



Citation: *KK v Canada Employment Insurance Commission*, 2022 SST 1754

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

Decision

Appellant: K. K.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (475691) dated April 22, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto
Type of hearing: Videoconference
Hearing date: July 6, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: July 13, 2022
File number: GE-22-1743, GE-22-1745

Decision

[1] K. K. is the Claimant. The Canada Employment Insurance Commission (Commission) made many decisions about her entitlement to Employment Insurance (EI) benefits. The Claimant is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that the employer suspended the Claimant because of misconduct. I also find that she hasn't proven that she was available for work. This means she can't get EI benefits while she was off work.

Overview

[3] The Claimant works in a long-term care home. The employer introduced a policy requiring all employees to get two doses of COVID-19 vaccinations by November 15, 2021. The Claimant didn't have two doses of the vaccine by November 15, 2021. So, the employer suspended her from work.

[4] The Commission says the Claimant was suspended because of misconduct. The Commission says the Claimant knew that she couldn't work as long as she didn't follow the employer's policy on vaccinations.

[5] The Commission also says the Claimant hasn't proven that she was available for work while she was suspended. The Commission says she wasn't making enough effort to find a job. The Commission says both of these decisions mean that the Claimant isn't entitled to EI benefits from November 18, 2021 until March 11, 2022.

[6] The Claimant disagrees with the Commission's decisions. She says that she was dealing with significant mental health conditions and so she couldn't get vaccinated before the deadline. So, she says she didn't act wilfully. She says that the employer changed the policy on vaccinations and didn't follow provincial guidance on vaccination requirements.

[7] The Claimant also says that she was available for work. She says that she was trying to return to work with her regular employer. She also tried to find a job with different employers.

Matter I have to consider first

The Claimant sent documents after the hearing

[8] The Claimant submitted another document after the hearing. I have decided to accept this document. The Claimant repeats many of the same arguments she made at the hearing about her mental health.

[9] Tribunal staff sent a copy of the Claimant's document to the Commission. So, I don't think it would be unfair to any of the parties if I accept this document.

Issues

[10] I have to make several decisions.

[11] First, I must decide if the employer suspended the Claimant for misconduct. To make this decision, I have to look at the following questions:

- Did the employer suspend the Claimant?
- Why did the employer suspend the Claimant?
- Is the reason the employer suspended the Claimant misconduct under the law?

[12] Then, I have to decide if the Claimant has proven that she was available for work.

Analysis - Misconduct

[13] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has fired you or suspended you.¹

¹ Section 30 of the Employment Insurance Act says you are disqualified from receiving EI benefits if you

[14] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.²

[15] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the employer suspended the Claimant. What was the conduct that caused the suspension? Then, I have to determine whether the law considers that reason to be misconduct.

[16] But first, I will explain why I have decided to look at this as a suspension from work.

Is the Claimant suspended from work?

[17] I am going to treat this as a suspension from work. This means that I am going to use the parts of the law that talk about suspension to make a decision about whether the Claimant can get EI benefits.

[18] I know the employer says that the Claimant is on an unpaid leave of absence. But the Claimant says she didn't choose to leave her job. She says the employer made the decision to put her on a leave of absence from work.

lost your job because of misconduct. Section 31 of the Employment Insurance Act says you are disentitled from receiving EI benefits if you are suspended from your job because of misconduct. Both a disqualification and a disentitlement means you can't get EI benefits. The difference between a disqualification and a disentitlement is that a disentitlement can end if you fix the situation that is causing the disentitlement. But a disqualification lasts until you work enough hours to start a new EI benefit period

² Section 31 of the *Employment Insurance Act*

[19] So, this isn't a case where the Claimant voluntarily look leave from her job. This is because she didn't have a choice to stay or leave her job.³

[20] Because the employer made the choice to put the Claimant on a leave of absence, I am going to treat this as a suspension. I am going to use the parts of EI law that talk about being suspended from work. So, now I have to decide if the reasons the employer suspended the Claimant are misconduct under the law.

Why did the employer suspend the Claimant?

[21] The Commission says the employer suspended the Claimant because she didn't follow their vaccination policy. The Commission says the employer told the Claimant that she had to have two doses of the COVID-19 vaccine by November 15, 2021, or she couldn't work. The Commission says the Claimant didn't have two doses of the COVID-19 vaccination by November 15, 2021, so the employer suspended her.

[22] The Claimant agrees that she didn't have two doses of the COVID-19 vaccine by November 15, 2021. She agrees that this is why the employer wouldn't let her return to work.

[23] So, I find that the employer suspended the Claimant because she didn't follow their policy on COVID-19 vaccination. She didn't have two doses of the COVID-19 vaccine by November 15, 2021.

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

[24] I find that the reason for the Claimant's suspension is misconduct under the law. I find that she isn't entitled to EI benefits from November 16, 2021 until January 12, 2022.

[25] To be misconduct under the law, 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

³ See *Canada (Attorney General) v Peace*, 2004 FCA 56.

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

[26] There is misconduct if the Claimant 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 a suspension because of that.⁷

[27] The Commission has to prove that the employer suspended the Claimant 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 employer suspended her because of misconduct.⁸

[28] The Claimant says that there wasn't misconduct because her actions weren't wilful. She says that she was dealing with significant mental health issues, and so she didn't act deliberately when she failed to get two doses of the COVID-19 vaccine by the employer's deadline.

[29] She also says the employer kept changing its policy on vaccinations and didn't apply the policy consistently to all employees.

[30] There are doctors' notes in the appeal file. The doctor's notes say that the Claimant was disabled from work and unable to work for mental health reasons. One note refers to stress and mental health as reasons for the Claimant's absence from work.

[31] But none of the notes say that the Claimant was unable to get COVID-19 vaccinations for health reasons. And the Claimant told the Commission that she didn't talk about vaccination with her doctor.

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.

[32] Also, the doctors' notes don't say that the Claimant was unable to read or understand the employer's policy about vaccination because of her mental or cognitive health.

[33] So, I find that the Claimant's decision to delay getting her COVID-19 vaccination was wilful. She hasn't proven that her mental, physical, or cognitive health prevented her from being able to act wilfully and make deliberate choices about the COVID-19 vaccine.

[34] The Claimant also argues that the employer changed its policy about COVID-19 vaccination. She says that the employer wasn't clear about the deadline and when she could return to work. She says that the employer told the Commission that it would have let her keep working if she had one dose of the vaccine by November 15, 2021. She says this shows that the employer's policy wasn't clear.

[35] I disagree with the Claimant. I find that the employer's policy clearly told her that she couldn't continue working if she didn't have two doses of the COVID-19 vaccine by November 15, 2021.

[36] There are copies of the employer's vaccination policy in the appeal file. There are also copies of letters and emails between the Claimant and the employer.

[37] The employer emailed all staff on October 1, 2021. This email says that employees must provide proof of full vaccination status by November 15, 2021. The employer sent a letter to the Claimant on October 18, 2021. This letter says that, if she waits until after November 15, 2021 to get vaccinated, she can only return to work once she has given the employer proof that she is fully vaccinated. The letter says that unvaccinated employees will be put on leave.

[38] The Claimant emailed the employer on January 13, 2022. In this email, she says she knows that the employer's policy allows her to return to work after she has had two vaccinations.

[39] And at the hearing, the Claimant agreed that she knew the employer's vaccination policy meant that she couldn't work if she didn't have two doses of the COVID-19 vaccine after November 15, 2021.

[40] It is clear to me that the Claimant knew about the employer's vaccination policy. She understood that the employer expected her to have two doses of the COVID-19 vaccine by November 15, 2021.

[41] I can't make decisions about whether the employer's vaccination policy was reasonable. I am not making decisions about whether the employer was giving other employees exceptions to the vaccination policy.⁹ I am only looking at the Claimant's actions.

[42] And I find that the Claimant's actions are misconduct under the law. This is because I find that she acted wilfully when she delayed getting vaccinated. This is because she hasn't given me any medical evidence showing that she wasn't capable of making conscious decisions about vaccination.

[43] I also find that the Claimant knew that she couldn't return to work until she gave the employer proof that she had two doses of the COVID-19 vaccine. She knew that her failure to follow the employer's vaccination policy was putting her employment at risk.

[44] I understand that the Claimant didn't expect such a long delay before she could get a second COVID-19 vaccine. But this doesn't change the fact that the Claimant knew the employer wouldn't let her work until she had two doses of the COVID-19 vaccine.

[45] So, I find that the Claimant's actions amount to misconduct. I find that she isn't entitled to EI benefits starting November 16, 2021. This is because she didn't comply with her employer's vaccination policy starting on this date.

[46] But I also find that the employer's policy about the booster dose wasn't clear. The Claimant argues that she followed her employer's vaccination policy and expected that

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

she could return to work after her second dose. While she was on leave, the employer adjusted the policy to require booster doses.

[47] The Claimant says that she didn't understand how the employer's policy on booster doses applied to her. She says that the employer let her return to work before she had her booster dose, so this shows the policy wasn't clear.

[48] I agree with the Claimant on this point. I find that the employer clearly communicated its policy about two vaccine doses, but it didn't clearly notify her of its updated policy on booster doses. The fact that the employer allowed the Claimant to return to work on March 14, 2022, before she had a booster dose, shows me that the employer's policy on the third COVID-19 vaccine wasn't clear.

[49] So, I find that the Claimant complied with the employer's vaccination policy starting January 12, 2022. This is because she got a second dose of the COVID-19 vaccine on this date. I find the reasons for her continued suspension after January 12, 2022 aren't misconduct under the law.

[50] But this decision doesn't mean that the Claimant can get EI benefits after January 12, 2022. This is because I also have to make a decision about her availability for work.

Analysis – Availability for work

[51] There are two different sections of the law that say you have to prove that you are available for work. Even though the Commission says it used both sections of the law, to look at the Claimant's availability for work, I am only going to look at one part of the law.¹⁰

¹⁰ The Commission says it used subsection 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations* to assess the Claimant's entitlement to EI benefits. But the Commission never asked the Claimant for a job search record. It didn't explain why her job search efforts weren't reasonable or customary. I am refusing to refer to this part of the law because I am following the Appeal Division's guidance in *LD v Canada Employment Insurance Commission*, 2020 SST 688. I will not use these parts of the law to assess whether the Claimant was making reasonable and customary efforts to find a suitable job.

[52] The law says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[53] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;
2. You must show that you made reasonable efforts to find a suitable job;
3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.¹¹

– **Wanting to go back to work**

[54] The Claimant says that she wanted to work. She says the fact that she was trying to get vaccinated and follow her employer's policy shows that she wanted to work.

[55] I have no reason to doubt the Claimant's statements. In fact, she returned to work in March 2022. So, I agree that she has shown that she wanted to return to work.

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

[56] The Commission says the Claimant wasn't doing enough to find a job.

¹¹ In *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.

[57] The Claimant disagrees. She says that she was trying to return to work with her regular employer. She also says that she applied for one job at a bakery and called two other care homes.

[58] I agree with the Commission. I find that the Claimant hasn't proven that she was making reasonable efforts to find a job.

[59] Between November 2021 and March 2022, the Claimant applied for one job at a bakery. She called two other long-term care homes. And she waited until she could return to work with her usual employer. I don't think these are reasonable job search efforts. I find that this is not enough to meet the requirements of this factor.

[60] You have to be looking for work to prove your availability for work. It isn't enough to wait for your usual employer to recall you to work.¹² Case law says that you have to show that you are trying to find a job, even if it seems like it would be reasonable not to look for work. Even if you think your job search won't be successful, you have to show that you are trying to look for work.¹³

[61] So, I find that the Claimant hasn't proven that she was making reasonable efforts to find a job.

– **Unduly limiting chances of returning to work**

[62] I find that the Claimant set personal conditions that limited her chances of returning to the labour market. This is because I find that her main job search activity was waiting to return to work with her usual employer.

[63] I agree that the Claimant applied for a job at a bakery and called two other long-term care homes. But she told the Commission that she was waiting to return to work with her usual employer. At the hearing, she said the same thing.

¹² *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

¹³ *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.

[64] So, I find that the Claimant's main job search activity was waiting to return to work with her usual employer. However, she knew that she couldn't return to work with her employer until she met their vaccination policy.

[65] The Claimant stopped working because she wasn't vaccinated according to the employer's policy. She had to wait several weeks before she met the vaccination policy. She knew that the employer wouldn't let her return to work until she was vaccinated against COVID-19.

[66] So, I find that it wasn't reasonable for her to wait to return to work with her usual employer as her main job search activity. This is because she knew that she had to wait before the employer would let her return to work. So, I find that the Claimant set personal conditions that unduly limited her chances of returning to the labour market.

– **So, was the Claimant available for work?**

[67] I agree that the Claimant wanted to work. But I find that she wasn't making reasonable efforts to find a job. She set conditions on her job search that unduly limited her chances of returning to the labour market. So, I find that the Claimant hasn't proven that she was available for work from November 16, 2021 until March 11, 2022.

Conclusion

[68] I am dismissing the Claimant's appeal. She isn't entitled to EI benefits while she was on leave from work.

Amanda Pezzutto
Member, General Division – Employment Insurance Section