Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 239

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. K.
Representative:	Ian Perry
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (470456) dated May 16, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Videoconference
Hearing date:	January 24, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	March 8, 2023
File number:	GE-22-3637

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant 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 that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.

[4] The Appellant disputes this. He also says that going against his employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

Matter I have to consider first

The Appeal Division returned the Appellant's appeal to the General Division

[6] The Appellant appealed the Commission's reconsideration to the General Division of the Social Security Tribunal (Tribunal). The General Division found that the Appellant's appeal had no reasonable chance of success. So, it summarily dismissed the appeal.

[7] The Appellant filed an appeal with the Appeal Division of the Tribunal. The Appeal Division allowed his appeal. It found that the General Division did not properly

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[1] Section 31 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disentitled from receiving benefits.

apply the tests for summary dismissal. The Appeal Division returned the appeal to the General Division to be heard.

Issue

[8] Was the Appellant suspended from his job because of misconduct?

Analysis

[9] 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.[2]

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

Why was the Appellant suspended from his job?

[11] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[12] The Appellant says his employer placed him on a forced leave of absence. He says wasn't given a reason for the leave of absence.

[13] The Commission says the Appellant didn't comply with his employer's COVID-19 vaccine policy due to personal reasons. It concluded that this led to his suspension.

[14] In his application for EI benefits, the Appellant said he was given no reason for being placed on a leave of absence. He confirmed this at the hearing. He testified that he sent an email to his employer to find out why he was restricted from work, but he was ignored.

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

[15] The Appellant’s employer issued a record of employment (ROE). It lists leave of absence as the reason it was issued. It shows the last day the Appellant was paid for was November 14, 2021.

[16] In response to a question from his representative, the Appellant testified that he was placed on leave on November 2, 2021, and he sent his employer an email on November 8, 2021, asking why he was placed on a leave of absence.

[17] I asked the Appellant about the ROE his employer issued. I asked him when he last worked. The Appellant said he last worked on November 14, 2021. I give more weight to this statement than to the one in response to his representative’s question. I do so because it is consistent with the information in the ROE. It is also consistent with the details in an email from the employer to the Appellant that I will discuss below.

[18] The Commission’s file has an email dated November 4, 2021, that the employer sent to the Appellant. It states that he would be placed on an unpaid leave of absence effective November 15, 2021, because he isn’t vaccinated against COVID-19. The Appellant testified that he got so many bulletins that look like this email, so it looks familiar. But he said he’s not sure if he saw this email.

[19] The Appellant sent the Commission an email exchange with his employer. He originated the email on November 2, 2021, asking about changes to his schedule. The employer responded on the same date by saying that because the Appellant had not complied with the mandatory vaccination policy, he was placed on a leave of absence from November 15, 2021.

[20] I don’t find the Appellant’s statements and testimony that his employer didn’t give him a reason for being placed on a leave of absence are credible. I give a lot of weight to the emails from the employer, most notably the one in response to the Appellant’s question about his schedule. I find that both give a clear reason for the unpaid leave of absence. I find so even if the Appellant had more questions that the employer didn’t answer. I find that the Appellant’s employer placed him on an unpaid leave of absence because he went against its COVID-19 vaccination policy.

[21] The Appellant says he was on a forced leave of absence, not suspended. He says that it should be considered as a lay-off. But he told the Commission that his employer had a severe shortage of employees.

[22] I don’t agree that the Appellant’s leave of absence is a lay-off. I find that the Claimant’s employer placed him on the leave of absence because he didn’t do something it required him to do. I find that he stopped working because he didn’t say if he was vaccinated.

[23] The Appellant doesn’t think his employer can legally place him on a forced leave of absence. But I find that the employer doing so is the same as suspending him from his job. I find the employer suspended the Appellant because he went against its COVID-19 vaccination policy.

Is the reason for the Appellant’s suspension misconduct under the law?

[24] The reason for the Appellant’s suspension is misconduct under the law.

[25] 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 Appellant’s suspension 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.

[26] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] The Appellant 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.[5]

[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.

[27] There is misconduct if the Appellant 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.[6]

[28] The law doesn't say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[8]

[29] The Commission has to prove that the Appellant 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 Appellant was suspended from his job because of misconduct.[9]

[30] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[31] In a Federal Court of Appeal (FCA) case called *McNamara*, the appellant argued that he should get EI benefits because his employer wrongfully let him go.[11] He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

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[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[32] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.[12]

[33] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[13]

[34] In a more recent case called *Paradis*, the appellant was let go after failing a drug test.[14] He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.[15]

[35] Similarly, in *Mishibinijima*, the appellant lost his job because of his alcohol addiction.[16] He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.[17]

[36] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to suspend the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

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[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[37] The Appellant says there was no misconduct because:

- the unilaterally changed his employment contract without the agreement of his union,
- his health records are confidential, and
- the employer’s policy violates his privacy.

[38] The Commission says there was misconduct because the Appellant didn’t comply with his employer’s COVID-19 vaccination policy. It says the Appellant knew he had to provide proof of his vaccination status, or he would be placed on a leave of absence, but he chose not to do so.

[39] I find that the Commission has proven that there was misconduct, because the Appellant knew that he would be suspended from his job if he went against his employer’s COVID-19 vaccine policy.

[40] The Appellant’s employer sent the Commission a copy of a message and communications package about its COVID-19 vaccination policy. The message states that:

- employees have to be fully vaccinated by October 30, 2021 as a condition of being allowed to access the workplace, and,
- employees who don’t provide proof of full vaccination will be placed on a leave of absence without pay as of October 31, 2021

[41] The employer told the Commission that it notified employees about the COVID-19 vaccination policy in October 2021 by email and through supervisors. The Appellant said he didn’t get any direct messages from anyone. He added that his intention was to go to work, barely pay attention, and then go home. He said there were so many bulletins posted at work and he didn’t really pay attention to them.

[42] I asked the Appellant about the October 7, 2021 message and communications package. He said he can't recall if he saw them. I find the Appellant's response evasive and self-serving. And I'm not persuaded by his testimony that he didn't really pay attention to the employer's bulletins.

[43] I have already found that the Appellant's statement about not knowing the reason for being placed on an unpaid leave of absence isn't credible. I made this finding based on his employer's response to an email the Appellant originated before the start of the unpaid leave.

[44] I also find the Appellant's testimony that he wasn't aware that leave was pending isn't credible. This is what he testified in response to him representative's question. But, again, the Appellant sent the Commission a copy of an email from his employer saying that he would be placed on an unpaid leave of absence on November 15, 2021. So I find the Appellant knew about the pending leave, which I've found was a suspension.

[45] The Appellant replied to the employer's email on November 8, 2021. He referred to an attempt on the October 30, 2021 deadline to submit his COVID-19 vaccination result to HR. He said that this means he did so on time, and not after the deadline.

[46] The Appellant testified about trying to disclose his vaccination status. He said that out of nowhere, he got a message from a friend saying he had to go on a web application and submit documents. He said he did so, but when he got to the part where he had to disclose his vaccination status, he tried to choose other. He said because vaccination is part of the medical history, he chose not to disclose it.

[47] In a conclusion statement on his November 8, 2021 email to the employer, the Appellant said he will hold the employer liable for any financial injury it coerces or discriminates against him based on his decision not to participate in its vaccination mandates, and that he will not disclose his vaccination status to the company.

[48] I accept that the Appellant may have entered some information in the employer's web application. But I find that he didn't disclose his vaccination status. So, I find his

suggestion that he complied with the employer's policy because he met the deadline is misleading.

[49] For the reasons above, I don't find the Appellant's evidence to be reliable or trustworthy. I find from the email exchanges the Appellant sent the Commission that he likely read the employer's October 7, 2021 message. I find it likely that he saw and read other messages from which he learned that he had to provide proof of vaccination by October 30, 2021.

[50] I don't accept that out of nowhere a friend told the Appellant that he had to complete a web form. I find it more likely that the Appellant knew that his employer required him provide proof that he had taken the COVID-19 vaccine. But he chose for personal reasons not to provide that proof.

[51] The Appellant said he asked his employer to accommodate him on religious grounds. He sent a copy of his request to the Commission. The Appellant said his employer ignored his request.

[52] The employer had an accommodation process for employee's who couldn't be fully vaccinated because of any protected ground under the *Canadian Human Rights Act*. But the Appellant didn't make his request until after he was suspended. So, I find that he didn't have an exemption to requirement to provide proof by October 30, 2021 of vaccination against COVID-19.

[53] The Appellant argues that he hasn't breached an expressed or implied duty owed to his employer when he chose not to be vaccinated or failed to seek an approved exemption. He says imposing the COVID-19 vaccine requirement constituted a unilateral change to the employment contract made without the agreement of his union.

[54] In support of this argument, the Appellant sent the Tribunal an unpublished copy of a decision of the General Division of the Social Security Tribunal.[18] He says that in that case, the appellant's collective agreement didn't say anything about the COVID-19

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[18] See *A.L. v Canada Employment Insurance Commission*, GE-22-1889.

vaccine, but said employees could refuse any vaccines. He states that there is nothing in his collective agreement about vaccines at all.

[55] I am not bound by decisions made by other General Division Tribunal members. I can adopt the reasoning of such decisions if I find them persuasive. But I don't in this case.

[56] In the case noted above, the appellant worked in an administrative role in a hospital. She decided not to take the COVID-19 vaccine because she has a health condition. Her employer suspended and later dismissed her. The appellant's collective agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[57] The Tribunal Member in the above-noted case found that the Commission had presented no evidence that there was an expressed requirement arising out of the appellant's employment agreement that she take the COVID-19 vaccine. The Member also decided that no evidence had been presented that would suggest that the appellant had an implied duty arising from her employment agreement to be vaccinated.

[58] Despite the Appellant's arguments, it is not my role to decide whether his employer breached his collective agreement by unilaterally changing the terms and conditions of his employment. As noted above, in *McNamara*, *Paradis* and *Mishibinijima*[19] these Court cases make it clear that the focus must be on what an Appellant has or has not done.

[59] A more recent Federal Court decision confirmed a decision of the Appeal Division of the Social Security Tribunal in a case of a person who didn't follow his employer's COVID-19 vaccination policy.[20] It held that the Tribunal was not permitted to address the issues he raised about his employer's requirement that he take the COVD-19 vaccine.

[19] See paragraphs 23 to 27 of this decision above.
[20] See *Cecchetto v Canada (Attorney General)*, 2023 FC 10.

[60] I note that the Appellant has filed grievances with his employer against its COVID-19 vaccination policy. It is open to him to seek this recourse or through another court or tribunal if he thinks his employer has breached a term and condition of his employment.

[61] I agree that the Appellant's collective agreement doesn't say anything about vaccinations. But I find that going against his employer's COVID-19 vaccination policy got in the way of the Appellant carrying out his duties. By choosing not to say if he was vaccinated, the Appellant no longer met a condition to be allowed to access his workplace to do his job.

[62] I find that the Appellant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to say if he had taken the vaccine. He did so, knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

So, was the Appellant suspended from his job because of misconduct?

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

[64] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to say if he was vaccinated was likely to cause him to be suspended from his job.

Conclusion

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

[66] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section