Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 1870

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: J. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (530677) dated September 21, 2022 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Teleconference
Hearing date: May 9, 2023
Hearing participant: Appellant

Decision date: June 23, 2023
File number: GE-22-4116

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 her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. She also argues that she had been granted an exemption for religious reasons; this was later rescinded.

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

Issue

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

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]

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[1] Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. This applies for both suspension or dismissal.
[2] See sections 30 and 31 of the Act.

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

Why was the Appellant suspended from her job?

[9] I find that the Appellant temporarily lost her job because she went against her employer's vaccination policy.

[10] The Appellant does not dispute this. I accept that this is the reason for her suspension.

[11] The Appellant says that she could not get vaccinated as it went against her religious beliefs. She argues that her employer should have accommodated her under various pieces of legislation, notably the Charter and the Bill of Rights. She adds that she had been working from home and was not a threat to anyone by not being vaccinated. She felt coerced into getting an experimental vaccine.

[12] The Commission says that refusing to be vaccinated as required by the employer's vaccination policy is considered misconduct under the *Employment Insurance Act*.

[13] I find that the Appellant was suspended from her job because she didn't comply with the employer's vaccination policy.

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

[14] The reason for the Appellant's dismissal is misconduct under the law.

[15] 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 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.

[16] 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 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.[5]

[17] 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 let go because of that.[6]

[18] The Commission has to prove that the Appellant lost 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 lost her job because of misconduct.[7]

[19] 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 her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her.[8] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[20] 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.[9] 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.

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[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 *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[21] 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.[10]

[22] 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.[11]

[23] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[12] 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.[13]

[24] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[14] 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.[15]

[25] These cases aren't 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 suspend the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[12] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[14] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the employer sent letters to the Appellant many times to communicate what it expected once her request for religious accommodation was denied: attend a training session on the benefits of Covid vaccination and get vaccinated. She was also told she would be suspended if she did not comply with the vaccination policy
- the Appellant knew or should have known what would happen if she didn't follow the policy

[27] The Appellant says that there was no misconduct because:

- the employer's vaccination policy was not law
- it was not part of her employment contract
- the Appellant hadn't thought that she would be suspended if she didn't get vaccinated; she thought that the laws of the land would prevail, and she would get an exemption from the policy for her sincerely held religious beliefs
- she was being coerced
- she was not given enough time to comply with the policy after her request for accommodation was denied

[28] The employer's vaccination policy says that:

- It takes effect on October 6, 2021
- It applies to all employees, even those who work from home

- Employees are to disclose their vaccination status by the deadline of October 29, 2021

- Failure to comply would result in leave without pay until the employee complies or the policy is rescinded[16]

[29] The Appellant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. On February 10, 2022, the employer told the Appellant that her appeal of her denial of an exemption for religious reasons was denied.

[30] At that point, is should have been clear to the Appellant that she had two choices: get a first dose of the vaccine and report it or accept to be suspended and placed on leave without pay.

[31] The Appellant states that she was placed on leave on February 14, 2022. She argues that she had only four days to comply with getting vaccinated. I find that this is being disingenuous. While the delay of four days is correct, it was open to the Appellant to inform her employer that she was going to comply and actually set a date by which she would do so.[17] She had been warned long before that leave was the consequence of not getting the vaccine; once it was clear that there was no religious exemption, the suspension was not a surprise.

[32] I have read all the Appellant's submissions with great interest. I have no doubt that she is most sincere in her religious beliefs. However, it is not up to me to decide on the reasonableness of her employer's denial of her request for a religious exemption and subsequent accommodation. This for another tribunal or a grievance arbitrator to decide.

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[16] https://www.tbs-sct.gc.ca/pol/doc-fra.aspx?id=32694
[17] See GD7-84

[33] I will note that the employer does not have a "duty to accommodate" unless and until an exemption is granted. Since the exemption was denied in this case, the employer did not have to accommodate the Appellant because of her religious beliefs.

[34] Similarly, I do not have the authority to weigh in on the contractual aspect of the Appellant's relationship with the employer. Again, this is better addressed at the union level in a grievance or in the courts.

[35] The Appellant makes submissions on the possible criminal nature of the coercion she experienced in being forced to either be vaccinated or lose her livelihood. This is a matter for the courts and not for this Tribunal.

[36] It bears repeating that denial of EI benefits for "misconduct" does not mean that the Appellant did something wrong. Under the EI Act, it means that the employee went against the employer's policy wilfully, knowing that suspension would be a likely result.

[37] My task is to focus on the Appellant's knowledge of the vaccination policy and her behaviour as a result of it.[18] The denial of the Appellant's religious exemption request by the employer is not relevant in this context.

[38] I find that the Commission has proven that there was misconduct because:

- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated
- the employer sent letters to the Appellant several times to communicate what it expected, both generally and when accommodation was requested and ultimately denied on appeal
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

[18] GD3 and GD11

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

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

[40] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to be suspended from her job, especially after the denial of her appeal for an exemption on religious grounds.

Conclusion

[41] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[42] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section