Citation: *AK v Canada Employment Insurance Commission*, 2022 SST 1648

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 (492711) dated July 12, 2022 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	November 10, 2022
Hearing participant:	Appellant Support person (K. T.)
Decision date:	December 9, 2022
File number:	GE-22-2635

Decision

[1] The appeal is dismissed on both issues.

[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).

[3] The Claimant hasn't shown that he was available for work from February 1, 2022. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[4] The Claimant was suspended from his job.[1] The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't provide proof of his vaccination.

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

[6] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended because of misconduct.[2] It also decided that the Claimant was not available for work. For these reasons, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[7] The Claimant disagrees and says that he was actively seeking work but he is in a specialized field with few job opportunities. And employers were reluctant to give him a job since he could have been recalled to his employment at any time.

---

[1] The Claimant's employer put him on an unpaid leave of absence from work. Since the employer initiated the Claimant's separation from employment, this is considered a suspension.
[2] Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Matter I have to consider first

The employer is not a party to the appeal

[8] The Tribunal identified the Claimant's former employer as a potential added party to the Claimant's appeal. The Tribunal sent the employer a letter asking if they had a direct interest in the appeal and wanted to be added as a party. The employer did not respond by the date of this decision. As there is nothing in the file that indicates the employer has a direct interest in the appeal, I have decided not to add them as a party to this appeal.

Issues

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

[10] Was the Claimant available for work?

Analysis

[11] 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.[3]

[12] 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. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended?

[13] Both parties agree that the Claimant was suspended from his job because he went against the employer's vaccination policy by not providing proof of his vaccination. I see no evidence to contradict this, so I accept it as fact.

[3] See sections 30 and 31 of the Act.

Is the reason for his suspension misconduct under the law?

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

[15] 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 dismissal 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.

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

[17] 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 let go because of that.[7]

[18] The Commission has to prove that the Claimant lost 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 lost his job because of misconduct.[8]

[19] I only have the power to decide questions under the Act. 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

---

[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *Minister of Employment and Immigration v Bartone*, A-369-88.

decide.[9] I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[10] Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[21] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits.

[22] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[11] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[12]

---

[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

[23] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[13] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[14]

[24] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Claimant. Instead, I have to focus on what the Claimant did or did not do and whether that amounts to misconduct under the Act.

[25] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the employer clearly notified the Claimant about its expectations about providing proof of vaccination
- the employer sent the Claimant letters several times to communicate to the Claimant what it expected
- the Claimant knew or should have known what would happen if he/she didn't follow the policy

[26] The Claimant says that there was no misconduct because:

- the employer's vaccination policy was went against the law, violated his human rights and his collective agreement

[13] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

- he had questions about the safety of the vaccine and the employer's decision to implement the policy, but the employer wouldn't give him answers
- he hadn't thought that he could be suspended if he didn't follow the policy

[27] The employer's vaccination policy said that employees had to be fully vaccinated against COVID-19 and show proof of their vaccination. The deadline for vaccination was October 31, 2021, but was later extended to January 31, 2022.

[28] The Claimant said he was notified of the policy in August 2021. He told his union about his objections to the policy, but the union representative told him that he could choose whether to be vaccinated. And if he didn't get vaccinated, he would be placed on an unpaid leave of absence (suspension).

[29] In October 2021, the Claimant sent an email to the employer asking questions about the policy and COVID-19 vaccines. The employer responded by stating that all employees were required to be fully vaccinated by the deadline.[15]

[30] The first deadline passed and nothing happened. This made the Claimant think that the policy wasn't going to be enforced. Then, the employer sent a letter in December 2021, stating that the new deadline for vaccination was January 31, 2022.[16]

[31] The Claimant said he hoped that deadline might pass without anything happening again, but there were rumours that this time would be different. That people were going to be put on leave. He didn't know for sure, he thought it might just be a scare tactic to make people get vaccinated.

[32] On January 31, 2022, the employer sent the Claimant a letter saying he was being put on an unpaid leave of absence for failing to comply with its COVID-19 vaccination policy as of February 1, 2022.[17]

---

[15] See GD3A-47 to GD3A-48.
[16] See GD3A-43 to GD3A-45.
[17] See GD3A-28 to GD3A-29.

[33] The Claimant argued that he didn't refuse to get vaccinated. However, he had to provide proof of vaccination to comply with the policy. His action of not providing the proof of vaccination means he went against the policy's requirement. If the Claimant intended to comply with the policy, he could have communicated that to his employer and asked for an extension of time to do so.

[34] The Claimant knew what he had to do under the vaccination policy and what would happen if he didn't follow it. The employer told the Claimant about the requirements and the consequences of not following them.

[35] The Claimant argued that the employer's policy unilaterally changed the terms and conditions of his employment, in violation of his collective agreement.

[36] 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 policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.[18]

[37] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.[19]

[38] I do not have the authority to decide whether the employer breached the Claimant's collective agreement by implementing the vaccination policy or suspending the Claimant from his job. If the Claimant believed the employer's policy violated his collective agreement, filing a grievance through his union is a more appropriate venue to address that allegation.

[39] The Claimant also said that the employer's policy violated the law and his human rights.

---

[18] See *Canada (Attorney General) v Lemire,* 2010 FCA 314.
[19] See *Canada (Attorney General) v Marion,* 2002 FCA 185.

[40] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Charter is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and a number of provincial laws that protect rights and freedoms.

[41] These laws are enforced by different courts and tribunals.

[42] This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter.

[43] But this Tribunal is not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. Nor is the Tribunal allowed to make rulings based on the *Canadian Bill of Rights* or the *Canadian Human Rights Act* or any of the provincial laws that protect rights and freedoms.

[44] The Claimant may have other recourse to pursue his claims that the employer's policy violated his rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide.

[45] The Claimant also argued that he needed the employer to give him "informed consent" by answering his questions about the vaccine before he could make a decision whether to comply with the policy.

[46] The Claimant said that the employer responded to his questions about the vaccine by directing him to government websites that gave information about the vaccine. However, he wanted the employer itself to answer his questions.

[47] The Claimant hasn't shown why the employer had to answer his questions about the safety and efficacy of the vaccine before he could make a choice about whether to get vaccinated. There is no evidence that suggests his employer would have been the best source for that information. It also appears reasonable that the employer would instead direct him to resources where he could find the information he requested.

[48] Ultimately, the Claimant made the choice to follow the employer's policy by being vaccinated and providing proof of his vaccination. He didn't take those steps before the deadline, so he went against the employer's vaccination policy.

[49] The Claimant's support person submitted several decisions that he felt were relevant to the Claimant's appeal. Even though making submissions on a party's behalf is not the role of a support person, I have looked at these decisions and considered their relevance to the Claimant's case.

[50] First, the support person submitted *TC v Canada Employment Insurance Commission,* 2022 SST 891. In this appeal, the claimant, TC, was put on leave from his job because he didn't comply with the vaccination policy at work, and the Commission decided that he was suspended due to his own misconduct.

[51] Importantly in this case, the employer notified TC of the vaccination policy verbally two days before the deadline to be vaccinated. He didn't see a copy of the policy and didn't know what the consequences were for not following the policy. He also didn't have a chance to ask for an exemption to the policy. Two days later, the employer put him on leave. The Tribunal member found that the employer had the right to develop and impose policies at the workplace but employees should be given a chance to understand the policy, to know what is required, have an opportunity to review and/or ask questions, and be given enough time to comply.

[52] The Claimant's appeal and TC's have the same question of law – whether they were suspended from their jobs because of misconduct. However, the important facts are different. In the Claimant's case, he was given notice of the employer's vaccination policy several months before the first deadline to comply. He saw a copy of the policy and had the opportunity to apply for an exemption, if he wanted. He also had the chance to ask his employer and his union questions about the policy. I understand that he wasn't satisfied with the answers he received, but he did have that opportunity. He also had ample time to comply with the policy by getting vaccinated, if he so chose.

[53] Because of these differences, I find the case of TC is not persuasive in the question of whether the Claimant was suspended due to misconduct. The factors that the Tribunal Member in TC relied on to allow his appeal are not present in this case.

[54] Next, the support person submitted *Re Thompson and Town of Oakville Re Ruelens and Town of Oakville,* [1964] 1 OR 122. In this appeal, the Chief Constable of a municipal police force required members of the force to submit to a medical examination by a specific doctor. Mr. Thompson and Mr. Ruelens refused this directive and were dismissed for refusing to obey. Importantly in this case, other municipal employees were 0.able to choose their own doctor for the required medical examination.

[55] The Ontario High Court of Justice held that, without a statutory or contractual obligation to do so, the Chief Constable did not have the right to require members of the force to submit to a medical examination by a specific doctor. Police officers were required by law to be medically examined at the time they were appointed to the force, but that did not apply to an existing member of the force and there was no basis for the requirement that the Chief Constable would name the specific doctor to perform the examination. The Court indicates that employees can refuse to obey orders by the employer if there is no lawful basis for the order.

[56] I don’t find this decision persuasive for several reasons. Firstly, this decision has been considered by other courts and tribunals in subsequent cases, who have found that employers can require employees to submit to medical examinations in certain circumstances, even if there is no statutory or contractual obligation.[20] Secondly, there is not a sufficient connection between the facts in this case and the Claimant’s circumstances. The Claimant’s employer did not order him to undergo a medical procedure. He was able to make the choice whether to be vaccinated. And his choice not to be vaccinated had consequences that were set out in the policy, of which the Claimant was aware.

[20] See Bottiglia v Ottawa Catholic School Board, 2015 HRTO 1178.

[57] I acknowledge that the Claimant was hopeful that he would not be suspended after the January 31, 2022, deadline for vaccination. However, the consequence of not following the employer's policy was clearly set out in the policy itself, and in the employer's communications to him. This tells me that he could have normally foreseen that by going against the policy it would be likely to result in his suspension.

[58] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees had to provide proof of being fully vaccinated against COVID-19
- the employer clearly told the Claimant about what it expected of its employees in terms of being vaccinated
- the employer communicated to the Claimant what it expected
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy

So, was the Claimant suspended because of misconduct?

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

[60] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that failing to provide proof of vaccination was likely to cause him to be suspended.

Was the Claimant available for work?

[61] Two different sections of the law require claimants to show that they are available for work. However, the Commission decided that the Claimant was disentitled under only one of these sections.

[62] The *Employment Insurance Act* (Act) says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[21] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[22] I will look at those factors below.

Capable of and available for work

[63] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:[23]

- He wanted to go back to work as soon as a suitable job was available.
- He has made efforts to find a suitable job.
- He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[64] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[24]

- Wanting to go back to work

[65] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[66] The Claimant was employed in a specialized job in a technical field. His employer put in place a mandatory vaccination policy and he was suspended from his job as a result of that policy on February 1, 2022.

---

[21] See section 18(1)(a) of the Act.
[22] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[23] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[24] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[67] The Claimant said that he was looking for other work after his suspension. He registered to the online Job Bank and looked for jobs in his field. Because of the specialized nature of his work, there were only three job postings that were suitable for him throughout his leave. One was at his former employer, so he could not apply for that. Another was at a competing employer, but that employer also required employees to be vaccinated. He applied for the third job and contacted the employer. But, when the employer found out that he was waiting to be recalled to his job, they lost interest in his application.

[68] I believe the Claimant wanted to return to work. He was actively looking for work. His conduct of applying for a job and contacting the employer, also supports that he wanted to work.

- **Making efforts to find a suitable job**

[69] The Claimant has made enough effort to find a suitable job.

[70] The Claimant's efforts to find a new job included looking at job postings online on a regular basis, contacting a prospective employer, and applying for one job.

[71] Given the limited number of jobs available in the Claimant's field, I think the Claimant made reasonable and ongoing efforts to find work by looking for job postings and applying for a job that might be suitable for him. So, his efforts to find work have shown that he wanted to go back to work as soon as a suitable job was available.

- **Unduly limiting chances of going back to work**

[72] The Claimant did set personal conditions that might have unduly limited his chances of going back to work.

[73] The Commission said the Claimant was overly limiting his chances of going back to work because he was unwilling to take another job that might jeopardize his return to his employment.

[74] The Claimant agreed that he wasn't willing to risk his current employment (which he was suspended from) by accepting a job with a competitor. And he told one employer that if he did get the job, he may have to leave shortly if he was recalled to his work.

[75] The Claimant said that this was only reasonable, as he had been a long-term employee in his job and was subject to a non-compete clause that prevented him from accepting work with a competitor of the employer's for two years.

[76] The Claimant also said that he was only able to apply for jobs that didn't require employees to be vaccinated against COVID-19. He testified that this stopped him from applying to a job during his suspension. He said that he found a job posting that was suitable for him but wasn't able to apply because the company had a policy requiring employees to be vaccinated.

[77] I understand that the Claimant hadn't made a choice about whether to be vaccinated. He had concerns about the safety and efficacy of the vaccine. I recognize that the Claimant had good personal reasons for not wanting to get the COVID-19 vaccine at that time. But, regardless of the Claimant's reasons, his testimony supports that the inability to accept a job that required the COVID-19 vaccination put serious limits on his chances of returning to work.

[78] The Federal Court of Appeal has given guidance in cases where claimants have good reasons for being unable to accept some work:

> The question of availability is an objective one—whether a claimant is sufficiently available for suitable employment to be entitled to [Employment Insurance] benefits—and it cannot depend on the particular reasons for the restrictions on availability, however, these may evoke a sympathetic concern. If the contrary were true, availability would be a completely varying

> requirement depending on the view taken of the particular reasons in each case for the lack of it.[25]

[79] The Claimant's choice not to accept work that may interfere with him returning to his job, and his inability to accept work with employers that had a vaccination policy were barriers that didn't allow him to apply for and accept suitable jobs. These are personal conditions that he had which unduly limited his chances of going back to work.

- **So, was the Claimant capable of and available for work?**

[80] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

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

[82] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[83] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

[25] See *Attorney General of Canada v Bertrand*, A-613-81