



Citation: *KS v Canada Employment Insurance Commission*, 2022 SST 1600

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

Decision

Appellant: K. S.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (475305) dated May 31, 2022
(issued by Service Canada)

Tribunal member: Raelene R. Thomas
Type of hearing: Teleconference
Hearing date: November 4, 2022
Hearing participant: Appellant
Decision date: November 16, 2022
File number: GE-22-2140

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.¹

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving employment insurance (EI) benefits.²

Overview

[3] The Claimant was employed by a courier firm. The Claimant's employer brought in a policy requiring that all employees be vaccinated for COVID-19 by January 10, 2022. The Claimant's employer placed the Claimant on unpaid leave because she was not vaccinated.³

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

[5] The Claimant does not agree with the Commission. She says that when she was hired being vaccinated was not required. She did not consent to the change of policy. She wore personal protective equipment (PPE) and was willing to continue to do rapid testing, at her expense. The Claimant has medical concerns that do not fall within the policy's exemption criteria. She says if she did get the vaccine it would be her affected and not the employer or anyone else. The Claimant says she should be allowed to work if she is not sick.

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

² Section 31 of the *Employment Insurance Act* (EI Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits until the period of the suspension expires; the claimant loses or voluntarily leaves the employment; or, the claimant works enough hours of insurable employment in another employment to qualify to receive EI benefits.

³ The Record of Employment issued to the Claimant shows that the last day for which she was paid was Friday, January 7, 2022. January 10, 2022 fell on a Monday.

Matters I have to consider first

The employer is not an added party to the appeal

[6] Sometimes the Tribunal sends a claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[7] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a leave of absence

[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.⁴

[9] In the Claimant's case, her employer initiated the leave of absence.

[10] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of leave from her employment.

[11] The section of the EI Act 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.⁵

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

⁴ Section 32, EI Act

⁵ Section 31, EI Act

Issue

[13] Was the Claimant suspended from her job because of misconduct?

Analysis

[14] 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.⁶

[15] Specifically, section 31 of the EI Act says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

(a) the period of suspension expires;

(b) the claimant loses or voluntarily leaves their employment; or,

(c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

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

Why was the Claimant suspended from her job?

[17] I find that the Claimant was suspended from her job because she did not comply with the employer's vaccination policy.

[18] The Claimant testified that her employer brought in a policy requiring that employees be vaccinated for COVID-19. She does not recall the exact date the policy was announced. She says the deadline for vaccination was pushed back two or three times. The Claimant testified the employer allowed rapid testing for COVID-19. Employees were allowed to continue working while they tested until testing was no

⁶ See sections 30 and 31 of the EI Act.

longer accepted. The Claimant testified the employer's policy provided for an exemption to vaccination but she did not submit a request because her doctor would not give her a letter to be exempt.

[19] The appeal file shows a representative of the employer spoke to a Service Canada officer on March 31, 2022. The representative said staff were given multiple notices of the new policy and time to comply. There was a deadline of January 10, 2022 to be fully vaccinated. The representative confirmed the Claimant was placed on an unpaid leave of absence due to failure to comply with the vaccination policy.

[20] The Claimant testified she received a letter from her employer that she had to sign and return. The letter said that after "this date" she would not be allowed to come back to work. The Claimant said the last deadline for vaccination was the end of December [2021]. She said she continued working until January 7, 2022. On that date she was told not to come to work on Monday [January 10, 2022] unless she was vaccinated. She sent a text to her boss to confirm she was not to come to work. Her boss told her she had been given a letter if she was not vaccinated by December 31, 2021 she was not to come to work.

[21] This evidence tells me the Claimant was suspended from her job because she failed to get vaccinated, and did not have an exemption to vaccination, as required by the employer's policy.

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

[22] Yes, the reason for the Claimant's suspension is misconduct under the law. The reasons for my finding follow.

[23] The EI 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 EI Act. It sets out the legal test for misconduct. A legal test are the questions and criteria that I consider when deciding whether misconduct has occurred.

[24] Case law says that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ The Claimant 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.⁹

[25] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.¹⁰

[26] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.¹¹ A deliberate violation of the employer's policy is considered to be misconduct.¹²

[27] The law doesn't say I have to consider how the employer behaved.¹³ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹⁴

[28] I have to focus on the EI Act only. I can't make any decisions about whether the Claimant has other options under other laws or her collective agreement. Issues about whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹⁵ I can consider and decide only one thing: is what the Claimant did or failed to do misconduct under the EI Act?

[29] The Commission has to prove the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of

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

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

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

¹¹ See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314

¹² See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460

¹³ See section 30 of the Act.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

probabilities. This means it has to show it is more likely than not the Claimant was suspended from her job because of misconduct.¹⁶

[30] The Commission says in this case the Claimant made a personal decision to not adhere to the employer's vaccination policy. It says because the Claimant made the choice not to get vaccinated for personal reasons, it can be said that she initiated the separation from employment because she knew not following the policy would result in the loss of her employment. The Commission says if it looks at the reason for separation as a suspension, it can also determine the Claimant's actions were wilful, reckless and deliberate, as it was her choice to not adhere to the employer's policy. Therefore, the Commission says, the reason the Claimant lost her employment meets the definition of misconduct under the EI Act.

[31] The Claimant said she was sent a letter from her employer that she was asked to sign and return to the employer. The letter said you could not work after a certain date if not vaccinated. She did not agree with that but did sign and return the letter to her employer. After that letter, the deadline for vaccination was extended and rapid testing was started.

[32] The Claimant testified she was employed with a courier firm. She would usually get laid off after the Christmas rush and usually get recalled to work in March based on her seniority. The Claimant said she does not recall the exact date when she was told employees had to be vaccinated for COVID-19. She thought it was in October 2021. She said she saw the employer's COVID-19 Safer Workplaces Policy at the time it was issued.¹⁷ The employer's policy was issued on October 13, 2021.

[33] The employer's policy said all employees had to attest to their vaccination status by no later than October 15, 2021. The Claimant said that she reported her vaccination status through the parcel scanner.

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ The employer's "COVID-19 Safer Workplaces Policy" is at pages GD3-22 to GD3-26 of the appeal file.

[34] The employer's policy said all employees had to be fully vaccinated with a COVID-19 vaccine series by November 1, 2021. The Claimant testified she understood that she had to get vaccinated. She said that the November 1, 2021 deadline got pushed back and the final deadline for vaccination was the end of December [2021]. The policy also said that from November 2, 2021 to December 31, 2021 employees who were not fully vaccinated for COVID-19 or provided a negative attestation of vaccination status were required to provide a negative COVID-19 test at least twice per week. The Claimant testified that she did comply with the rapid testing requirements, testing on Tuesday and Thursday each week.

[35] The employer's policy says that after December 31, 2021 anyone who is not vaccinated, and without an approved exemption for medical or religious grounds will be in contravention of the policy. Those individuals would be placed on an unpaid leave.

[36] The Claimant testified she did not apply for an exemption to the policy. Her doctor would not give her an exemption. She did not ask for an exemption based on her religious beliefs because she is not religious. She said she thought the deadline would be pushed back again once the rapid testing was introduced. She thought she could continue with the testing, wearing PPE and sanitizing and still be employed. She made this assumption because she was doing the testing, she was not sick and could not infect anyone else. She said she does not know why she could not continue to do that.

[37] The Claimant testified that she worked until January 7, 2022. On that date she was told not to come to work on Monday [January 10, 2022] unless she was vaccinated. She sent a text to her boss to confirm she was not to come to work. Her boss told her she had been given a letter if she was not vaccinated by December 31, 2021 she was not to come to work.

[38] The Claimant testified she is a member of a union and a grievance has been filed on her being placed on a leave of absence. She is not sure of the current status of the grievance.

[39] The Claimant argued that it was not misconduct. She does not believe anyone has the right to tell her what to inject in her body. She did not see why she could not continue to do the testing and wearing the protective gear. Those two things had worked up to January 7, 2022. She should have been allowed to continue to test, wear the PPE and continue to work. She had medical concerns that did not fit into the vague medical criteria for exemption. It would be her that would be affected by an injection, not her employer or the government. She argued that if she was not sick she should be allowed to work. The Claimant argued that the Nuremberg Code says she cannot be forced to take a medical treatment.

[40] I asked the Claimant if there was a provision in the policy that would allow her to continue testing after January 7, 2022 to continue working. She replied no, it was either get the vaccination or get fired, was how she understood it, regardless of her health concerns, there was no other option.

[41] I find the Commission has proven that there was misconduct, because it has shown the Claimant made the conscious, deliberate and willful decision to not comply with the employer's policy when she was aware that not complying could lead to her being suspended from her job. My reasons for this finding follow.

[42] The Claimant's employer introduced a policy on October 13, 2021 requiring all employees to be vaccinated for COVID-19 by December 31, 2021. The policy provided that employees who were not vaccinated could continue working from November 2, 2021 to December 31, 2021 if they provided a negative COVID-19 test twice weekly. The policy said after December 31, 2021 employees who were unvaccinated would be placed on leave without pay.

[43] The Claimant thinks she should have been allowed to keep testing so that she could keep working. But that is not what the employer's policy required of her.

[44] The Claimant testified she was aware that the employer required her to be vaccinated or to have an approved exemption to vaccination by December 31, 2021. She was aware that if she was not vaccinated or did not have an exemption by that date

she would not be allowed to work. The Claimant did not ask for an exemption to the policy because her doctor would not give her a letter for a medical exemption and she is not religious. The Claimant remained unvaccinated by December 31, 2021.

[45] This evidence tells me the Claimant was aware of the requirement to be vaccinated by December 31, 2021 or to have an exemption to vaccination and knew that she would be suspended (placed on a leave of absence) if she did not comply with the requirement. The Claimant did not have an exemption and was not vaccinated by the required date. This means the Claimant made the conscious, deliberate and wilful decision to not comply with the policy when she knew that by doing so she could be suspended from her job and not be able to carry out the duties owed to her employer. As a result, I find that the Commission has proven the Claimant was suspended from her job due to her own misconduct within the meaning of the EI Act and the case law described above.

So, did the Claimant lose his job because of misconduct?

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

Conclusion

[47] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits for the period of the suspension.

[48] This means that the appeal is dismissed.

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