

[50] I also note that in A.L., the Tribunal Member applied their misconduct analysis when looking at the appellant's collective agreement and what it did and didn't say about vaccinations.[31]

[51] But I disagree with this approach too. I find that the Act and the Court haven't given me the authority to apply a collective agreement (or an employment contract, in this case) and decide whether the employer rightfully dismissed or suspended an appellant, as mentioned above. This means that the Tribunal isn't the right forum to decide whether an appellant was wrongfully dismissed or suspended. If I start doing this, I exceed my authority as a decision-maker.

[52] Also, I note that the Court has recently said that A.L. doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it is not binding on the Court.[32]

[53] So, for these reasons, I won't follow A.L. and don't give it much weight here.

[54] While I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find that the evidence clearly shows that she made a conscious decision not to follow it. She didn't get vaccinated after her employer denied her religious accommodation request, which shows that her actions were intentional.

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[31] *A.L. v. Canada Employment Insurance Commission*, SST, paragraphs 29 to 67.
[32] See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

[55] I also find that the Appellant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being suspended.

[56] There is clear evidence that the Appellant knew she could be suspended for not following her employer's policy. She said she knew this, as mentioned above.

[57] There is also other evidence that confirms the Appellant knew she could be suspended for not following her employer's policy. This evidence is:

- Her employer's letter refusing her religious accommodation request, dated November 17, 2021. It says she will be placed on unpaid leave if she doesn't attest to her vaccination status within two weeks of the letter date or get her first COVID-19 vaccine dose within four weeks.[33]
- Her employer's email reiterating their refusal of her religious accommodation request, dated November 26, 2021. It says that the timelines outlined in their initial refusal letter still apply.[34]

[58] I believe the Appellant when she says that she didn't think she would be suspended because she couldn't believe her employer had denied her religious accommodation request and still hoped they would reconsider.

[59] Unfortunately, I find that this doesn't mean the Appellant also couldn't have known that she could be suspended. In my view, the Appellant's hope that her employer would change their mind doesn't cancel out the fact that they had also told her that she could be suspended if she didn't follow their policy.

[60] In other words, I find it was entirely possible for the Appellant to believe both things (that she would be able to keep her job but could also be suspended) at the same time, especially as she confirmed that she knew about her employer's policy and what would happen if she didn't follow it, as mentioned above.

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[33] GD3-38.
[34] GD2-34.

[61] So, while I acknowledge that the Appellant didn't think she would be suspended for not following her employer's policy, I find the evidence shows that she did know she could be suspended for this reason.

[62] I therefore find that 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 let go.

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

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

[64] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew or ought to have known that refusing to get vaccinated after her employer denied her religious accommodation request was likely to cause her to be suspended from her job.

Additional Considerations

[65] The Commission proposes an amendment to its initial decision. It proposes that the Appellant's disentitlement period should end on June 17, 2022.

[66] The Commission argues that the Appellant returned to work on June 20, 2022, so it considers her suspension to be lifted at that time.[35]

[67] I agree with the Commission. The Appellant confirmed during her testimony that she returned to work on June 20, 2022. There is also no evidence to indicate that this return date is incorrect.

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[35] GD4-1.

[68] I therefore find that the Appellant's disentitlement period should end on June 17, 2022, as proposed by the Commission.

Conclusion

[69] 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.

[70] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section