



Citation: *KP v Canada Employment Insurance Commission*, 2022 SST 1473

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

Decision

Appellant: K. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (473557) dated May 19, 2022
(issued by Service Canada)

Tribunal member: Jillian Evans

Type of hearing: Teleconference

Hearing date: October 25, 2022

Hearing participant: Appellant

Decision date: October 27, 2022

File number: GE-22-2055

Decision

1. The appeal is dismissed.
2. The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost 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 K. P. was a long-time and well-regarded employee of a federally regulated transportation company. Her employer says that she was let go because she went against one of its policies: the Appellant didn't get vaccinated by the deadline set out in the employer's COVID-19 mandatory immunization policy.
4. The Appellant doesn't dispute that this happened. She agrees that she chose not to receive COVID-19 vaccines by the required deadline and she agrees that she knew that she would lose her job as a result.
5. The Commission decided that because K. P. was dismissed for breaching one of her employer's policies she lost her job due to misconduct. So, the Commission disqualified the Appellant from receiving EI benefits.
6. The Appellant says that she had been a dedicated and model employee for more than two decades. She went above and beyond throughout her career to provide excellent service. She never had any complaints or disciplinary actions against her and was promoted up through the ranks due to her good performance and reliability. Her co-workers threw her a party on her last day of work. She disputes the Commission's determination that she ever engaged in misconduct.

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

7. She also says that she has paid into the EI program for nearly 50 years and that her decision to follow her personal beliefs about her body and her health should not be called misconduct that would disqualify her from receiving EI benefits.
8. My job is to decide if the Appellant's actions and behaviours meet the legal meaning of misconduct under the *Employment Insurance Act*.

Issue: Did the Appellant lose her job because of misconduct?

Analysis

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

Why did the Appellant lose her job?

10. The Commission and the Appellant agree about why the Appellant lost her job.
11. In her telephone conversations with EI Officers, the Appellant confirmed that she was made aware of the employer's mandatory vaccination policy on several occasions in the months prior to her termination. She also confirmed that she understood the policy and was aware of the consequences of failing to comply. She knew that she could get fired if she did not get vaccinated against COVID-19.²
12. At the hearing, K. P. was equally honest about her understanding of why she was terminated from her job:
 - She says that she knew about the policy and its requirement that she be fully vaccinated against COVID-19 by a particular date.

² GD3-70

- She did not want to get vaccinated because she was concerned for her health: she believes that there is a serious chance that the COVID-19 vaccines will cause her to suffer from a life-threatening heart attack.
- K. P. also knew that the policy allowed her to ask for a medical exemption by having a health care practitioner complete a Medical Exemption Request Form.³
- She did not ask her doctor to complete one of the forms for her, as she was told by her doctor that she would not qualify. K. P. did not seek an exemption.
- She asked her employer for different accommodations to avoid having to be vaccinated (working from home, working late/overnight hours when no one else was in the office) but those were denied.
- She knew from her discussions with her employer's human resources department that without an exemption, she would have to choose between being vaccinated and losing her job. She chose not to be vaccinated.

13. The Appellant understood that she had been terminated from her job because she chose not to comply with her employer's COVID-19 vaccination policy. I see no evidence to contradict this, and so I find that the Appellant lost her job for this reason.

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

14. The Appellant's decision not to comply with her employer's vaccination policy amounts to misconduct under the law.

15. The *Employment Insurance Act* doesn't provide an exact definition of the word misconduct. But case law (decisions from courts and tribunals) shows us how to

³ GD3-28 to GD3-51

determine whether an Appellant's actions and behaviours amount to misconduct under the Act.

16. In reviewing the decisions by the courts, we find a difference between the common use of the word "misconduct" and the legal meaning of that word in the Employment Insurance context.
17. The Commission bears the burden of proving that K. P.'s refusal to comply with her employer's vaccination policy fits this legal meaning of the word. This means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.⁴
18. Case law says that, to be misconduct, the conduct has to be wilful. This means that the Commission needs to prove that the conduct was conscious, deliberate, or intentional.⁵ They do not need to prove that there was deceit or a desire to cause the employer harm. The employee doesn't have to mean to be doing something wrong for their behaviour to be misconduct under the law.⁶
19. The case law also says that misconduct, in the context of the Act, means behaviour that could get in the way of an employee carrying out their duties toward their employer. This means that the Commission also bears the burden of proving that the Appellant's behaviour breached an important and necessary part of their job responsibilities. The case law does not require that the Commission demonstrate that the behaviour be dangerous, criminal, deceptive or unethical in order to amount to misconduct.
20. Finally, the case law also establishes that for behaviour to be misconduct in the context of the Employment Insurance Act, the employee needs to have known that their actions might result in them being fired.

⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Attorney General of Canada v Secours*, A-352-94

21. I find that the employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this vaccination policy as a requirement for all of its employees, this policy became a condition of the Appellant's employment.

22. I find that compliance with the policy became a necessary part of the Appellant's job.

23. I also find that the Commission has proven, on a balance of probabilities, that K. P. lost her job because of misconduct:

- I accept that the Appellant was aware of her employer's policy requiring her to have received two doses of a COVID-19 vaccine by a certain date. She agrees that she knew about the policy.
- I accept that the Appellant knew that she could be fired for refusing to follow the employer's policy. She was clear about this at the Hearing.
- I also accept that the Appellant decided not to follow the policy. She knew that this was a condition of her employment and she chose not to meet that condition.

24. The Appellant raised other issues in her submissions.

25. The Appellant says that the policy violated her right to make her own decisions about her health and what was best for her body. I disagree. The Appellant was able to make a decision about whether or not to get the vaccine, and she did make an intentional decision not to.

26. The Appellant also says that her employer was wrong for refusing to accommodate her. She offered to work remotely or to come to the workplace while no other employees were present.

27. The Federal Court has said that the role of the Tribunal is not to decide whether the employer's policy was fair or whether an employee's dismissal under that policy

was justified or reasonable, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act.⁷

28. The Tribunal must focus on the Appellant's behaviour and actions, not the employer's conduct.⁸ This means I can't look into whether the employer should have made reasonable arrangements or accommodated the Appellant. And I can't ask whether termination was a reasonable or appropriate penalty.

29. The Appellant also argued that she had been paying into EI for her entire working life and that it was unfair for her to now be denied benefits right when she needs them the most.

30. The Employment Insurance Act is an insurance plan. Like other insurance policies, claimants looking to collect benefits under the plan need to meet the specified conditions of the plan.⁹

31. The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. The Tribunal is not authorized to make decisions based on compassion or fairness. It must follow the law and apply the Act.¹⁰

32. The Appellant may have other recourse to pursue her claims that the employer's policy breached her personal rights and or that she ought to have been accommodated. But these matters must be addressed by the correct court or Tribunal.

So, did the Appellant lose her job because of misconduct?

33. Based on my findings above, I find that the Appellant lost her job because of misconduct. She acted deliberately. She knew that refusing to get vaccinated was

⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185 at paragraph 3

⁸ See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31

⁹ See *Pannu v. Canada (Attorney General)* 2004 FCA 90

¹⁰ See *Canada (Attorney General) v Knee* 2011 FCA 301

likely to cause her to lose her job. And she decided not to get vaccinated and lost her job.

Conclusion

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

35. This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section