Citation: *JK v Canada Employment Insurance Commission*, 2023 SST 940

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decisions under appeal:	Canada Employment Insurance Commission reconsideration decisions (530259 and 545556) dated October 6, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	March 14, 2023
Hearing participant:	Appellant
Decision date:	March 24, 2023
File numbers:	GE-22-3660 and GE 22-3661

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 job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.[1]

[3] The Appellant hasn't shown that he was available for work. This means that he can't receive EI benefits.

Overview

[4] The Appellant was suspended from his job. The Appellant's employer says he was suspended because he went against its vaccination policy: he didn't get vaccinated.

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

[6] The Commission accepted the employer's reason for the suspension. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

[7] The Commission also decided the Appellant was disentitled from receiving EI benefits from April 17, 2022, because wasn't available for work.

Matter I have to consider first

The Appellant's appeals are joined

[8] The Appellant appealed two of the Commission's reconsideration decisions. I joined the appeals because of the common facts and questions. I also don't find that

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[1] Section 31 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disentitled from receiving benefits.

joining the appeals is unfair to the parties.[2] The Tribunal sent the Appellant a letter on January 30, 2023, notifying him that the appeals would be joined.

Issues

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

[10] Was the Appellant available for work?

Analysis

Misconduct

[11] 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]

[12] To answer the question of whether the Appellant was suspended from his job because of misconduct, 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.

– **Why was the Appellant suspended from his job?**

[13] I find that the Appellant was suspended from his job because he went against his employer's vaccination policy.

[14] The Appellant says he refused to get vaccinated. He says his employer put him on an unpaid leave of absence because of this.

[15] The Commission says the Appellant didn't comply with his employer's COVID-19 vaccine policy. It concluded that this led to his suspension.

[16] The Appellant sent the Commission a letter his employer sent him confirming the unpaid leave of absence. It refers to the employer's COVID-19 vaccination policy. The

[2] Section 35 of the *Social Security Tribunal Rules of Procedure* sets out this rule.
[3] See sections 30 and 31 of the Act.

letter also confirms that the Appellant would be put on an unpaid leave of absence because he didn't provide proof of vaccination.

[17] The Appellant doesn't dispute the reason his employer placed him on unpaid leave. I find this is the same as a suspension because the Appellant didn't do something his employer's policy required him to do. So, I find that the Appellant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

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

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

[19] 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 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.

[20] 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 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.[6]

[21] 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 let go because of that.[7]

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[4] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[5] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[6] See *Attorney General of Canada v Secours*, A-352-94.
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[22] The law doesn't say I have to consider how the employer behaved.[8] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[9]

[23] The Commission has to prove that the Appellant was suspended from 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 was suspended from his job because of misconduct.[10]

[24] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it is not for me to decide whether his employer wrongfully suspended him or should have made reasonable arrangements (accommodations) for him.[11] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[25] 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.[12] 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.

[26] 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.[13]

[27] 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

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[8] See section 30 of the Act.
[9] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[14]

[28] In a more recent case called *Paradis*, the appellant was let go after failing a drug test.[15] 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.[16]

[29] Similarly, in *Mishibinijima*, the appellant lost his job because of his alcohol addiction.[17] 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 is not relevant that the employer didn't accommodate them.[18]

[30] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to suspend the appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[31] The Appellant says his employer placed him on an unpaid leave for not getting vaccinated, but not for misconduct.

[32] The Commission says there was misconduct because the Appellant knew he would be suspended for going against his employer's COVID-19 vaccination policy, but he made a deliberate choice not to get vaccinated.

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[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[33] I find that the Commission has proven that there was misconduct, because the Appellant knew that he could be suspended if he didn't get vaccinated as his employer's policy required.

[34] The Appellant testified about his employer's COVID-19 vaccination policy. He said he learned about it in late August or September 2021. He said the employer sent emails to say employees had to be fully vaccinated by October 31, 2021. He added that within two days of the deadline, the employer allowed employees to do rapid tests. He was later notified that he had to get vaccinated by January 2022. The Appellant said that one of the emails the employer sent said employees who didn't get vaccinated would be terminated.

[35] I find from the Appellant's testimony that he knew about his employer's policy. But he says because the employer kept changing the deadline, he didn't think he would be suspended.

[36] The Appellant was on sick leave due to a shoulder injury from the end of November 2021 until February 21, 2022. When he returned to work, he was told that he wasn't due back at work until the end of March due to seasonal leave he had applied for. The Appellant said he discovered the employer wasn't paying him, so he filed a grievance, which he won.

[37] The Appellant told the Commission that he returned to work on March 23, 2022. His employer put him on unpaid leave on April 14, 2022.

[38] I accept as fact that the employer extended the deadline for employees to get vaccinated against COVID-19. The letter the Appellant sent to the Commission says the employer had informed him that employees who hadn't attested that they were fully vaccinated by January 31, 2022, would be placed on unpaid leave. It also says the Appellant had been given an extension beyond January 31, 2022, to provide proof of taking the second dose because of his special circumstances.

[39] I asked the Appellant about the special circumstances for the extension. He said he had no idea what the special circumstances were. But I find from the letter that the

Appellant should have known from communications his employer sent him that he would likely be put on unpaid leave if he didn't provide proof of vaccination.

[40] I don't find that extending the deadline to do so meant that the employer would not enforce its COVID-19 vaccination policy; rather, I find that the employer was giving employees more time to comply with the policy.

[41] The Appellant explained why he didn't take the COVID-19 vaccine. I understand his reasons for not doing so. And I sympathize with him given his experiences with needles as a child.

[42] Despite the Appellant's concerns, I find that his action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so, knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

[44] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

Availability

[45] A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[46] I must decide whether the Appellant has proven that he was available for work. The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[47] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both sections. So, he has to meet the criteria of both sections to get benefits.

[48] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[19] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[20]

[49] The Commission states that they disentitled the Appellant under section 50 of the Act along with sections 9.001 of the Regulations for failing to prove his availability for work. In their submissions, they say that showing availability requires a claimant to make reasonable and customary efforts to find suitable employment.

[50] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they have to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.[21]

[51] I don't find that the Commission asked the Claimant to provide a job search record to prove his availability. For this reason, I do not find that he is disentitled under this part of the law.

Capable of and available for work

[52] The second part of the Act that deals with availability says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable

[19] See section 50(8) of the Act.
[20] See section 9.001 of the Regulations)
[21] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688

job.[22] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[23] I will look at those factors below.

[53] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on this section of the law.

[54] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[24]

a) He wanted to go back to work as soon as a suitable job was available.

b) He made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[55] When I consider these factors, I have to look at the Appellant's attitude and conduct.[25]

[56] I have found that the Appellant's employer suspended him from his job. He told the Commission that he couldn't look for work because that would go against his employer's Code of Ethics. He said he believed he would return to work within a week or two since the government was dropping its vaccine mandates. He thought his employer would do the same.

[57] At the hearing, the Appellant explained that according to the Code of Ethics, he couldn't work for another company. He said his employer had sent him a letter asking if he had found another job. But he said if he had gotten another job and gone against

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[22] See section 18(1)(a) of the Act.
[23] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[24] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[25] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

the Code of Ethics and didn't get his job back, he would lose his severance. The Appellant confirmed that he couldn't look for another job.

[58] I find from the Appellant's testimony that he was waiting for his employer to lift its vaccine mandate so he could return to his job. Because he believed that he would be going against his employer's Code of Ethics if he looked for another job, he said he didn't.

[59] I accept that the Appellant wanted to return to work. But I find that by not looking for another job, he hasn't shown that he made efforts to find a suitable job. I also find that this was a personal condition he set that might have unduly limited his chances of returning to work. This is because he didn't consider any other job opportunities.

– **So, was the Appellant capable of and available for work?**

[60] Based on my findings on the three factors, I find that the Appellant hasn't shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[61] The Commission has proven that the Appellant was suspended from him job because of misconduct.

[62] The Appellant hasn't shown that he was available for work within the meaning of the law.

[63] This means that the appeal is dismissed. The Appellant is disentitled from receiving EI benefits.

Audrey Mitchell

Member, General Division – Employment Insurance Section