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Citation: *KF v Canada Employment Insurance Commission*, 2022 SST 1682

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

Decision

Appellant: K. F.
Representative: F. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (481022) dated June 22, 2022 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: December 12, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: December 14, 2022

File number: GE-22-2368

Decision

[2] The appeal is dismissed.

[3] The Claimant (who is the Appellant in this appeal) cannot receive employment insurance (EI) benefits because she lost her job due to her own misconduct¹.

Overview

[4] The Claimant worked as a medical secretary and was employed by X. In September 2021, the employer implemented a mandatory Covid-19 vaccination policy (the policy) that required all employees to be fully vaccinated against Covid-19 by October 29, 2021. The Claimant did not want to comply with the policy by being vaccinated. She asked for a medical exemption, but the employer denied her request.

[5] Starting on October 30, 2021, the Claimant was placed on an unpaid leave of absence because she failed to submit proof of full Covid-19 vaccination by the deadline in the policy. On November 30, 2021, she was terminated because she remained non-compliant with the policy.

[6] The Claimant applied for EI benefits. The Respondent (Commission) decided that she was suspended – and subsequently dismissed – from her job due to her own misconduct² and could not be paid any EI benefits³.

¹ That is, misconduct **as the term is used for purposes of EI benefits**. The meaning of the term “misconduct” for EI purposes is discussed under Issue 2 below.

² See the April 8, 2022 decision letter at GD3-49. Since the Claimant only applied for EI benefits on January 13, 2022, benefits were refused from January 9, 2022 which was the start of the benefit period on her claim.

³ Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from their employment because of misconduct is not entitled to receive EI benefits during the period of the suspension. It does not matter whether the Record of Employment says suspension or leave of absence. Where an employer unilaterally places an employee on leave without pay rather than imposing a suspension or termination, the leave without pay is considered the equivalent of a suspension from employment if the reason for the unpaid leave is due to misconduct. In the present case, the Commission determined that the reason for the Claimant’s unpaid leave of absence (namely, her failure to comply with the employer’s mandatory vaccination policy) was misconduct and, therefore, considered her separation

[7] The Claimant asked the Commission to reconsider. She admitted she was suspended and then dismissed for non-compliance with the policy, but stated she was opposed to being vaccinated for personal medical reasons. She also said the policy was not part of her employment contract and her union filed a grievance on her behalf. The Commission maintained the decision to deny EI benefits on her claim, and the Claimant appealed that decision to the Social Security Tribunal (Tribunal).

[8] I must decide whether the Claimant lost her job due to her own misconduct⁴. To do this, I have to look at the reason for her suspension and dismissal, and then determine if the conduct that caused her job loss is conduct the law considers to be “misconduct” for purposes of EI benefits.

[9] The Commission says the Claimant was aware of the policy, the deadlines for compliance, and the consequences of non-compliance – and made a conscious and deliberate choice not to comply with the policy. She knew she could be placed on an unpaid leave of absence and then dismissed from her job by making this choice – and that’s what happened. The Commission says these facts prove the Claimant lost her job due to her own misconduct, which means she cannot receive EI benefits.

[10] The Claimant disagrees. She said she made a personal choice not to be vaccinated. She also says she was wrongfully terminated while she was off work on an approved sick leave. She doesn’t want her job back. She just wants the EI benefits she is entitled to after paying into the EI program for many years.

[11] I agree with the Commission. These are my reasons.

from employment from October 30, 2021 to November 29, 2021 to be a suspension. This is why the Commission says the Claimant is **disentitled** to EI benefits during the suspension.

Section 30 of the EI Act says a claimant is disqualified from receiving EI benefits if they lose their employment due to their own misconduct. Since the Commission determined that the reason the Claimant was terminated from her employment on November 30, 2021 was due to her own misconduct, she has been **disqualified** from EI benefits as of that date.

The combined effect of these decisions is that the Claimant cannot be paid any EI benefits on her claim starting from October 30, 2021.

⁴ That is, misconduct as **the term is used for purposes of EI benefits**. See Issue 2 below.

Issue

[12] Was the Claimant suspended and then dismissed from her job at X because of her own misconduct?

Analysis

[13] To answer this question, I need to decide two things. First, I must determine why the Claimant was suspended and subsequently dismissed from her job. Then I have to determine whether the *Employment Insurance Act* (EI Act) considers that reason to be misconduct.

Issue 1: Why was the Claimant suspended and subsequently dismissed from her job?

[14] The Claimant was suspended – and subsequently dismissed – from her job because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

[15] The employer told the Commission that⁵:

- The Claimant was informed of the mandatory Covid-19 vaccination policy in September 2021⁶.
- Employees had until October 29, 2021 to provide proof they were fully vaccinated or they would be placed on unpaid leave of absence⁷.
- The Claimant did not provide proof of vaccination or obtain an approved exemption by the deadline, so she was put on unpaid leave as of October 30, 2021.

⁵ See Supplementary Record of Claim at GD3-36.

⁶ The employer provided the Commission with a copy of the policy (see GD3-38 to GD3-46).

⁷ Except those employees who had an approved medical exemption or qualified under the exemption criteria in the Ontario Human Rights Code.

- She was given multiple warnings and was aware that if she did not comply with the vaccine mandate, she would be fired.
- Her employment was terminated on November 30, 2021 for failing to comply with the policy⁸.

[16] The employer issued a Record of Employment stating the Claimant was on a leave of absence after her last paid day of work on October 28, 2021 (GD3-22). The employer later amended that Record of Employment to reflect the Claimant's dismissal (GD3-24).

[17] The Claimant does not dispute any of this.

[18] In her application for EI benefits she said she was dismissed because she did not comply with the employer's vaccine mandate (GD3-10). When contacted by the Commission she said she was forced to go on leave – and subsequently dismissed – for failing to comply with the employer's Covid-19 vaccination policy (GD3-26). She also said she asked her employer for a medical exemption, but her request was denied because it was not accompanied by a doctor's certificate (GD3-53).

[19] I therefore find that the Claimant was suspended – and subsequently dismissed – from her job because she failed to provide proof of vaccination as required by the policy and did not have an approved exemption.

Issue 2: Is the reason for the suspension and subsequent dismissal misconduct under the law?

[20] Yes, the reason for the Claimant's suspension and subsequent dismissal is misconduct for purposes of EI benefits.

[21] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional⁹. Misconduct also includes conduct

⁸ The employer provided the Commission with a copy of the Claimant's termination letter (at GD3-47).

⁹ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

that is so reckless (or careless or negligent) that it is almost wilful¹⁰ (or shows a wilful disregard for the effects of their actions on the performance of their job).

[22] The Claimant doesn't have to have wrongful intent (in other words, she didn't have to mean to do something wrong) for her behaviour to be considered misconduct under the law¹¹.

[23] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties to the employer and there was a real possibility of being suspended and dismissed because of it¹².

[24] The Commission has to prove the Claimant was suspended and then dismissed from her job due to misconduct¹³. It relies on the evidence Service Canada representatives obtain from the employer and the Claimant to do so.

Evidence from the Employer

[25] The employer's evidence is set out in paragraph 15 above.

[26] The termination letter issued to the Claimant on November 30, 2021 (at GD3-47) refers to multiple discussions, letters and meetings with the Claimant regarding her failure to comply with the policy. It also includes the following statement:

“As an employee of X, you were required to provide proof of your Covid-19 vaccination to the Hospital's Occupational Health, Safety and Wellness Department by October 29, 2021. You have been on an unpaid leave since October 30, 2021 as a result of your failure to provide proof of full Covid-19 vaccination. To date, you have not provided proof of vaccination and as a result your employment is now terminated for cause for violating the Policy.” (GD3-47)

¹⁰ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

¹¹ See *Attorney General of Canada v. Secours*, A-352-94.

¹² See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹³ The Commission has to prove this on a balance of probabilities (see *Minister of Employment and Immigration v. Bartone*, A-369-88). This means the Commission must show it is more likely than not that the Claimant lost her job because of misconduct.

Evidence from the Claimant

[27] The Claimant told the Commission that¹⁴:

- a) She did not agree with the employer's "unlawful vaccine mandate", which was not part of her employment contract and went against "health and privacy act" (see application for EI benefits at GD3-10).
- b) She was informed about the policy in September 2021. The final deadline to become fully vaccinated was October 28, 2021.
- c) She objected to the Covid-19 vaccines on medical grounds, as she believed being vaccinated meant she could not have children in the future. She wants to have a family and is worried the vaccines will affect her fertility.
- d) She consulted her gynecologist and family doctor about her concerns, but they did not issue her a medical exemption.
- e) She submitted a request for an exemption, but without the necessary supporting documentation from her doctor. The employer denied it.
- f) She asked the employer if she could work from home, but the employer denied that as well. She had several discussions with her manager to find a solution, but no accommodation was offered.
- g) The employer sent her warnings and reminder E-mails about the requirement to become vaccinated by the October 28, 2021 deadline.
- h) She was aware of the consequences of not being vaccinated.
- i) She still refused to be vaccinated, so she was put on unpaid leave and then terminated for violating the policy.

¹⁴ See Supplementary Records of Claim at GD3- 26 and GD3-53, and Request for Reconsideration at GD3-51 (unless cited separately).

[28] She also provided the Commission with the following documents:

- a) Copy of an E-mail she sent her supervisor on September 30, 2021 advising she was not ready to get vaccinated and asking for clarification about the employer's latest mail stating she would be placed on unpaid leave and then fired for failing to comply (GD3-27);
- b) Copy of an E-mail she sent her supervisor on October 26, 2021 regarding her "Vaccination Compliance Suspension Letter" and asking if she could work from home (GD3-28);
- c) Copy of an E-mail she sent "H.R." on October 27, 2021 advising she had an appointment with her gynecologist in "mid-November" to consult about her vaccination concerns and asking the employer to provide her with other options to continue working until then (GD3-29).
- d) Copy of an E-mail she sent her supervisor on October 28, 2021 advising that she had just met with "HR" and was told she would not be allowed to work from home or return to work after consulting with her doctor in mid-November, and advising she was feeling anxious and was not "able to stay the rest of the day" (GD3-31).
- e) Copy of a doctor's note written November 1, 2021 recommending the Claimant stay off work from October 28, 2021 to November 21, 2021 for medical reasons (GD3-32).
- f) Copy of a doctor's note written November 22, 2021 recommending the Claimant stay off work from November 22, 2021 to December 12, 2021 for medical reasons (GD3-33).
- g) "Certificate of Health status" dated December 6, 2021 re: the Claimant's concerns about Covid-19 vaccination and the impact of these concerns on her mental health (GD3-34).

[29] In the Claimant's Notice of Appeal (at GD2-5), she said she lost her job through no fault of her own, wanted to work and was dismissed against her will. She also said that the vaccine mandate was not in her employment contract when she was hired and should not have been a reason for her to be fired. She says she should be entitled to EI benefits because she was wrongfully dismissed and has paid into the EI program for over 10 years.

[30] At the hearing, the Claimant testified that:

- She was on a medical leave of absence when she lost her job¹⁵.
- This is "wrongful termination".
- She was notified of the mandatory Covid-19 vaccination policy in September 2021 and was aware of the fact there was a deadline to be vaccinated, although it seemed to be "a moving target".
- She thought she would be placed on an unpaid leave for 1 month. She doesn't recall being advised she would lose her job after that.
- She kept asking her manager what would happen next, and her manager said she would get back to her – but her manager never did.
- She doesn't want her job back.
- She just wants her EI benefits because that's what she's entitled to after paying into the EI program.

¹⁵ There is no evidence that the employer agreed to a medical leave of absence. There is only the Claimant's e-mail to her supervisor on October 28, 2021 advising that she was unable to remain at work after learning she would be placed on unpaid leave for failing to comply with the policy; and a medical note written on November 1, 2021 (after the October 29, 2021 vaccination deadline) recommending the Claimant remain off work for medical reasons. This is not sufficient to prove she was on a medical leave of absence. The employer must approve an employee's request to take a medical leave of absence – the employee does not take medical leave unilaterally. There is no evidence the employer approved the Claimant for medical leave. I note that the termination letter issued to her on November 30, 2021 makes no reference to medical leave, but clearly states that she was "on an unpaid leave since October 30, 2021" because of her "failure to provide proof of full Covid-19 vaccination" (GD3-47).

[31] The Claimant's representative made the following submissions on her behalf:

- a) "Chapter 7 of the Canadian Charter of Rights and Freedoms" (Charter) guarantees a right to security of the person, and this includes "bodily integrity".
- b) The Charter was not suspended during the Covid-19 pandemic.
- c) The employer's policy "does not supersede our Charter rights".
- d) The employer cannot tell the Claimant to take the vaccine when it was the stress of the vaccine mandate that caused the Claimant to require a medical leave of absence in the first place.

[32] The Claimant's representative also said he knew of a "decision" where a claimant who "made a personal medical decision" like the Claimant did was allowed to get EI benefits¹⁶ (the TC case). Although that decision is not binding on me, I have reviewed and considered it. It is easily distinguished from the Claimant's case.

[33] In the TC case, the Tribunal Member found that the Commission did not prove that the Claimant lost his job because of misconduct for 3 reasons:

- a) The employer did not give TC sufficient time to comply with the vaccination policy. TC only had 2 days to comply with it.
- b) The employer did not make the consequences of non-compliance clear. TC was told he could quit his job if he didn't want to comply – not that he would be dismissed from his employment for failing to comply.
- c) The employer did not provide TC with a copy of the policy. The policy was only communicated verbally, which meant TC was never told he could have asked for a medical exemption.

[34] In the Claimant's case:

¹⁶ The representative referred me to this Tribunal's decision in *TC v. Canada Employment Insurance Commission*, 2022 SST 891 (see GD06).

- a) She had sufficient time to become compliant. She told the Commission she was advised of the policy in September 2021¹⁷ and given until October 29, 2021 to become fully vaccinated.
- b) The consequences of non-compliance with the policy were communicated to her¹⁸.
- c) She was given a written copy of the policy, and told the Commission that she read and understood it¹⁹. She was also clearly aware she could ask the employer for a medical exemption because she did, in fact, do so.

[35] I am satisfied the Claimant's facts are not the same as those in the TC case.

[36] It is not the Tribunal's role to decide if the employer's policy was reasonable, or whether the employer should have accepted the Claimant's request for a medical exemption. Nor can the Tribunal decide whether the penalty of being placed on an unpaid leave of absence and subsequently dismissed on was too severe²⁰. The Tribunal must focus on the reason the Claimant was separated from her employment and decide if the conduct that caused the Claimant to be suspended and dismissed constitutes misconduct under the EI Act.

[37] I have already found that the conduct which led to the Claimant's suspension and dismissal was her refusal to be vaccinated in accordance with the policy, after her exemption request was denied.

¹⁷ The policy refers to being effective September 7, 2021 (see GD3-40).

¹⁸ In her application for EI benefits, the Claimant told the Commission that she was given a written copy of the policy, and that she read and understood it (see GD3-10 to GD3-11). The policy clearly sets out the consequences of non-compliance (see GD3-40 to GD3-41). In her first interview with a Service Canada representative, the Claimant again confirmed that she had a copy of the vaccination policy (see GD3-26).

¹⁹ See application for EI benefits at GD3-10 to GD3-11.

²⁰ See *Fakhari v. Canada (Attorney General)*, 197 N.R. 300 (FCA) and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. See also *Canada (Attorney General) v. McNamara*, 2007 FCA 107, where the court held that questions of whether a claimant was wrongfully dismissed or whether the employer should have provided reasonable accommodation to a claimant are matters for another forum and not relevant when determining if there was misconduct for purposes of EI benefits.

[38] The uncontested evidence obtained from the employer, together with the Claimant's evidence and testimony at the hearing, allow me to make these additional findings:

- a) the Claimant was informed of the policy and given time to comply with it.
- b) her refusal to comply with the policy was deliberate and intentional. This made her refusal wilful.
- c) she knew her refusal to be vaccinated after failing to obtain an approved exemption could cause her to be suspended and then dismissed from her job²¹. This means she accepted the consequences.
- d) her refusal to comply with the policy was the direct cause of her suspension and subsequent dismissal.

[39] The employer has the right to set policies for workplace safety. The Claimant had the right to refuse to comply with the policy.

[40] By choosing not to be vaccinated after her request for a medical exemption was denied, she made a personal decision that led to foreseeable consequences for her employment.

[41] This Tribunal's Appeal Division has repeatedly confirmed that it doesn't matter if a claimant's decision is based on religious beliefs or medical concerns or another personal reason. The act of deliberately choosing not to comply with a workplace

²¹ The Claimant testified at the hearing that she did not recall telling the Commission that she understood she'd lose her job for non-compliance with the policy. She said she thought she would be placed on an unpaid leave for 1 month and hoped her manager would get back to her about an accommodation after that.

I give greater weight to the Claimant's original statements to the Commission (see paragraph 34(b) and footnote 17 above) that she was aware of the consequences of the policy, as they were made spontaneously and prior to any negative decisions on her claim. I note that she reiterated that she was aware of the consequences of non-compliance in her reconsideration interview (see GD3-53). I also note it is apparent from the E-mails she sent to her supervisor on September 30, 2021 and October 28, 2021 that she was aware that termination would follow the unpaid leave of absence if she remained non-compliant (see GD3-27 and GD3-31 respectively).

Covid-19 safety policy is considered wilful and will be misconduct for purposes of EI benefits²².

[42] These cases are supported by case law from the Federal Court of Appeal that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act²³.

[43] I therefore find that the Claimant's wilful refusal to be vaccinated in accordance with the policy – after failing to obtain an approved exemption by the deadline in the policy - constitutes misconduct under the EI Act.

[44] The Claimant submits her conduct was not misconduct because there was no provision for mandatory vaccination in the employment agreement she signed when she started working for X in 2017. This is not a persuasive argument, as there was no Covid-19 pandemic at that time and the employer is entitled to set workplace health and safety policies as circumstances may require.

[45] The Claimant also submits she has a "Charter right" to bodily integrity. She says she should have been granted an exemption to the mandatory vaccination requirement in the policy and an accommodation that would have allowed her to continue working from home. She also says that she was wrongfully dismissed, and that the employer's denial of her exemption request violated her collective agreement, her human rights and Canadian law.

[46] But I have no authority to decide whether the employer breached the Claimant's collective agreement²⁴ or any of her rights²⁵. Nor do I have authority to decide if the

²² See: *SP v Canada Employment Insurance Commission*, 2022 SST 569, *AS v Canada Employment Insurance Commission*, 2022 SST 620, *SA v Canada Employment Insurance Commission*, 2022 SST 692, *KB v Canada Employment Insurance Commission*, 2022 SST 672, *TA v Canada Employment Insurance Commission*, 2022 SST 628.

²³ See *Canada (Attorney General) v. Bellavance*, 2005 FCA 87, and *Canada (Attorney General) v. Gagnon*, 2002 FCA 460.

²⁴ This was recently confirmed by the Tribunal's Appeal Division in *SC v Canada Employment Insurance Commission*, 2022 SST 121.

²⁵ See footnote 17 above.

Claimant was wrongfully dismissed, or if the employer's accommodation request process was proper, or whether the employer should have accommodated the Claimant. The Claimant's recourse for all of her complaints against the employer is to pursue her claims in court or before another tribunal that deals with such matters.

[47] I therefore make no findings with respect to the validity of the policy or any violations of the Claimant's rights. She is free to make these arguments before the appropriate adjudicative bodies and seek relief there²⁶.

[48] However, none of the Claimant's arguments or submissions change the fact that the Commission has proven on a balance of probabilities that she was suspended and subsequently terminated because of conduct that is considered to be misconduct under the EI Act.

[49] And this means she cannot be paid EI benefits.

Issue 3: Is the Claimant entitled to EI benefits because she has paid into the EI program?

[50] No, she is not.

[51] It is not enough to have paid into the EI program or to be in need of financial support.

[52] If a claimant is suspended from their employment due to their own misconduct, they are not entitled to EI benefits during the period of the suspension²⁷. And if a claimant is dismissed from their employment due to their own misconduct, they are disqualified from EI benefits for having done so²⁸. These outcomes are established by law, and they apply regardless of how many years a claimant has contributed to the EI program or how difficult their financial circumstances are.

²⁶ I note that the Claimant said her grievance is continuing.

²⁷ Section 31 of the EI Act.

²⁸ Section 30 of the EI Act.

Conclusion

[53] The Commission has proven the Claimant was suspended and subsequently dismissed from her employment because of her own misconduct. This means she cannot receive EI benefits.

[54] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section