



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

Decision

Claimant: Rebecca Abdo
Representative: James S.M. Kitchen

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (490789) dated July 10, 2022
(issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Videoconference
Hearing date: November 1, 2022
Hearing participants: Claimant
Claimant's representative

Decision date: November 23, 2022
File number: GE-22-2664

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she refused to comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant disagrees that she was let go from his job for this reason. She says that she was let go because her employer refused her request for a religious exemption from their mandatory COVID-19 vaccination policy and discriminated against her on this basis.

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

Issue

[6] Did the Claimant lose her job because of misconduct?

Analysis

[7] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost

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

her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[8] I find that the Claimant lost her job because she refused to comply with her employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission don't agree on why the Claimant lost her job. The Commission says that the reason the employer gave is the real reason for the dismissal.

[10] The Claimant disagrees. The Claimant says that the real reason she lost her job is that her employer denied her request for a religious exemption from their mandatory COVID-19 vaccination policy, so she was fired.²

[11] I note that the Claimant's termination letter, dated November 16, 2021, clearly states that she was let go for not complying with her employer's mandatory COVID-19 vaccination policy.³

[12] On the other hand, the Claimant hasn't provided any evidence to show that her employer fired her because they denied her religious exemption request. Her termination letter doesn't mention this at all, and she hasn't provided any other evidence to counter what the letter says.

[13] I accept that the Claimant believes her employer let her go because they refused her religious exemption request, but the evidence clearly shows that she was let go for not complying with her employer's mandatory COVID-19 vaccination policy.

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

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

² GD2B-23 to GB2B-24.

³ GD3-25.

[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 Claimant'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.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.⁶

[17] There is misconduct if the Claimant 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.⁷

[18] The Commission has to prove that the Claimant 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 Claimant lost her job because of misconduct.⁸

[19] The law doesn't say I have to consider how the employer behaved.⁹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹⁰

[20] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was

⁴ See *Mishibinjima 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.

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

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

⁹ See section 30 of the Act.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*. 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.¹²

[22] In response to Mr. McNamara's arguments, the Federal Court of Appeal (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."¹³

[23] 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.¹⁴

[24] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*. Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug

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

¹² *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

¹³ *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

¹⁴ *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

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 Federal 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.¹⁵

[25] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*. 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 here. My role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

[27] The Commission says that there was misconduct because the Claimant knew about her employer's mandatory COVID-19 vaccination policy and knew that she could be let go if she didn't comply with it, but decided not to comply anyway.¹⁷

[28] The Claimant says that there was no misconduct because she complied with her employer's mandatory COVID-19 vaccination policy by submitting a religious exemption request.¹⁸ She says that her employer's policy was unlawful because they discriminated against her by refusing her religious exemption request.

¹⁵ *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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

¹⁷ GD4-4.

¹⁸ GD2B-23 to GD2B-24.

[29] The Claimant told the Commission and testified that she complied with her employer's mandatory COVID-19 vaccination policy by submitting a request for a religious exemption, dated September 28, 2021, which included a letter from her pastor.¹⁹

[30] The Claimant also testified that she worked mainly on her own and didn't think she needed to get vaccinated for this reason either. She submitted some photographs of her workplace as evidence.²⁰

[31] The Claimant testified that she expected her employer to approve her religious exemption request because they had assured employees that medical and religious exemptions would be approved and because she submitted sincere proof of her faith.

[32] The Claimant also testified that after submitting her religious exemption request, she spoke to her employer twice about it. She testified that the first call lasted about an hour and the second call about 10 minutes and she felt both calls went well. She also testified that the person she spoke with on the first call told her she believed her religious faith was sincere, which gave her the impression that her request would be approved.

[33] The Claimant testified that she was shocked when she found out her employer had refused her religious exemption request and that they didn't give her any reasons why they did so.

[34] The Claimant told the Commission and testified that she remained unvaccinated after her employer refused her religious exemption request.²¹

[35] The Claimant argues that her employer's mandatory COVID-19 vaccination policy was unlawful because they prevented her from complying with their policy by

¹⁹ GD3-24.

²⁰ GD3-56 to GD3-61.

²¹ GD3-80.

refusing her religious exemption request. She also argues that a recent Tribunal decision shows that I need to consider whether her employer's policy was lawful.²²

[36] The Claimant also argues that her employer discriminated against her on religious grounds by refusing her exemption request. She argues that the Supreme Court has concluded that people seeking religious accommodation should not be required to get their beliefs objectively verified, so her employer should have approved her religious exemption request based on the evidence she gave them.²³

[37] The Claimant further argues that her employer's decision to ultimately refuse her exemption request indicates that they had just been looking for a reason to get rid of her.

[38] Additionally, the Claimant argues that several other decisions from the Tribunal involving an employer's mandatory COVID-19 vaccination policy show that she didn't commit misconduct.²⁴

[39] I find that the Commission has proven there was misconduct for the following reasons.

[40] I find the Claimant committed the actions that led to her dismissal, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[41] I further find the Claimant's actions were intentional as she made a conscious decision not to comply with her employer's mandatory COVID-19 vaccination policy after her religious exemption request was refused.

[42] There is clear evidence that the Claimant knew about her employer's policy. She submitted a religious exemption request to her employer, as mentioned above, which

²² GD8-17 to GD8-26.

²³ GD8-27 to GD8-32.

²⁴ GD8-2 to GD8-16, GD3-33 to GD3-39.

shows that she knew what she had to do under the policy if she didn't want to get vaccinated.

[43] I acknowledge that the Claimant believed her employer would automatically approve all exemption requests based on what they said. But there's no evidence here for me to reach the same conclusion.

[44] I note that when discussing religious exemption requests, the employer's mandatory COVID-19 vaccination policy, dated September 1, 2021, says only that the employer "reserves the right to make appropriate enquiries to verify the authenticity of a religious-based request by an employee."²⁵ In my view, this doesn't mean that the employer would automatically approve requests. Instead, I find it indicates that they would take steps to investigate each request individually before making a decision whether to approve or refuse it.

[45] So, without more evidence, I can't conclude that the Claimant's employer told employees that they would automatically approve all exemption requests.

[46] I also acknowledge that the Claimant believed her religious exemption request would be approved because she provided proof of her religious belief. But I find that this isn't relevant here. I can only look at the Claimant's actions in relation to what the law says about misconduct, as mentioned above. This means I need to focus on the Claimant's actions leading to her dismissal and whether she knew her actions could lead to her being let go.

[47] Additionally, I acknowledge that the Claimant believes her employer refused her religious exemption request just so that they could get rid of her. But again, I find that this isn't relevant here. I can only look at the Claimant's actions in relation to what the law says about misconduct, as mentioned above.

²⁵ GD3-72.

[48] I also acknowledge that the Claimant believes her employer's mandatory COVID-19 vaccination policy was unlawful and that she didn't even need an exemption from the policy because she worked alone most of the time.

[49] But once again, I find that the Claimant's argument about her employer's policy being unlawful isn't relevant here. I can only look at the Claimant's actions in relation to what the law says about misconduct, as mentioned above. So, if the Claimant wishes to pursue this argument, she needs to do that through another forum. For the same reason, I also don't give the Supreme Court and Tribunal's Appeal Division decisions much weight here.

[50] As for the other three Tribunal cases the Claimant cites, I note that I'm not bound by prior decisions of the Tribunal and must decide each case based on the facts before me.

[51] I also note that these other Tribunal decisions were based on evidence that isn't similar to the facts in this appeal.

[52] In one of these decisions, I note the employer approved the claimant's religious exemption request but let them go anyway because they said they couldn't accommodate them due to undue hardship.²⁶ In the second decision, I note that it was proven the employer didn't intend to accept any religious exemption requests despite stating in their policy that employees who weren't vaccinated for medical or religious reasons wouldn't be disciplined.²⁷ And in the third decision, I note the claimant told their employer that they wouldn't comply with their COVID-19 vaccination policy before it came into effect and were dismissed for this reason.²⁸ But there's no evidence before me that any of these things occurred here.

[53] So, for these reasons, I don't give these Tribunal decisions much weight either.

²⁶ GD8-39.

²⁷ GD8-7.

²⁸ GD8-11.

[54] I understand that the Claimant believes she complied with her employer's mandatory COVID-19 vaccination policy by submitting a religious exemption request. But I find that the evidence clearly shows that she made a conscious decision not to comply with her employer's mandatory COVID-19 vaccination policy by still refusing to get vaccinated after her request was refused, which shows that her actions were intentional.

[55] I also find the Claimant knew or should have known that refusing to comply with her employer's mandatory COVID-19 vaccination policy could lead to her losing her job.

[56] I note that the Claimant's employer's mandatory COVID-19 vaccination policy, dated September 1, 2021, states that all employees were required to be fully vaccinated by October 31, 2021 unless granted a medical or human rights accommodation. It also states that any employees who weren't fully vaccinated by this date would be placed on an unpaid leave of absence for 10 days, and following this period, any employees still not fully vaccinated would be terminated.²⁹

[57] I also note that the Claimant's employer's exemption refusal letter, dated October 22, 2021, states that they required the Claimant to be fully vaccinated in order to continue working. It also states that if she couldn't get vaccinated by the October 31, 2021 deadline, she would be placed on an unpaid leave of absence for 10 days.³⁰ The Claimant testified that she received and read the letter.

[58] The Claimant testified that she knew that she could be let go if she didn't comply with her employer's mandatory COVID-19 vaccination policy, but still didn't think that would actually happen. She testified that she was in disbelief after her employer refused her religious exemption request and thought that she would ultimately be able to keep her job

²⁹ GD3-68 to GD3-70.

³⁰ GD3-63 to GD3-64.

[59] I believe the Claimant when she says she thought she would be able to keep her job. But this doesn't mean she also couldn't have still known that she could be let go. In other words, it was entirely possible for her to believe both of these things at the same time, especially as she confirmed that she knew about her employer's mandatory COVID-19 vaccination policy and the consequences of not complying with it, as mentioned above.

[60] While I understand that the Claimant didn't think she would be let go even after learning that her religious exemption request was refused and choosing to remain unvaccinated, I find that the evidence shows that she should have known that she could be let go.

[61] I therefore find that the Claimant's conduct is misconduct under the law since she committed the conduct that led to her dismissal (she refused to comply with 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, did the Claimant lose her job because of misconduct?

[62] Based on my findings above, I find that the Claimant lost her job because of misconduct.

Conclusion

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

[64] This means that the appeal is dismissed.

Bret Edwards
Member, General Division – Employment Insurance Section