



Citation: *KP v Canada Employment Insurance Commission*, 2023 SST 878

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

## Decision

**Appellant:** K. P.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (496529) dated July 21, 2022 (issued by Service Canada)

---

**Tribunal member:** Linda Bell

**Type of hearing:** Teleconference

**Hearing date:** January 31, 2023

**Hearing participant:** Appellant

**Decision date:** February 1, 2023

**File number:** GE-22-2782

## Decision

[1] I am dismissing the appeal, with modification.

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant lost her job because of misconduct (in other words, because she did something that caused her to be suspended and then dismissed).

[3] This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from March 21, 2022, to May 19, 2022.<sup>1</sup> The Claimant never returned to work. Her employer dismissed her effective May 24, 2022, due to misconduct. This means the Claimant is disqualified from receiving EI benefits as of Sunday, May 22, 2022.<sup>2</sup>

## Overview

[4] The Claimant was put on unpaid leave (suspended) from her job. The Claimant's employer says she was suspended because she didn't comply with their mandatory COVID-19 vaccination policy. She refused to disclose her vaccination status. The employer dismissed the Claimant effective May 24, 2022.

[5] The Commission accepted the employer's reason for the suspension. It initially decided the Claimant wasn't entitled to benefits as of March 20, 2022, because she took a period of voluntary leave. The Commission changed its decision after reconsidering the issue. The Commission determined the Claimant wasn't entitled to benefits as of December 6, 2021, because she was suspended due to misconduct.

[6] Even though the Claimant doesn't dispute that this happened, she says that going against the employer's policy isn't misconduct.

---

<sup>1</sup> Section 31 of the *Employment Insurance Act* (Act) states that, if a claimant is suspended due to misconduct, they are not entitled to receive EI benefits during the period of suspension. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be payable or paid.

<sup>2</sup> Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.

## **Matters I have to consider first**

### **Potential added party**

[7] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

### **Administrative request**

[8] The hearing date was changed to January 31, 2023. The Claimant was granted an administrative change to the January 9, 2023, hearing date. This is because within two days of being notified of that hearing date, she submitted a request to change the hearing to the end of January 2023.

## **Issues**

[9] Was the Claimant suspended and then dismissed because of misconduct?

## **Analysis**

[10] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.<sup>3</sup>

[11] To answer the question of whether the Claimant was suspended and then dismissed because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended and later dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

---

<sup>3</sup> See sections 30 and 31 of the Act.

## **Why did the Claimant lose her job?**

[12] There is no dispute that the Claimant was put on leave without pay (suspended), and later dismissed, because she refused to disclose her vaccination status by the deadline(s) set out by the employer's mandatory COVID-19 vaccination policy.

[13] There is nothing in the file that could make me find otherwise. So, I find the Claimant was suspended and then dismissed from her job because she refused to disclose her vaccination status, as required by the employer's mandatory COVID-19 vaccination policy.

## **Is the reason for the Claimant's suspension and dismissal misconduct under the law?**

[14] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[15] To be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup>

[16] The Claimant doesn't have to have 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.<sup>6</sup>

[17] 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 there was a real possibility of being let go because of that.<sup>7</sup>

[18] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the

---

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.<sup>8</sup>

[19] The Commission says there was misconduct for the following reasons:

- On October 5, 2021, her employer notified her of the requirement to disclose her vaccination status.
- The Claimant was aware that all employees were required to disclose they were fully vaccinated by November 22, 2021, regardless of where they were working.
- The Claimant knew she would be placed on unpaid leave (suspended) if she failed to disclose that she was fully vaccinated by November 22, 2021.
- The employer notified the Claimant that if she continued to refuse to disclose her vaccination status within three months from December 6, 2021, her employment may be terminated.
- The Claimant didn't apply for a medical or religious exemption from the policy.

[20] The Claimant says she didn't commit misconduct because the policy didn't accommodate her right to refuse or her choice. Her contract does require her to take vaccinations or undergo medical procedures. The employer's policy doesn't allow for informed consent. Her employer used coercion, threats, and intimidation tactics.

[21] The Claimant explained in detail how on October 5, 2021, she was notified of the requirement to be fully vaccinated against COVID-19 and to disclose her vaccination status by November 22, 2021. On October 31, 2021, she was involved in a motor vehicle accident. She went on sick leave from November 1, 2021, until December 5, 2021.

[22] The Claimant says that on November 22, 2022, her employer called her while she was on sick leave. They asked if she would disclose her vaccination status. The

---

<sup>8</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

Claimant refused and said she would discuss the matter with her employer when she returned to work on December 6, 2021. She attended a meeting with her director on her first day back to work on December 6, 2021. She still refused to disclose her vaccination status during that meeting. Later that same day she was issued a letter telling her she was being put on a leave without pay (suspended) effective December 7, 2021.

[23] The Claimant submitted a copy of the employer's December 6, 2021, suspension letter, outlining the events leading up to her suspension. In this letter the employer also wrote:

- Should your circumstances change and you become vaccinated against COVID-19, please confirm with [director's name], Director of Strategic Finance as soon as possible. If you remain unvaccinated, or continue to refuse to disclose your vaccination status within three months from December 6, 2021, your employment may be terminated.<sup>9</sup>

[24] The Claimant confirmed she knew the policy was being implemented and she would be suspended without pay if she didn't comply with the vaccine policy, requiring her to disclose her vaccination status. She argued that the policy document was not sent out until sometime in November when she was on sick leave. She says she was working from home and didn't have any direct contact with anyone, so the employer's policy shouldn't apply to her. She was a good employee. She had no disciplinary actions against her.

[25] During the hearing, the Claimant referred to a decision issued by this Tribunal in *AL v CEIC*, in which a Member of this Tribunal allowed the appeal.<sup>10</sup> She says her appeal should also be allowed because her circumstances were similar.

- *AL* was a unionized employee whose collective agreement didn't require vaccination against COVID-19; and

---

<sup>9</sup> See the employer's letter at pages GD2-9 to GD2-10.

<sup>10</sup> The Claimant submitted a copy of the Tribunal's decision, *Annette Lance v Canada Employment Insurance Commission (AL v CEIC)*, GE-22-1889.

- *AL* worked for a provincial government in health care directly with patients. But the Claimant worked for a provincial government at home, so she had no direct contact with anyone else.

[26] I am not bound by other decisions made by this Tribunal.<sup>11</sup> This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[27] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on his findings regarding the employer's unilateral actions to impose the policy and whether that claimant was legally justified in refusing to get vaccinated against COVID-19. I also wish to note that this *AL v CEIC* decision has been appealed.

[28] Recently, in *Cecchetto v Attorney General of Canada*, the Federal Court dismissed an application for judicial review in a matter with similar facts as those in *AL v CEIC*.<sup>12</sup> The Appellant in *Cecchetto* worked at a hospital and was denied EI benefits because they were found to have been suspended and then dismissed from their job due to misconduct. They failed to comply with the provincial directive requiring mandatory COVID-19 vaccination for hospital workers.

[29] In *Cecchetto*, the Court confirmed that it is not within the mandate or jurisdiction of the Social Security Tribunal to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy. Put another way, as a Member of this Tribunal I can't make decisions about whether the Claimant had other options under other laws or whether the employer should have made reasonable arrangements (accommodations)

---

<sup>11</sup> I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis*.

<sup>12</sup> See *Cecchetto v Attorney General of Canada*, 2023 FC 102.

for the Claimant.<sup>13</sup> I can consider only one thing: whether the Claimant's actions or inaction are misconduct under the EI Act.

[30] Further, the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.<sup>14</sup>

[31] Whether or not the Claimant worked from home is irrelevant. This is because the duty owed to her employer was to comply with the vaccination policy, which was a condition of continued employment.<sup>15</sup>

[32] I acknowledge the Claimant may have a right to decide whether to be vaccinated or to disclose her vaccination status. But she knew there were consequences if she refused to follow the employer's policy, which in this case was a suspension and then dismissal from her employment.

[33] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary.<sup>16</sup> This is not an automatic right, even if a claimant has paid EI premiums. In my view, the Claimant did not lose her job involuntarily. This is because her non-compliance with the employer's policy is what led to her suspension and her dismissal.

[34] Based on the facts set out above, I find the Commission has proven misconduct because the Claimant's refusal to disclose her vaccination status was deliberate or intentional. There was a cause-and-effect relationship between her refusal to be

---

<sup>13</sup> See *Cecchetto v Attorney General of Canada*, 2023 FC 102 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

<sup>14</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

<sup>15</sup> See *MN v Canada Employment Insurance Commission*, AD-22-628.

<sup>16</sup> See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.



vaccinated, her suspension, and dismissal. So, I find the Claimant was suspended and then dismissed from her job because of misconduct.

### **Period of disentitlement and disqualification**

[35] I find the Claimant is disentitled and then disqualified from receiving EI benefits because she was suspended and then dismissed due to misconduct. Here is what I considered.

[36] In this case, the Commission determined the Claimant was disentitled as of December 6, 2021, because she was suspended due to misconduct. On July 20, 2022, the Claimant told the Commission she was eventually dismissed for the same reason she was suspended. But I see nothing in the documents on file that show the Commission imposed a disqualification in the week the Claimant was dismissed.

[37] The law says that, in cases of misconduct, a disentitlement imposed during the period of suspension doesn't prevent (preclude) a disqualification when the disentitlement period expires as the result of a dismissal.<sup>17</sup>

[38] The Claimant's benefit period started on March 20, 2022, and she was dismissed on May 24, 2022. So, I find the Claimant is disentitled from receiving EI benefits from Monday, March 21, 2022, to Friday, May 20, 2022.<sup>18</sup> The Claimant is disqualified from receiving EI benefits as of Sunday, May 22, 2022.<sup>19</sup>

---

<sup>17</sup> See *Thibodeau v Canada (Attorney General)* 2015 FCA 16.

<sup>18</sup> Section 31 of the Act provides that a disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid during a benefit period.

<sup>19</sup> Section 30(2) of the Act provides that a disqualification starts on the Sunday of the week in which a claimant was dismissed.

## **Conclusion**

[39] The Commission has proven the Claimant lost her job because of misconduct.

[40] The appeal is dismissed, with modification.

Linda Bell

Member, General Division – Employment Insurance Section