



Citation: *AK v Canada Employment Insurance Commission*, 2023 SST 546

**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 (515577) dated September 29, 2022 (issued by Service Canada)

Tribunal member: Susan Stapleton

Type of hearing: Videoconference

Hearing date: February 9, 2023

Hearing participant: Appellant

Decision date: February 14, 2023

File number: GE-22-3524

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 employment due to his own misconduct. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant's employer instituted a policy that required him to be vaccinated against Covid-19. He didn't get vaccinated, and was placed on unpaid leave (suspended) from his job on February 1, 2022. His suspension ended on August 2, 2022, when the employer's vaccination policy was abolished.²

[4] The Appellant doesn't dispute that this happened. However, he didn't agree with the employer's policy. Being vaccinated against Covid goes against his religious beliefs. He says he has been discriminated against for his religious beliefs, and that the law that protects his religious freedoms was not followed. His employer should have accommodated him, based on his religious beliefs. He has a spotless work record, and says there was no misconduct on his part. He paid in to EI for many years, and feels he is entitled to benefits.³

[5] The employer told the Commission that the Appellant was suspended because he didn't comply with its Covid vaccination policy.⁴

¹ Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Section 31 of the Act addresses what happens when an Appellant is suspended for misconduct.

² See GD3-33.

³ See GD2-9-10.

⁴ See GD3-33.

[6] The Commission initially found that it was unable to pay the Appellant benefits because he stopped working by voluntarily taking leave from his job without just cause.⁵

[7] The Appellant told the Commission that he hadn't voluntarily left his job, but had been suspended by his employer, because of the employer's vaccine mandate.⁶

[8] In its representations to the Tribunal, the Commission confirmed that the Appellant's disentanglement was changed to being due to a suspension for misconduct, instead of the leave of absence that had initially been communicated.⁷

[9] My decision will therefore address whether the Appellant is disengaged from receiving benefits because he was suspended from his job due to misconduct.

Issue

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

[11] To answer this, 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.

Analysis

Why was the Appellant suspended from his job?

[12] I find that the Appellant was suspended from his job because he didn't comply with the employer's mandatory Covid vaccination policy. He stated in his Application for Benefits that he was on a leave of absence due to "vaccine mandate."⁸ His Record of Employment (ROE) indicated that it was issued due to "dismissal or suspension."⁹

⁵ See GD3-22.

⁶ See GD3-18.

⁷ See GD4-2-3.

⁸ See GD3-7.

⁹ See GD3-16.

[13] The Appellant told the Commission Officer that he was suspended from his job due to the vaccine mandate. He said the employer gave him warnings to comply with its vaccine mandate. He said he was unsure of when he had been given these warnings¹⁰.

[14] The Appellant spoke to the Commission's Reconsideration Officer. He said that he was put on a leave of absence because he didn't comply with the employer's vaccination policy. He said that the employer's policy and email communications were clear that all employees had to be vaccinated by February 1, 2022. He feels the employer's policy was coercive. He said the employer unfairly changed the terms of his employment, by implementing its mandatory vaccination policy and not giving him a religious exemption. He feels that his rights have been violated.¹¹

[15] The Reconsideration Officer spoke to the employer. The employer said that the Appellant was put on leave on February 1, 2022, because he didn't comply with its Covid vaccination policy. The Appellant's leave ended on August 2, 2022, when the employer's mandatory vaccination policy was abolished. The employer said the Appellant was off work and receiving short term disability benefits since August 9, 2022.¹²

[16] The Appellant testified that the employer sent out emails, beginning in the Fall of 2021, that said employees would have to be vaccinated, and attest online to being vaccinated, before November 1, 2021. The emails also said that the employer would consider requests for exemptions from being vaccinated, for medical and religious reasons.

[17] The file contains copies of email correspondence from the employer to the Appellant. On September 28, 2021, the employer sent a reminder email to employees. It said that all employees had to attest to being fully vaccinated by October 31, 2021. The email also said that employees who didn't attest, would be considered not to be fully vaccinated. It said that while exemptions were limited, the employer's existing

¹⁰ See GD3-19.

¹¹ See GD3-31.

¹² See GD3-33.

accommodation process would be available for valid human rights (such as medical) reasons.¹³

[18] The Appellant's Team Leader also sent an email, on September 28, 2021. She said that employees were required to follow the employer's Covid protocols, as well as the protocols established by provincial authorities. She repeated the employer's requirement for all employees to attest to being fully vaccinated by October 31, 2021.¹⁴

[19] The employer sent an email on October 4, 2021, again stating that all employees had to attest to being fully vaccinated by October 31, 2021. The employer said that starting November 1, 2021, employees who were not fully vaccinated would have to follow some safety protocols, including twice-weekly testing, mandatory masking, distancing and completing a daily Covid screening form. This requirement also applied to employees who had been granted a human rights exemption.¹⁵

[20] An email sent by the employer on October 27, 2021, stated that starting on November 1st, all employees who were not fully vaccinated, and whose presence in the workplace had been approved as being essential, would have to complete mandatory, twice-weekly rapid testing.¹⁶

[21] The Appellant testified that there was a formal vaccination policy posted on the employer's website. He said that he read the policy. He said that the policy applied to all employees, including him. He said that it didn't state the consequences for not complying with the policy, that he can recall.

[22] The Appellant testified that when the employer's policy came out, he told his manager that he wasn't vaccinated and would be requesting an exemption from being vaccinated, on religious grounds. He completed an exemption request form and submitted it to Human Resources (HR), about six weeks after the policy came out.

¹³ See GD2-20-21.

¹⁴ See GD2-22-23.

¹⁵ See GD2-15-16.

¹⁶ See GD2-18-19.

[23] The employer sent the Appellant a letter dated October 29, 2021. The letter said that the Appellant's vaccination exemption request was denied. The letter went on to say that because he wasn't vaccinated and didn't have an exemption, he would have to follow the "interim safety protocols."¹⁷

[24] The Appellant testified that from November 1, 2021, until he was suspended on February 1, 2022, he was undergoing testing twice a week. He continued to work. He said that the original emails that the employer sent out said that unvaccinated "essential employees" could continue to work if they underwent testing. He said that he thought he would be allowed to continue testing and wouldn't have to get vaccinated.

[25] The Appellant testified that when he went to work on February 1, 2022, he was given a letter dated January 31, 2022. That letter is on the file. The letter says the following:

- In application of (the employer's) COVID-19 vaccination policy announced in 2021, this letter is to confirm that you will be put on an unpaid leave of absence, effective February 1st, 2022. As previously communicated, all team members were required to be fully vaccinated against COVID-19 no later than January 31, 2022.
- You were previously notified that ... all team members who had not attested to being fully vaccinated by January 31, 2022 would be placed on an unpaid leave of absence.
- You were also informed that since you had not attested to being fully vaccinated, you were required to start your COVID-19 vaccination process and demonstrate to the vaccine verification team by December 10, 2021, that you received your first dose of a COVID-19 vaccine, as well as your appointment date for your second dose.

¹⁷ See GD2-13.

- You were also required to send your proof of vaccination by January 31, 2022, demonstrating that you received your second COVID-19 vaccine dose or your proof of appointment if it was scheduled on or before February 28, 2022.
- Unfortunately, you failed to send your proof of COVID-19 vaccination or appointment to the COVID-19 vaccination audit team. As a result, effective February 1st, 2022, you are being put on an unpaid leave of absence until May 1st, 2022.
- If at the end of the unpaid leave of absence you remain not fully vaccinated or unwilling to share your vaccination status, you will be deemed to be in breach of the COVID-19 vaccination policy and your employment will be terminated.¹⁸

[26] I asked the Appellant at the hearing about the letters he had received from the employer. I referred to the employer's January 31, 2022 letter to him, outlined above. He said that he didn't remember receiving a letter before the January 31, 2022 letter, that said he would be suspended if he didn't get vaccinated. He said that he didn't know until he received the suspension letter on February 1, 2022, that he could be suspended for not getting vaccinated.

[27] However, the Appellant said in his Notice of Appeal that in mid-January 2022, the employer's policy changed, stating that testing would be discontinued and any unvaccinated person would be put on unpaid leave starting on February 1st.¹⁹

[28] The Appellant also testified that he wasn't surprised when he was suspended from his job on February 1, 2022. He said that he knew that federally-regulated companies were suspending employees who didn't get vaccinated. He said it was clear that there would be no exceptions. His employer is federally-regulated, so he expected that he was going to get suspended from his job because he wasn't vaccinated.

¹⁸ See GD2-26-27.

¹⁹ See GD2-9.

[29] I find that the Appellant knew, or should have known, that if he didn't get vaccinated, and didn't have an exemption from being vaccinated, he would be suspended from his job. Although he testified that he didn't remember receiving a letter warning him that if he wasn't vaccinated, he would be suspended, the employer's January 31, 2022 letter makes it clear that he was provided with that information. The letter states that he was previously notified that if he didn't follow the employer's vaccination policy, he would be suspended from his job. The Appellant also acknowledged in his Notice of Appeal that the employer's policy changed in mid-January, that he would no longer be allowed to undergo testing instead of being vaccinated, and if he remained unvaccinated by February 1, 2022, he would be suspended from his job.

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

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

[31] The 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.

[32] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.²¹ 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.²²

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²² See *Attorney General of Canada v Secours*, A-352-94.

[33] 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 suspended from his job because of that.²³

[34] The Commission has to prove that the Appellant 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 Appellant lost his job because of misconduct.²⁴

[35] 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. And it isn't for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.²⁵ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[36] 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.²⁶ 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.

[37] 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.²⁷

[38] 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

²³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁶ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.²⁸

[39] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.²⁹ 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.³⁰

[40] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.³¹ 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 isn't relevant that the employer didn't accommodate them.³²

[41] These cases aren't about COVID-19 vaccination policies. But what they say is 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. The Appellant also said that no decision maker had addressed how a person could be forced to take an untested medication or conduct testing when it violates fundamental bodily integrity and amounts to discrimination based on personal medical choices.³³

[42] 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

²⁸ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

²⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

³⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

³¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³³ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at paragraphs 26 and 27.

decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.³⁴

[43] 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."³⁵

[44] Case law makes it clear that my role is not to look at the employer's behaviour or policies and determine whether it was right to let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[45] The Commission says that there was misconduct because the Appellant was aware of the employer's vaccine requirement, deadlines, and consequences of non-compliance, but chose not to comply with it before the deadline, knowing that his religious exemption request had been denied.³⁶

[46] The Appellant says that there was no misconduct, because:

- The employer treated him unfairly and punished him for holding religious beliefs that prevent him from taking the Covid vaccine. It should have approved his request for an exemption from being vaccinated on religious grounds.
- He was discriminated against for his religious beliefs, and the law that protects his religious freedoms was not followed.
- The employer changed the terms of his employment.
- He has a spotless work record.

³⁴ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 32.

³⁵ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102, at para 47.

³⁶ See GD4-4.

- He paid in to EI for many years, and feels he is entitled to benefits.

[47] The Appellant submits that the employer's policy said he could request a religious exemption from being vaccinated. His request was denied and the employer would not provide him with reasons for its denial, despite his repeated requests. He has filed a grievance with the help of his union. The Appellant says that "according to the Human Rights Code," he meets the requirements for religious creed or religion, that he should not be discriminated against, and that he should have been granted an exemption from being vaccinated.³⁷

[48] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to non-discrimination. The 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, such as Bill C-45, that protect rights and freedoms.

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

[50] This Tribunal is able to consider whether a provision of the 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 his Charter rights.

[51] 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*, the *Canadian Human Rights Act*, or any of the provincial laws that protect rights and freedoms.

[52] The Appellant may have other recourse to pursue his claims that the employer's policy violated his rights. These matters must be addressed by the correct court or tribunal. This was made clear by the Federal Court in *Cecchetto*.³⁸

³⁷ See GD3-9-10.

³⁸ See *Cecchetto v. Attorney General of Canada*, 2023 FC 102.

[53] I find that the Appellant made a conscious and deliberate choice not to be vaccinated, contrary to the employer's policy. He testified that he didn't get vaccinated and wasn't approved for an exemption from being vaccinated.

[54] I find that the Appellant knew, or should have known, at least by mid-January, 2022, that not getting vaccinated meant that he couldn't do his job as of February 1, 2022. He confirmed in his testimony that he received and read the employer's vaccination policy. He said that the policy applied to him. He had no intention of being vaccinated. Although he testified that he didn't recall reading about the consequences of non-compliance in the policy, he also said he knew that if he remained unvaccinated by February 1, 2022, he would be suspended from his job.

[55] I find that the Commission has proven on a balance of probabilities that there was misconduct because:

- the employer had a policy that said all employees had to be vaccinated, or have an approved exemption from being vaccinated;
- the employer communicated its policy to the Appellant, and specified what it expected in terms of getting vaccinated;
- the Appellant knew the consequence of not following the employer's vaccination policy;
- the Appellant didn't have an exemption from being vaccinated; and
- the Appellant didn't get vaccinated and was suspended as a result.

[56] I understand that the Appellant feels he should get EI because he's paid into it for many years. However, EI isn't an automatic benefit. Like any other insurance plan, you have to meet certain requirements to qualify to get benefits. He has not met the requirements to be eligible for benefits.

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

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

[58] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew, or should have known, that refusing to get vaccinated, when he didn't have an approved exemption, would cause him to be suspended from his job.

Conclusion

[59] 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.

[60] This means that the appeal is dismissed.

Susan Stapleton

Member, General Division – Employment Insurance Section