



Citation: *AK v Canada Employment Insurance Commission*, 2022 SST 1162

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

Decision

Appellant: A. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (470456) dated May 16, 2022
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Decision date: September 26, 2022

File number: GE-22-2002

Decision

[1] The Claimant's appeal is summarily dismissed because it has no reasonable chance of success.¹

[2] The Claimant has made no arguments and provided no evidence that would let me allow his appeal. The Commission has proven that the Claimant lost his job because of misconduct. The Claimant knew of employer's vaccination policy requirements, the consequences for non-compliance and he failed to comply.

[3] This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[4] The Claimant's employer placed him on a leave of absence from his job. The Claimant's employer said that the Claimant was put on a leave of absence because he did not comply with its vaccination policy.

[5] The Claimant worked as a screening officer at an airport. The Claimant's employer was obliged to follow the federal government's mandate requiring all employees to be vaccinated for COVID-19 to keep their positions. The employer asked its employees to provide proof of vaccination. The Claimant did not disclose his vaccination status and remained unvaccinated by the required date. He was placed on a leave of absence from his job.

[6] The Commission accepted the employer's reasons as to why the Claimant was no longer working. It decided the Claimant was suspended from his job because of misconduct.² Because of this, the Commission disentitled the Claimant from receiving EI benefits.

¹ In this decision, the Appellant is called the Claimant and the Respondent is called the Commission.

² The Commission initially disentitled the Claimant from receiving EI benefits because it decided the Claimant had voluntarily taken a period of leave without just cause. Upon reconsideration, the Commission changed its decision and disentitled the Claimant from receiving EI benefits because it decided the Claimant was suspended from his job due to misconduct.

[7] The Claimant argues that the second decision (the reconsideration) made by the Commission does not have any correlation to his status at all because he was placed on a leave of absence. He says he was not suspended, fired or terminated. The Claimant argues that all sections of the *Employment Insurance Act* (EI Act) mentioned by the Service Canada agent do not apply because he did not leave voluntarily and he committed no misconduct.

Matters I have to consider first

– The Claimant did not voluntarily take a period of leave from his job

[8] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.³

[9] In the Claimant's case, his employer initiated the leave of absence because the Claimant did not comply with the employer's policy.

[10] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of leave from his employment. He wrote in his appeal to the Tribunal that he was on a "forced" leave of absence.

[11] The section of the law on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.⁴

[12] The evidence shows it was the Claimant's conduct, of refusing to comply with the employer's vaccination policy led to him not working. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension.

³ Section 32, EI Act

⁴ Section 31, EI Act

– **The Tribunal gave Notice of Intent to Summarily Dismiss**

[13] Before I summarily dismiss an appeal, I have to give the Claimant notice in writing. I have to allow the Claimant a reasonable period to make arguments about whether I should summarily dismiss the appeal.⁵

[14] Tribunal staff sent a letter to the Claimant on August 24, 2022. In this letter, I explained why I was considering summarily dismissing her appeal. I asked him to respond to the letter by September 5, 2022.

[15] The Claimant responded to my letter on September 5, 2022. On September 21, 2022 he sent a copy of a decision made by another tribunal member for claimant. I have considered these submissions in reaching my decision.

Analysis

[16] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.⁶

[17] No reasonable chance of success means it is obvious that the appeal is bound to fail, no matter what argument or evidence the Claimant might present at a hearing.⁷

[18] The law says that you can't get EI benefits if you lose your job because of your own misconduct. This applies whether the employer has fired you or suspended you.⁸

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

⁵ Section 22, *Social Security Tribunal Regulations*

⁶ Section 53(1) of the *Department of Employment and Social Development Act*

⁷ In coming to this interpretation, I am relying on the following: *YA v Minister of Employment and Social Development*, [2022 SST 83](#); *LB v Minister of Employment and Social Development*, [2021 SST 773](#); *BB v Canada Employment Insurance Commission*, [2020 SST 951](#); *DV v Minister of Employment and Social Development*, [2020 SST 977](#).

⁸ Sections 30 and 31 of the EI Act

[20] Misconduct is not defined in the EI Act. The legal test for misconduct is set out in case law.⁹ The case law says that there will be misconduct where the conduct of a claimant is wilful - where the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.¹⁰

[21] The conduct of the employer is not a relevant consideration under section 30 of the EI Act. Rather, the analysis is focused on the Claimant's acts or omissions and whether that amounts to misconduct within the meaning of section 30 of the EI Act.¹¹

[22] The questions of whether the Claimant's employer violated the Claimant's collective agreement, privacy laws or other laws he has cited in his appeal are matters for other forums.¹² I am not making decisions about whether the Claimant has any course of action under his collective agreement or other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act.

[23] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show it is more likely than not the Claimant lost his job because of misconduct.¹³

[24] The Commission says if an employee willfully refuses to comply with their employer's mandatory vaccination policy, and there is a clear connection between the Claimant's refusal to comply and the suspension, a finding of misconduct can be established. It says in this situation, the Claimant was made aware of the company's mandatory vaccination policy and the consequences of failing to comply. The Claimant

⁹ Case law comes from decisions made by the courts.

¹⁰ *Mishibinijima v. Canada (Attorney General)* 2007 FCA 36.

¹¹ *Paradis v. Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v. McNamara*, 2007 FCA 107

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

¹³ *Minister of Employment and Immigration v. Bartone*, A-369-88.

was aware of the deadlines and still failed to comply, knowing negative consequences would be a result of such a refusal.

[25] The Commission says it concluded the Claimant's refusal to comply with company policy constituted misconduct within the meaning of the EI Act because the Claimant was aware of the requirement to comply with the policy. It says the Claimant was aware that refusing to comply with the policy could result in negative consequences, such as being placed on an unpaid leave of absence. The Commission says the Claimant was given the choice to comply with the policy, or face the known consequences of failing to comply. It says the Claimant still made the choice not to comply. Such a refusal is considered to be misconduct. The Commission noted disagreeing with a policy does not absolve one from complying with it.

[26] The Commission says the Claimant was made aware of the policy, the deadlines related to the policy, and the consequences of failing to comply with the policy. It says the Claimant chose non-compliance. The choice was wilful, conscious and intentional. The Commission says there is a clear causal link between the Claimant's misconduct and the Claimant's suspension.

[27] In his appeal to the Tribunal, the Claimant wrote that the second EI decision dated May 16, 2022 Benefits not payable – suspension from employment does not have any correlation with his status at all because he was placed on LOA (leave of absence) but not suspended, fired or terminated. He wrote that all sections of the EI Act mentioned by the Service Canada agent do not apply because he did not leave voluntarily and committed no misconduct.

[28] The Claimant also attached a letter to his appeal to the Tribunal. He argued that the initial decision, dated March 30, 2022 was not justified. He provided a list of the grievances he filed, a quote from a website related to labour standards, and a list of sections in the EI Act. He reiterated that he was on a LOA and not suspended, not fired or terminated. He provided proof of his employment status that included a schedule showing he was on a LOA and an email indicating he was on LOA.

[29] In the letter attached to his appeal, the Claimant also wrote with respect to misconduct, “it might be meant my unwillingness to follow company policy intending to gain access to my personal health information.” He noted that the employer’s policy was implemented by the employer without any negotiation with the union and provided a quote from R.S.O. 1990, c. O.1, s. 63(2). He wrote the policy violated his privacy as protected by various pieces of privacy legislation and the provincial occupational health and safety act. The Claimant stated that he asked his employer to provide him with a clear explanation regarding his concerns but received no response.

[30] The Claimant followed up his initial appeal to this Tribunal with a further submission containing an unaddressed email that shows a return to work date of July 8, 2022 and a screen shot of the *Canadian Charter of Rights and Freedoms* (Charter) with section 7 and a portion of section 15 of the Charter in the foreground.

[31] The Claimant responded to the Tribunal’s Notice of Intent to Summarily Dismiss his appeal. In his response, the Claimant provided a notarized Request for Accommodation that he sent to his employer with an enclosed Statement of Religious Belief and Conscience Affidavit, and a Notice of Amendment of Signature. The documents were notarized on December 6, 2021.

[32] The Claimant also included a letter with his submission. He argued that he had worked the minimum number of hours required to qualify for EI benefits. He said he was forced on an unpaid leave of absence which he says does not exist from a law perspective, he did not voluntarily leave his job and he was not suspended as he was “restricted from work until he provided the information which satisfied the [employer] or met its policy requirements.”

[33] The Claimant wrote that he did not “quite get” how his refusal to disclose his private confidential information could impair the performance of duties owed to his employer. He said that his employer ignored all his requests and refused to provide justification and conducted wrongdoing with respect to ensuring appropriate communication between and employee and employer.

[34] The Claimant wrote that the implementation and enforcement of the employer's policy was done with numerous violations and the policy violates numerous laws and legal acts. He goes on to state the policy and his employer violated the collective agreement, privacy legislation, the provincial health and safety act, the *Criminal Code of Canada*, the *Canadian Charter of Rights and Freedoms*, and the *Canadian Human Rights Act*, the Nuremberg Code. He also provided a list of legislation and listed decisions from the Supreme Court of Canada and British Columbia Court of Appeal. He stated that his employer had violated its ethical practices and policies.

[35] The Claimant wrote that he believed the exercising of his rights is protected by the Canadian Constitution in order to take care of his family and himself as well as to preserve his health to provide food and shelter for his family and all that should not be considered misconduct. He was confident that he performed and perform lawful actions and exercise his rights as a Canadian citizen and human being. He wrote that his employer tried to send threats in anonymous emails and some threats were in private emails not related to his employer to intimidate or coerce him.

[36] The Claimant argued that there is no evidence of his [vaccination] status available because he never gave the consent to disclose his confidential private information to his employer. Thus, he wrote, any decision regarding his status is an assumption. He says that an assumption-based decision is not specified in the Criminal or Labour Code and no justification of this decision can be considered legal.

[37] The Claimant stated that his employer failed to provide a clear explanation and to communicate in general. He stated that he did not request an exemption but did request an accommodation. He said his request was ignored. The Claimant provided a quote from a Supreme Court of Canada in support of his position.

[38] After the deadline for responding to the Tribunal's Notice the Claimant sent a copy of a decision issued by the Tribunal's General Division.¹⁴ In that case, the claimant was verbally told he had 2 days to get vaccinated for COVID-19 or he would

¹⁴ The decision for file number GE-22-829 issued on September 12, 2022, does not have a citation as of date of writing this decision.

have to quit. That is not the case for the Claimant in the appeal before me. As a result, I am not persuaded that I need to consider that decision to decide whether to summarily dismiss the Claimant's appeal

[39] I find that this appeal has no reasonable chance of success. This is because the Claimant lost his job due to his misconduct and there is no argument or evidence he could present that would lead me to a different conclusion.

[40] The appeal file shows me the Claimant's employer notified all employees about its vaccination policy. The employer is a subcontractor for Transport Canada and had to comply with the federal government's mandate that all employees be vaccinated to keep their positions. All employees who worked in airports had to be vaccinated.

[41] A representative of the employer spoke to a Service Canada officer on May 13, 2022. She told the Claimant asked for an exemption, but noted that all employees had to be vaccinated, so that even if an exemption to vaccination was granted he would not be able to work for the company.

[42] The employer sent Service Canada copies information about the vaccination requirements it circulated on October 7, 2021. The information stated, in part, the mandate is clear: employees in the commercial aviation industry in Canada are required to be fully vaccinated against COVID-19 by October 30, 2021. Employees were asked to send in their vaccination status no later than October 16, 2021.

[43] A Frequently Asked Questions document, dated October 7, 2021 stated, in part, if the company did not receive proof an employee was fully vaccinated by October 30, 2021 the employee would be subject to consequences of non-compliance. "This means that you will be placed on a leave of absence without pay as of October 31."

[44] Employees who were partially vaccinated would be subject to temporary workplace protocols (to be determined) until they were 14 days post vaccine. The policy provided that requests for exemption to vaccination for medical reasons and for grounds under the *Canadian Human Rights Act*, would be assessed by the employer on an individual basis.

[45] The FAQ has the question: I refuse to be vaccinated. What are my options? The response is: If you choose to not get fully vaccinated and are not covered by a certified medical contraindication or any protected ground under the *Canadian Human Rights Act*, you will be placed on a leave of absence without pay as of October 31. Please note: this is the only response you will get to this question, regardless of your reasons for refusing to get vaccinated.

[46] The information provided by the employer also included: directions on how to report vaccination status; the process for requesting a medical exemption, including examples of medical exemptions that would be accepted and those that would not; a User Guide for the Vaccination Reporting Portal; and, a “Status Stream Table.

[47] The Vaccination Reporting Portal provided for employees to report as Not vaccinated, Fully vaccinated or Partially vaccinated. If employees had technical issues or experienced difficulty using the portal they could contact their supervisor for assistance. The Status Stream Table shows what would happen to employees depending on whether they were partially vaccinated, seeking an exemption (medical or religious), made a personal choice to not vaccinate or have not submitted proof of full vaccination on the vaccination portal by November 15, 2021. The appeal file has a “D-stream Info Kit.” Employees in D-Stream were those who were unvaccinated. The information states that those employees who have not received any vaccine dose would not be able to continue working as long as the policy was in effect and would be put on an unpaid leave of absence effective November 15, 2021.

[48] The appeal file shows me that on November 2, 2021 the Claimant emailed his employer about noticing some changes on his schedule. He asked on what grounds he was put on LOA. The employer sent an email to the Claimant which says “According to our records, you have failed to report your COVID-19 vaccination status via [employer’s] portal by the deadline. You were emailed directly with information regarding the company’s mandatory vaccination policy. However, despite all efforts, you have not been compliant with the company’s request. For this reason, you have been placed on an LOA from 15th November.”

[49] The appeal file has an email dated November 4, 2021 from the Claimant's employer to the Claimant. The email notes that "since your status does not currently reflect that you are fully vaccinated or partially, nor is there a record of a request for an exemption under medical or religious reasons, effective November 15, 2021, you are being placed on an unpaid leave of absence without benefits. This letter is formal notification of your leave."

[50] The appeal file has an email dated November 8, 2021 from the Claimant outlining his questions regarding the policy. The Claimant states that he will hold the Company liable for any financial injury, direct or indirect loss of income, if the Company uses coercion or discrimination against me "based on my decision to not participate in [company's] COVID-19 vaccination mandates; nor will I disclose my vaccination status to the Company."

[51] The emails were followed with the December 6, 2021 notarized documents described above. The Claimant sent a further Notice of Duty to Accommodate, notarized on January 18, 2022, to his employer.

[52] The appeal file shows me that the Claimant spoke to Service Canada officer on March 16, 2022. During that conversation the Claimant said to the officer "I'm not vaccinated and does any employer have the right to ask a personal questions?" The Claimant also spoke to a Service Canada officer on May 11, 2022. During that conversation he said that as soon as the policy kicked in he sent a detailed message with questions regarding the medical treatment. He said that his employer never did respond to him. He said that he decided not to disclose his personal information that is protected by the law.

[53] The law says that I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.

[54] The Claimant was aware of the employer's policy and the employer's expectation that all employees were required to provide their vaccination status by October 30, 2021 and that all employees were required to be fully vaccinated against COVID-19 by

October 30, 2021. He knew that he could not work if he failed to report his vaccination status. The Claimant told his employer that he would not participate in the company's vaccine mandates, nor would he disclose his vaccination status to the company. I accept this evidence as true.

[55] So, I find that the Claimant lost his job because of misconduct. This is because the Claimant's actions led to him not working. He acted deliberately. He knew that his refusal to disclose his vaccination status or to get vaccinated was likely to lead to the loss of his job.

[56] If I accept the facts as true, there is no argument that the Claimant could make that would lead me to a different conclusion. There is no evidence that he could provide that would change these facts. As a result, I find his appeal is bound to fail, no matter what arguments or evidence he could bring to a hearing. This means I must summarily dismiss his appeal.

Conclusion

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

[58] I find the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss his appeal.

Raelene R. Thomas
Member, General Division – Employment Insurance Section