Citation: *CK v Canada Employment Insurance Commission*, 2023 SST 1083

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated February 14, 2023 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	In person
Hearing date:	May 4, 2023
Hearing participants:	Appellant
Decision date:	May 12, 2023
File number:	GE-23-606

Decision

[1] The appeal is dismissed.

[2] The Tribunal disagrees with the Appellant.

[3] The Canada Employment Insurance Commission (Commission) has proven that the Appellant's leave of absence was because of misconduct (in other words, because she did something that caused her to be placed on leave and not allowed in the workplace). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits on this claim.

Overview

[4] A claim for employment insurance benefits was established by the Appellant, C. K. effective January 23, 2022. This claim was, on April 6, 2022 denied as the Canada Employment Insurance Commission (Commission) determined that the Appellant was disqualified from receiving benefits because she had lost her employment due to her own misconduct. The Appellant sought and was granted a reconsideration of this decision resulting in the Commission changing its original decision to "You were placed on an unpaid leave of absence for non-compliance with a mandatory COVID-19 vaccination policy. As such, you were suspended from your employment due to your misconduct and we are therefore unable to pay Employment Insurance benefits from January 23, 2022." (GD3 – 27-28). She then appealed to the Social Security Tribunal. The Tribunal must decide if the Appellant committed the act in question and, if so, did her actions constitute misconduct. The results will determine eligibility for benefits under the Employment Insurance Act (Act).

[5] The Appellant's employer says that she was on a leave of absence because she went against its vaccination policy: she didn't get vaccinated.

[6] The Employment Insurance Act (EI Act) requires a voluntary period of leave to have the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.

[7] There is no evidence before me that the Appellant agreed to taking a period of leave from her employment beginning on December 16, 2021.

[8] The Act states that an Appellant who is suspended from their job due to their misconduct is not entitled to receive benefits.

[9] In this case it was the Appellant's action, the refusal to be vaccinated, that led to her not working. I am satisfied that in this case the Appellant's circumstances can be considered as a suspension.

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

[11] The Commission accepted the employer's reason for the leave. It decided that the Appellant was placed on leave because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits on this claim.

Matter I have to consider first:

Regarding the Appellant's submissions concerning the Decrees of Queen Romana Didulo as Head of State and Commander-in-Chief, Head of Government of Canada/President of Canada:

[12] To allow any reference to these "decrees" or mandates of other entities / governments in my decision would be an error in law as I am only empowered to rule based on the Employment Insurance Act as enacted by the Parliament of Canada.

[13] The Employment Insurance Act is a law enacted by the Parliament of Canada which gives the Commission power to evaluate claims and pay benefits to those who meet the statutory conditions as per the Act. The Act and associated Regulations authorize the Tribunal to examine reconsideration decisions made by the Commission and appealed by a Claimant.

[14] If the Appellant here believes that there is a higher power than the Government of the Dominion of Canada to deal with her being denied benefits, such as a Queen Didulo and her government, may I suggest she take her appeal there if she is not satisfied with the Government of Canada, the Commission and or the Tribunal's mandate to adjudicate such matters.

Issue

[15] Did the Appellant get suspended from her job because of misconduct?

Analysis

[16] The relevant legislative provisions are reproduced at GD4.

[17] The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. (**Tucker A-381-85)**

[18] Tribunals have to focus on the conduct of the claimant, **not the employer.** The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment **(McNamara 2007 FCA 107; Fleming 2006 FCA 16).**

[19] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities **LARIVEE A-473-06, FALARDEAU A-396- 85.**

[20] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of

employment **(Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91).**

[21] 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.

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

Issue 1: Did the Appellant get suspended from her job because of misconduct?

[23] Yes.

[24] The Appellant was on a leave of absence from and then suspended from her job. The Appellant's employer said she was placed on a leave of absence because she didn't comply with their policy to be fully vaccinated or have an exemption approved.

[25] The evidence shows it was the Appellant's conduct, of refusing to be vaccinated, that led to her not working. I am satisfied that, for the purposes of the EI Act, her circumstances can be considered as a suspension.

[26] **Issue**

[27] The Appellant doesn't dispute that this happened but she says she had decided not to be vaccinated.

[28] She did not apply for a medical or religious exemption. The Appellant was aware that being fully vaccinated was a requirement of her job. She argues this is illegal and her employer wrongfully suspended her.

[29] The Commission accepted the employer's reason for the suspension. It decided that the Appellant was suspended because of misconduct. Because of this, the

Commission decided that the Appellant is disqualified from receiving EI benefits as of January 23, 2022.

[30] I find the Appellant did breach the employer's vaccination policy which led to her suspension.

[1] **If so, did she do so wilfully to the point she could reasonably expect to be dismissed from her employment for her actions?**

[31] Yes.

[32] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (**McNamara 2007 FCA 107; Fleming 2006 FCA 16).**

[33] The proof of a mental element is necessary. The claimant must have a deliberate behaviour or so reckless as to approach wilfulness (**McKay-Eden A-402-96; Jewell A-236- 94; Brissette A-1342-92; Tucker A-381-85; Bedell A-1716-83)**

[34] A Tribunal must have the relevant facts before they can conclude misconduct and sufficiently detailed evidence for it to be able, first, to know how the claimant behaved, and second, to decide whether such behaviour was reprehensible (**Meunier A-130-96**; **Joseph** A-**636-85**).

[35] The word "misconduct" is not defined as such in the case law. It is largely a question of circumstances (**Gauthier A-6-98; Bedell A-1716-83).**

[36] All the evidence must be analysed before concluding of misconduct (**Ryan 2005 FCA 320).**

[37] The Appellant was aware of the employer's policy as per October 24, 2021 policy notification and the consequences should she choose not be vaccinated by December 16, 2021

[38] She chose not to follow the vaccine mandate of the employer asserting she was at risk medically from an untested substance entering her sovereign body. The employer then exercised its right to suspend the Appellant.

[39] I find the reason for the dismissal is misconduct under the law.

[40] The Appellant at her hearing, presented very detailed testimony regarding dismissal over her opposition to the mandated vaccine policy.

[41] She testified that she is a sovereign being not subject to the laws of Canada which allow for the Province of Newfoundland and Labrador, her employer, to exist. She is subject only to the laws of her Queen of the Kingdom of Canada which it was pointed out, then working for an illegal entity would be considered treasonous.

[42] Her concerns regarding the employer's vaccine mandate, as per her testimony and submissions went unanswered by all parties to whom she expressed them.

[43] She opined that others were given back benefits from EI in similar cases such as hers.

[44] She added that her co-workers were given laptops to work from home but this was a result of the shutdown of government offices, not an option for those refusing the vaccine mandate.

[45] The concept of Misconduct under the EI Act was discussed at great length with the Appellant and she fully understood that the Tribunal was restricted to making a decision on this only. To make any decision regarding any other issue such as the actions of the employer would be an error in law.

[46] The Appellant has referred to the mandate being determined to be not legal as per her collective agreement, as in the case of AL v. CEIC, a decision made by another Tribunal member.

[47] In AL v. CEIC the claimant was employed by a hospital when her employer introduced a policy requiring all employees to be vaccinated for COVID-19. The

Tribunal member allowed AL's appeal based on the member's interpretation of the collective agreement provisions to determine there had been no misconduct and a determination that AL had a "right to bodily integrity."

[48] I don't have to follow other decisions of our Tribunal. I can rely on them to guide me where I find them persuasive and helpful.

[49] I am not going to follow AL v CEIC because the findings and reasoning relied upon by the member do not follow the Federal Court's rules I am required to apply when deciding whether a claimant was suspended from or has lost their employment due to their own misconduct. If I were to follow the reasoning in *AL v CEIC*, by examining whether the employer's policy complied with the collective agreement or was mandated by legislation, I would be committing an error of law because my focus would be on the employer's actions – something which the courts have been very clear that I am not allowed to do. (I will note that this decision is now under appeal at the Appeal Division.)

[50] There is a case from the Federal Court of Appeal (FCA) called Canada (Attorney General) v. McNamara.1 Mr. McNamara, dismissed from his job under his employer's drug testing policy, argued he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[51] In response to these arguments, the FCA stated it has consistently said 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 employee amounted to misconduct within the meaning of the EI Act." The Court went on to note the focus when interpreting and applying the EI Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out 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.

[52] A more recent decision is Paradis v. Canada (Attorney General).2 Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. He argued he was wrongfully dismissed, the test results showed he was not impaired at work, and he said 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 EI Act.

[53] Another similar case from the FCA is Mishibinijima v. Canada (Attorney General). Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued his employer was obligated to provide an accommodation because alcohol dependence has been recognized as a disability. The Court again said the focus is on what the employee did or did not do, and the fact the employer did not accommodate its employee is not a relevant consideration.

[54] These cases are not about COVID-19 vaccination policies; however, the principles in these cases are still relevant.

[55] There is a very recent Federal Court decision, Cecchetto v Attorney General of Canada, 2023 FC 102, (Cecchetto), which does relate to an employer's COVID-19 vaccination policy. Mr. Cecchetto, the Applicant, argued his questions about the safety and efficacy of the COVID-19 vaccines and antigen tests were never satisfactorily answered by the Tribunal's General Division and Appeal Division. He 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.

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

[57] 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 – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of

---

.

the COVID-19 vaccines or antigen testing … 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.

[58] The Federal 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.".

[59] Case law makes it clear my role is not to look at the employer's conduct or policies and determine whether they were right in placing the Claimant on an unpaid leave of absence (suspension), failed to accommodate him, if the vaccination policy was in conflict with other employer policies or violated the Appellant's Collective Bargaining Agreement or offer of employment. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the EI Act.

[60] I think an employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the Claimant's employer implemented its COVID-19 vaccination policy as a requirement for all of its employees, this policy became an express condition of the Claimant's employment.3

[61] While not relevant to the case at hand, misconduct under the EI Act, this information could be used in another forum which is tasked to decide whether or not the Appellant's human rights were violated (Provincial Human Rights Tribunal) or if any labour issues exist under Provincial or Federal Labour Boards.

[62] 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 dismissal 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.

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

[64] 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 being let go because of that.

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

[66] I have to focus on the Act only. 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 reasonable arrangements (accommodations) for the Appellant aren't for me to decide. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[67] The Commission has to prove that the Appellant lost her 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 her job because of misconduct.

[68] The Appellant does not deny she lost her employment due to the employer's vaccine mandate but denies her actions constitute misconduct.

[69] I find the Appellant does meet the mental element of wilfullness inherent in a finding of misconduct. Her submissions show clearly that she was aware of the

consequences of not getting vaccinated by the employer's deadline but chose to not be vaccinated anyway.

[70] As a result, I find the Appellant made the conscious, deliberate and wilful choice to not comply with the employer's policy when she knew that by doing so there was a real possibility she could be suspended (placed on an unpaid leave of absence) and not be able to carry out the duties owed to his employer. Accordingly, I find the Commission has proven the Appellant was suspended due to her own misconduct within the meaning of the EI Act and the case law described above.

[71] The employer and the Commission have shown that the Appellant lost her employment due to misconduct, the decision being made on the balance of probabilities **LARIVEE A-473-06, FALARDEAU A-396- 85**.

[72] Therefore I find that it would be probable to conclude misconduct on the part of the Appellant. There should be a disqualification.

Conclusion

[73] The Tribunal ”Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment” (**Meunier A-130-96**).

[74] In having done so, the Member finds that, having given due consideration to all of the circumstances, the Appellant’s actions in this case were deliberate and willful to the point where she knew they would / could lead to her dismissal therefore they do amount to misconduct under the Act therefore the appeal is dismissed..

[75] The Appellant has not succeeded with her burden to demonstrate that her actions in this case do not meet the threshold where they could be considered wlful to the point where she would / could be expected to be dismissed. Therefore she is not entitled to receive EI benefits on this claim.

John Noonan

Member, General Division – Employment Insurance Section