Citation: *KS v Canada Employment Insurance Commission*, 2023 SST 534

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

# Decision

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

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (487509) dated July 5, 2022 (issued by Service Canada) |

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| **Tribunal member:** | Candace R. Salmon |
| **Type of hearing:** | In person |
| **Hearing date:** | December 8, 2022 |
| **Hearing participant:** | Appellant |
| **Decision date:** | February 6 , 2023 |
| **File number:** | GE-22-2611 |

# Decision

[1] The appeal is dismissed. The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended). For this reason, she is disentitled from receiving Employment Insurance (EI) benefits from November 15, 2021, until June 19, 2022.

# Overview

[2] The Appellant was suspended from her job.[1] Her employer says that she was suspended for non-compliance with its vaccination policy.

[3] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[4] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended due to her own misconduct.[2] Because of this, it found she was disentitled from receiving EI benefits.

[5] The Appellant disputes the Commission's decision. I must decide whether the suspension was due to misconduct.

# Matter I have to consider first

## The employer is not a party to the appeal

[6] The Tribunal identified the Appellant's former employer as a potential added party to the appeal. The Tribunal sent the employer a letter asking if it 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 indicating that the employer has a direct interest in the appeal, I have decided not to add them as a party.

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[1] The Appellant's employer put her on an unpaid leave of absence from work. Since the employer initiated the Appellant'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.

# Issue

[7] Was the Appellant suspended from her job because of misconduct?

# Analysis

[8] 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]

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

## Why was the Appellant suspended?

[10] Both parties agree that the Appellant was suspended from her job because she violated the employer's vaccination policy. I see no evidence to contradict this, so I accept it as fact.

## Is the reason for her suspension misconduct under the law?

[11] The reason for the Appellant's suspension is misconduct under the law.

[12] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law, meaning previous court cases, explain how to determine whether the Appellant'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.

[13] 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 Appellant doesn't have to have

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[3] See sections 30 and 31 of the Act.
[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.[6]

[14] There is misconduct if the Appellant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that.[7]

[15] The Commission must prove that the Appellant lost her job because of misconduct. The Commission must prove this on a balance of probabilities. This means that it must show that it is more likely than not that the Appellant lost her job because of misconduct.[8]

[16] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made accommodations for the Appellant aren't for me to decide.[9] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[17] 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.

[18] In response to Mr. McNamara's arguments, the FCA stated that it has consistently 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

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[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.
[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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.

[19] A more recent decision following 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 that 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]

[20] 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]

[21] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant. In a very recent decision, which did relate to a COVID-19 vaccination policy, the Appellant argued that his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. He also said that no decision maker had addressed how a person could be

[11] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[12] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[13] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[14] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.[15]

[22] In dismissing the case, the Federal Court wrote:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises…the key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.[16]

[23] The Court also wrote:

> The [Social Security Tribunal's General Division], and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct."[17]

[24] Case law makes it clear that my role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Appellant. Instead, I must focus on what the Appellant 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 Appellant about its expectations about getting vaccinated
- the employer communicated to the Appellant what it expected
- the Appellant knew or should have known what would happen if she didn't follow the policy

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[15] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraphs 26 and 27.
[16] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 32.
[17] *Cecchetto v. Attorney General of Canada,* 2023 FC 102, at paragraph 47.

[26] The Appellant says that there was no misconduct because, amongst other arguments:

- the employer's vaccination policy violates her human rights and various laws relating to rights and freedoms
- The employer's policy violated her privacy rights
- The employer's policy violates the *Criminal Code of Canada*
- She was not allowed to decide based on informed consent

[27] The Appellant worked from November 20, 2007, until November 12, 2021. She was suspended on this date, "due to non-compliance with the employer's vaccination policy."[18]

[28] The Appellant spoke to a Commission agent on March 28, 2022. She confirmed that she was placed on an unpaid suspension from her job due to non-compliance with the employer's COVID-19 vaccination policy. She stated that she was aware that the policy was in place from early October 2021, that it applied to all public servants, and that there would be consequences if she didn't comply. She added that she did not request a medical or religious exemption. At the hearing, the Appellant confirmed that she made these statements to the Commission.

[29] The Commission spoke to the employer on July 5, 2022. The employer said that it informed the Appellant on October 6, 2021, that an attestation regarding her vaccination status would be required. This had to be done by October 26, 2021. Employees who did not attest to either double vaccination or a single vaccination with arrangements for a second dose would be placed on unpaid leave as early as November 14, 2021. The employer added that the Appellant returned to work on June 20, 2022.

[30] A copy of the employer's policy is in the file. It states that employees must be fully vaccinated and that those who are unwilling to be fully vaccinated or to disclose their vaccination status will have to attend an online training session on COVID-19 vaccination,

[18] See Record of Employment, at page GD3-15.

and two weeks after the attestation deadline, the employer would restrict employee access to the workplace, conferences, off-site visits, and travel, followed by placing the employee on administrative leave without pay, advising them not to report to work or work remotely.[19]

[31] At the hearing, the Appellant confirmed that this is the policy with which her employer told her she had to comply. The Appellant said that the employer provided general email communication about the policy and said there were meetings with supervisors and regional directors who communicated the policy as well.

[32] The Appellant also said that she had been working entirely from home and did not have to interact with anyone in person. She said that she felt the employer's COVID-19 policy was an infringement on her rights, and said it was not part of her collective agreement or employment offer letter. She added that the employer could not force anyone to be vaccinated, and reiterated that the policy violated her human rights and privacy rights.

[33] The Appellant made numerous statements about the risks and efficacy of the COVID-19 vaccines, and said that she is the single income earner in her home and is a parent to a high-risk child, so she did not want to risk vaccine injury.

[34] She also stated that she knew the employer would place her on a leave of absence without pay if she didn't comply with the policy. She said that she hoped something would be available as an alternative because she felt the policy was an infringement on her human rights and bodily autonomy. She summarized that she knew the vaccination policy was being implemented and that she could be suspended from work for violating it, but said that does not mean she believed the policy was correct. She reiterated multiple times that the vaccination policy was based on a mandate, which is not the law, and spoke at length about the reasons she did not trust the vaccine or the pharmaceutical companies who made it.

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[19] See GD3-67.

[35] I find the evidence supports that the Appellant knew what she had to do under the vaccination policy and what would happen if she didn't follow the policy. The employer told the Appellant about the requirements and the consequences of not following them.

[36] The employer has a right to manage its daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented a COVID-19 policy as a requirement for all of its employees, this policy became an express condition of the Appellant's employment.[20]

[37] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or whether a claimant's dismissal was justified. The Tribunal must determine whether the Appellant's conduct amounted to misconduct within the meaning of the Act.[21]

[38] 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 *Canadian Charter of Rights and Freedoms* (Charter) is one of these laws. There is also the *Canadian Bill of Rights*, the *Canadian Human Rights Act*, and several other federal and provincial laws that protect rights and freedoms.

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

[40] This Tribunal is able 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. The Appellant has not identified a section of the EI legislation, regulations or related law that I am empowered to consider as violating her Charter rights.

[41] This Tribunal doesn't have the authority to consider whether an action taken by an employer violates a claimant's fundamental rights under the Charter. 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 other laws that protect rights and freedoms. The Appellant also referred to the *Criminal Code of Canada*, specifically the

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

sections relating to coercion and extortion. These are also not within my purview to consider.

[42] The Appellant may have other recourse to pursue her claim that the employer's policy violated her rights. But, these matters must be addressed by the correct court or tribunal. They are not within my jurisdiction to decide. This was made clear by the Federal Court in its January 2023 decision, *Cecchetto.*[22]

[43] I find the employer instituted a mandatory vaccination policy and communicated the policy requirements to the Appellant. I find the consequences of not following the employer's policy were clearly set out in the policy itself. The Appellant acknowledged that she knew she would be suspended from her job for non-compliance with the policy. Therefore, I find as fact that she knew about the requirements of the COVID-19 policy and that she would be suspended for violating it.

[44] I further 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 Appellant about what it expected of its employees in terms of being vaccinated
- the employer communicated to the Appellant what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

## So, was the Appellant suspended because of misconduct?

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

[46] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that failing to comply with the employer's policy was likely to cause her to be suspended, and she chose not to comply.

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[22] *Cecchetto v. Attorney General of Canada,* 2023 FC 102.

## Other issues

[47] The Appellant included a letter with her request for reconsideration. She stated that she paid into the EI program, so she is entitled to receive EI benefits.

[48] Paying into the EI program does not automatically entitle a person to receive EI benefits when they are unemployed. Like other insurance programs, the individual must qualify for the benefits. The Appellant does not qualify because she was suspended from her job due to her own misconduct, so she does not meet the requirements of the law.

## Conclusion

[49] The appeal is dismissed. The Commission has proven that the Appellant was suspended from her job because of misconduct. This means Appellant is disentitled from receiving EI benefits between November 15, 2021, and June 19, 2022.[23]

Candace R. Salmon
Member, General Division – Employment Insurance Section

[23] The reconsideration decision added an end date to the disentitlement, because the Appellant returned to work on June 20, 2022. See GD3-74.