



Citation: *DK v Canada Employment Insurance Commission*, 2022 SST 1545

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

## Decision

**Appellant (Claimant):** D. K.  
**Respondent (Commission):** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (498222) dated July 25, 2022 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy  
**Type of hearing:** Videoconference  
**Hearing date:** November 2, 2022  
**Hearing participant:** Appellant  
**Decision date:** November 15, 2022  
**File number:** GE-22-2832

## Decision

[1] The appeal is dismissed.

[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 be suspended from his job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Claimant worked as a parts-person and was placed on an unpaid leave of absence on December 21, 2021. The Claimant's employer (X) said the Claimant was placed on an unpaid leave of absence because he didn't comply with their vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from December 27, 2021.

[5] The Commission says the Claimant's actions were conscious and intentional and taken in full knowledge they would result in a loss of employment.

[6] The Claimant says the employer violated his human rights and religious beliefs.

## Issue

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

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<sup>1</sup> Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended from his employment because of his misconduct is not entitled to receive employment insurance benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 of the EI Act to qualify to receive benefits.

## **Analysis**

[8] 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 the Claimant was suspended from job. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was he Claimant suspended from his job?**

[9] I find the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason the Claimant was placed on an unpaid leave of absence. The employer told the Commission that the Claimant was placed on an unpaid leave because he didn't comply with their vaccination policy.

[11] The Claimant doesn't dispute that he was placed on an unpaid leave of absence for not complying with the employer's vaccination policy. However, the Claimant says the employer violated his human rights and religious beliefs.

[12] I find the Claimant was placed on unpaid leave of absence for failing to comply with the employer's vaccination policy by December 20, 2021.

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

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

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>2</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>3</sup> The Claimant doesn't have to have

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<sup>2</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>3</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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>4</sup>

[15] 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>5</sup>

[16] The Commission has to prove 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>6</sup>

[17] The Commission says there was misconduct because the Claimant's actions were conscious and intentional and taken in full knowledge they would result in a loss of employment.

[18] The Claimant says there was no misconduct because he didn't want to receive the vaccine for religious and medical reasons. He further says the employer violated his human rights and religious beliefs.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware he could lose his job if he didn't comply with the employer's vaccination policy (GD3-20). Furthermore, the Commission provided a copy of the employer's vaccination policy which clearly stated that failing to comply with their policy meant that employees wouldn't be eligible to work or be paid (GD3-34). I realize the Claimant testified the employer violated his human rights and religious beliefs by implementing the vaccination policy. However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.<sup>7</sup>

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<sup>4</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>6</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>7</sup> *Paradis v Canada (Attorney General)*, 2016 FC 1281.

## **Additional Testimony from the Claimant**

[20] I realize the Claimant further testified that his employer denied his request for a religious exemption. I acknowledge the Claimant was forthright in his testimony about why he chose not to be vaccinated. Nevertheless, the only issue before me was whether the Claimant was suspended from his job because of misconduct. On this matter I must apply the law. In other words, I cannot ignore the law even in for compassionate reasons.<sup>8</sup>

[21] Finally, the Claimant testified that he didn't want to be vaccinated for personal medical reasons. The Claimant further explained that his doctor wouldn't provide him with a deferral or exemption. I recognize this situation was unfortunate for the Claimant. Still, the only issue before me was whether the Claimant was suspended from his job because of misconduct. As mentioned, I cannot ignore the law even for sympathetic and compassionate reasons.

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

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

## **Conclusion**

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

[24] This means the appeal is dismissed.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section

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<sup>8</sup> *Knee v Canada (Attorney General)*, 2011 FCA 301.