



Citation: *RK v Canada Employment Insurance Commission*, 2022 SST 1183

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

## Decision

**Appellant:** R. K.  
**Representative:** J. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (471673) dated May 13, 2022  
(issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference  
**Hearing date:** October 18, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** October 31, 2022  
**File number:** GE-22-1788

## 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 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 disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant was suspended from his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

## Matter I have to consider first

### The Claimant's representative testified at the hearing

[6] The Claimant identified his union representative as his representative for the appeal. But, the union representative wanted to give testimony at the hearing as well. For this reason, he took a solemn affirmation.

## Issue

[7] Was the Claimant suspended from his job because of misconduct?

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

## Analysis

[8] 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.<sup>2</sup>

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

### Why was the Claimant suspended from his job?

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

[11] The Claimant says he asked his employer for a religious exemption so he wouldn't have to take the COVID-19 vaccine. But, his employer refused it.

[12] The Commission says the Claimant refused to follow his employer's COVID-19 vaccine policy, so the employer suspended him.

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

[14] The Commission spoke to the Claimant's employer. The employer said it put the Claimant on an unpaid leave of absence for not complying with its vaccine mandate. The employer said the Claimant is suspended and could return to his position once he is vaccinated. The employer sent the Commission text of a letter it sent to the Claimant notifying him that he would be placed on an unpaid leave of absence effective November 1, 2021.

[15] The Claimant doesn't dispute the reason his employer placed him on an unpaid leave of absence. But, he doesn't agree that he didn't comply with its policy. He argues that he can't be vaccinated against COVID-19 based on his religious beliefs. But, the

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<sup>2</sup> See sections 30 and 31 of the Act.

employer didn't approve an accommodation on religious grounds. So, I find the employer placed him on an unpaid leave of absence, which means they suspended him. I find the employer did so because he went against its COVID-19 vaccine policy.

### **Is the reason for the Claimant's suspension misconduct under the law?**

[16] The reason for the Claimant's suspension is misconduct under the law.

[17] 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 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.<sup>3</sup>

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> 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 law.<sup>6</sup>

[19] 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 suspended or let go because of that.<sup>7</sup>

[20] The law doesn't say I have to consider how the employer behaved.<sup>8</sup> Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.<sup>9</sup>

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<sup>3</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>8</sup> See section 30 of the Act.

<sup>9</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[21] 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 wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.<sup>10</sup> I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[22] The Commission has to prove that the Claimant was suspended from his 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 was suspended from his job because of misconduct.<sup>11</sup>

[23] The Commission says that there was misconduct because the Claimant refused to follow his employer's COVID-19 vaccine policy.

[24] The Claimant says that there was no misconduct because he could not take the vaccine due to his religious beliefs. He says his collect agreement has no provisions in it about vaccinations or medical interventions. So, he says his employer has grossly violated the collective agreement.

[25] I find that the Commission has proven that there was misconduct, because the Claimant knew that if he didn't take the COVID-19 vaccine and didn't have an approved exemption, he could be suspended.

[26] The Claimant's employer sent the Commission messages it sent to employees about the requirement to take the COVID-19 vaccine. One is a message from August 2021. It says employees have to take the vaccine by October 31, 2021 as a condition of employment.

[27] A second message from September 2021 that the employer sent to employees says that employees who aren't fully vaccinated will be suspended without pay or

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<sup>10</sup> See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>11</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

terminated after November 1, 2021. The deadline was later changed to November 15, 2021. All messages refer to exemptions on different grounds.

[28] The Claimant's employer also sent text of a November 16, 2021 letter it sent to employees who had not complied with the requirement to be vaccinated. It states that these employees would be placed on an unpaid leave effective November 15, 2021.

[29] The Claimant confirmed at the hearing that he saw both messages referred to above. He said he didn't ask for a medical exemption because he couldn't find a doctor willing to sign the required forms. He also confirmed getting a letter confirming his leave of absence. The Claimant sent the Commission a copy of the letter his employer sent him refusing his request for accommodation.

[30] I find from the above that the Claimant knew that about his employer's requirement that he take the COVID-19 vaccine as a condition of his employment. The new policy his employer put in place allowed for exemptions. I find the Claimant asked for an exemption based on his creed, but the employer refused it. So I find by not taking the COVID-19 vaccine, the Claimant went against his employer's policy.

[31] The Claimant testified that he was aware of the consequences of not getting the COVID-19 vaccine from the letters he received. But he and his witness say he can't be suspended or terminated without a fair and impartial investigation.

[32] The Claimant's witness said that the Claimant submitted a request for religious exemption. But the employer never gave him a hearing. He says that the employer didn't comply with the collective agreement. The Claimant submitted a copy of his collective agreement in support of this argument. He has filed a grievance with the employer.

[33] The Claimant insisted that he had submitted a request for religious exemption, so he was fully compliant with his employer's policy. He said no one knows who is on the committee that refuses or approves these requests and no one signed the refusal of his request. He testified that it's not up to the employer to decide if an employee's beliefs are sincere.

[34] The Claimant sent the Commission a copy of his request for accommodation on religious grounds and the employer's response. He also sent copies of two faith-based documents in support of his beliefs concerning the COVID-19 vaccine. But both are signed on April 13, 2022, after the Commission's initial decision.

[35] As noted above, it is not my role to decide the reasonableness of the employer's actions. This includes whether the employer acted properly when it suspended the Claimant without a hearing, and whether it properly refused the Claimant's request for accommodation on religious grounds. Rather, I have to decide if the Claimant's decision not to take the COVID-19 vaccine constitutes misconduct.

[36] I find that the Claimant's action, namely not complying with his employer's COVID-19 vaccine policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I have found that this means that he was suspended. So, I find that the Commission has proven that there was misconduct.

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

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

[38] 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 suspended from his job.

## **Conclusion**

[39] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[40] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section