



Citation: *YP v Canada Employment Insurance Commission*, 2023 SST 1822

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: Y. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (491458) dated July 7, 2022 (issued by Service Canada)

Tribunal member: Peter Mancini

Type of hearing: Videoconference

Hearing date: December 5, 2022

Hearing participants:

- Appellant
- Respondent

Decision date: January 15, 2023

File number: GE-22-2672

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was placed on administrative leave without pay (suspended from his job) because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from his job, without pay. The Claimant's employer said that he was suspended without pay because he went against the vaccination policy. He didn't get vaccinated

[4] Even though the Claimant doesn't dispute that this happened, he says that going against the employer's vaccination policy isn't misconduct. He also argued that because he was entitled to sickness benefits, he should be entitled to regular benefits.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant was suspended without pay because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

[6] Was the Claimant suspended from his job without pay because of misconduct?

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

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.²

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

Why did the Claimant lose his job?

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

[10] The Claimant and the Commission do not disagree on why the Claimant was suspended from his job. Both agree that he was suspended from his job because he did not get vaccinated.

[11] I find that the Claimant was suspended without pay because he refused to comply with the employer's vaccination policy. There is no dispute about this. The Claimant stated he did not want to comply with the policy and said he did not apply for an exemption. He said he knew what the policy contained and the consequences of not following the policy.

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

[12] The reason for the Claimant's dismissal is misconduct under the law.

[13] The *Employment Insurance Act* doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for

² See sections 30 and 31 of the Act.

misconduct. It sets out the questions and criteria to consider when examining the issue of misconduct.

[14] Case law says that to be misconduct, the conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost willful.⁴ The Claimant 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 law⁵.

[15] There is misconduct if the Claimant 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

[16] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements for him⁷. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[17] In a Federal Court of Appeal Case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.⁸ 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.

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

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

⁵ See *Attorney General of Canada v Secours* A-352-94

⁶ See *Mishibinijima v Canada (Attorney General)* 2007 FCA 36

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

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

[18] 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.⁹

[19] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employers. 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.¹⁰

[20] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹¹ 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 FCA relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹²

[21] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction¹³ 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 them¹⁴.

[22] These Cases are not about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

⁹ See *Canada (Attorney General) v McNamara* 2007 FCA at paragraph 22

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23

¹¹ See *Paradis v Canada (Attorney General)* 2016 FC 1282

¹² See *Paradis v Canada (Attorney General)* 2016 FCA 1282 at paragraph 31

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

[23] The Commission says that there was misconduct because the Claimant refused to comply with the policy of his employer regarding vaccination. He did so deliberately and knowing that if he did so he would be suspended from his job without pay. The Commission agrees that the Claimant received sickness benefits, but that does not entitle him to regular benefits. The criteria for the two types of benefits are different. His refusal to comply with the policy is misconduct. And that is why he has been denied benefits.

[24] The Claimant says that there was no misconduct because the employer's policy violated international codes. He believes the policy violated his rights. He knew he could apply for a religious exemption. He did not apply for an exemption on religious grounds because he knew of others who had applied based on religious grounds and were not given exemptions.

[25] The employer's vaccination policy says that all employees had to attest that they were vaccinated by November 14th, 2021. If the employee was not vaccinated by that date, they would be placed on administrative leave without pay unless they had applied for and been granted an exemption from the policy. This policy was communicated to the Claimant on October 6th, 2021. The fact that the Claimant knew the policy is an important part of the test for misconduct.

[26] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. On October 6th, 2021, the employer told the Claimant about the policy requirements and the consequences of not following them. This is not disputed by the Claimant.

[27] I find that the Commission has proven that there was misconduct, because both the Claimant and the Commission agree that the Claimant refused to follow the employer's policy. The evidence is clear that the Claimant had been given the policy, knew the conditions of the policy and knew the consequences of not following the policy. He knew that if he did not have an exemption, he would be placed on administrative leave without pay. Knowing this he refused to follow the policy. The

Commission is correct that the criteria for receiving sick benefits under the Act is different from the criteria for receiving regular benefits.

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

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

[29] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be placed on administrative leave without pay.

Conclusion

[30] The Commission has proven that the Claimant was suspended from his job without pay because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[31] This means that the appeal is dismissed.

Peter Mancini

Member, General Division – Employment Insurance Section