



Citation: *BK v Canada Employment Insurance Commission*, 2023 SST 1305

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: B. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (562935) dated January 19, 2023 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: June 27, 2023

Hearing participant: Appellant

Decision date: June 30, 2023

File number: GE-23-529

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant was suspended¹ from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means the Appellant is disentitled from receiving Employment Insurance (EI) benefits.²

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said she was suspended because she didn't follow their mandatory COVID-19 vaccination policy: she didn't get fully vaccinated.

[4] Even though the Appellant agrees she didn't get fully vaccinated, she says her employer suspended her after they refused her religious exemption request without good reason and, in the process, didn't follow their duty to accommodate her.

[5] The Commission accepted the employer's reason for the suspension. It decided the Appellant was suspended from her job because of misconduct. Because of this, the Commission decided the Appellant is disentitled from receiving EI benefits.

Issue

[6] Was the Appellant suspended from her job because of misconduct?

Analysis

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

¹ In this decision, suspension and unpaid leave of absence mean the same thing.

² Section 31 of the *Employment Insurance Act* says that appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Why was the Appellant suspended from her job?

[8] I find the Appellant was suspended from her job because she didn't follow her employer's mandatory COVID-19 vaccination policy: she didn't get fully vaccinated.

[9] The Appellant and the Commission don't agree on why the Appellant was suspended from her job. The Commission says the reason the employer gave is the real reason for the suspension.³ The employer told the Commission that the Appellant was suspended because she didn't follow their policy.⁴

[10] The Appellant disagrees. The Appellant says the real reason she was suspended was that her employer denied her religious exemption request without good reason and, in the process, didn't follow their duty to accommodate her.⁵

[11] I note the Appellant's employer sent her an email on March 23, 2022. It says she is on leave without pay as of March 24, 2022 because she didn't follow their mandatory COVID-19 vaccination policy.⁶

[12] On the other hand, I find the Appellant hasn't shown her employer suspended her specifically because they denied her religious exemption request without good reason and, in the process, didn't follow their duty to accommodate her. She hasn't provided any evidence that this is specifically why her employer suspended her.

[13] I acknowledge that the Appellant feels her employer should have approved her religious exemption request and didn't provide good reasons for denying it. But in this section, I'm only looking at why the Appellant was suspended from her job, so I will address the above part of her argument later in this decision.

[14] So, while I acknowledge the Appellant thinks her employer suspended her for the reason she says, I find the evidence (the employer's email to the Appellant on March

³ GD4-8.

⁴ GD3-20, GD3-89.

⁵ GD2-6 to GD2-13.

⁶ GD3-47 to GD3-48.

23, 2022) shows that she was suspended for not following her employer's mandatory COVID-19 vaccination policy.

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

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

[16] 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.

[17] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ The Appellant 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.⁹

[18] There is misconduct if the Appellant 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 suspended because of that.¹⁰

[19] The Commission has to prove that the Appellant was suspended from 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 was suspended from her job because of misconduct.¹¹

[20] 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. Issues about

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

whether the Appellant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹² I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[21] There is a case from the Federal Court of Appeal (Court) called *Canada (Attorney General) v. McNamara*.¹³ Mr. McNamara was dismissed from his job under his employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[22] In response to Mr. McNamara's arguments, the Court stated that it has constantly said that 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 Act."

[23] In the same case, the Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that 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.

[24] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.¹⁴ Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in

¹² See *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

¹³ See *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

¹⁴ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.

accordance with its own policies and provincial human rights legislation. The Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.¹⁵

[25] Another similar case from the Court is *Mishibinijima v. Canada (Attorney General)*.¹⁶ Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.¹⁷

[26] These cases are not about COVID vaccination policies. But I find the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and decide whether they were right in dismissing the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

[27] The Commission says there was misconduct because the Appellant knew her employer had a mandatory COVID-19 vaccination policy and knew she could be suspended for not following it, but she chose not to follow it anyway.¹⁸

[28] The Appellant says there was no misconduct because she did everything that she could to follow her employer's policy, but they still suspended her. She also says there was no misconduct because she never expected that her employer would put her on unpaid leave for not following their policy.

[29] The Appellant's employer told the Commission:

- The Appellant was suspended for not following their mandatory COVID-19 vaccination policy.¹⁹

¹⁵ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.

¹⁶ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁷ *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

¹⁸ GD4-8 to GD4-9.

¹⁹ GD3-20, GD3-89.

- Their policy was posted online, and employees got multiple emails about it.²⁰
- Their policy allowed employees to ask for an exemption. They just had to submit a duty to accommodate request.²¹
- The Appellant asked for a religious exemption, but it was denied.²²
- After they denied the Appellant's religious exemption, she asked them to reconsider their decision, but they denied this as she didn't present any new information for them to consider.²³
- The Appellant knew she could be suspended if she didn't follow their policy.²⁴

[30] The Appellant's employer's mandatory COVID-19 vaccination policy says the following:

- It takes effect on October 6, 2021.²⁵
- It applies to all employees regardless of where they work.²⁶
- The duty to accommodate applies. Managers must address exemption requests on a case-by-case basis, in a timely manner, and up to the point of undue hardship.²⁷
- Employees must attest to their vaccination status by October 29, 2021.²⁸
- Employees who aren't willing to attest to their vaccination status or get fully vaccinated will be placed on unpaid leave 2 weeks after the attestation deadline.²⁹

[31] The Appellant says:

²⁰ GD3-20.

²¹ GD3-20.

²² GD3-20, GD3-89.

²³ GD3-89.

²⁴ GD3-20.

²⁵ GD6-1.

²⁶ GD6-8.

²⁷ GD6-3 to GD6-4.

²⁸ GD6-11.

²⁹ GD6-8 to GD6-9.

- She knew about her employer's mandatory COVID-19 vaccination policy.³⁰
- She got the first COVID-19 vaccine dose. But she had side effects after the first dose and had concerns about the use of foetal cells in vaccine development, so she didn't get any more doses.³¹
- Her employer's policy allowed employees to ask for a medical or religious exemption. To do this, she had to file a duty to accommodate request. She learned about this in late October 2021.³²
- She asked for a religious exemption from her employer's policy in November 2021. Her faith (Catholicism) says the use of foetal cells in research is a moral sin and it's up to her to decide whether to get vaccinated.³³
- After she submitted her religious exemption request, she had an interview with an HR representative in December 2021.³⁴ They said her employer would decide on her request by the end of January 2022.³⁵
- She didn't hear back from her employer about her request and wasn't suspended by the end of the January 2022, so she assumed they had accepted her request and she wouldn't be suspended.³⁶
- She got an email from her employer in February 2022, but she had trouble opening it and didn't realize it was about her exemption request.³⁷
- She was eventually able to open her employer's email in March 2022 and found out then that her exemption request was denied and that she would be put on unpaid leave for not being fully vaccinated.³⁸

³⁰ GD3-18, GD3-79, GD3-87.

³¹ GD3-87.

³² GD3-79.

³³ GD3-79, GD3-87.

³⁴ GD3-79.

³⁵ See hearing recording.

³⁶ See hearing recording.

³⁷ See hearing recording.

³⁸ See hearing recording.

- She then asked her employer to give their reasons why they denied her exemption request so she could give them more information to reconsider their decision. But all she got was a response that she had to file an ATIP request if she wanted to know why her request was denied.³⁹
- She decided to send them more information about her exemption request anyway. They accepted the information but told her she was still going to be put on unpaid leave.⁴⁰
- Her employer didn't follow their duty to accommodate process because they didn't explain their reasons for not following their duty to accommodate her under their policy and why it would cause them undue hardship to accommodate her.⁴¹
- Her ATIP request showed that her employer seemed to have internal questions about her exemption request that they never asked her, so they made their decision on her request without being fully informed of her position.⁴²
- She had been working from home since the start of the pandemic and wasn't a health risk that way, so her employer had no reason to ask her to get vaccinated.⁴³
- Another Tribunal decision (*A.L. v Canada Employment Insurance Commission*) shows she didn't commit misconduct.⁴⁴
- She was surprised her employer didn't follow their own duty to accommodate under their policy.⁴⁵
- She knew that employees who didn't follow her employer's policy could be put on unpaid leave.⁴⁶ She also got the emails saying she would be put on unpaid leave after her religious exemption request was denied.⁴⁷

³⁹ GD3-88.

⁴⁰ GD3-88.

⁴¹ GD2-6.

⁴² See GD3-88 and hearing recording.

⁴³ See hearing recording.

⁴⁴ GD2-9.

⁴⁵ See GD2-6 and hearing recording.

⁴⁶ GD3-88.

⁴⁷ See hearing recording.

- But she didn't think she would be put on unpaid leave for not following her employer's policy. The point of her employer's policy was that she could ask for the duty to be accommodated. After she asked for a religious exemption, it was then her employer's responsibility to give her a chance to respond to any concerns they had about her request, but they didn't do that. And since they didn't do that, any decisions her employer made after that (including putting her on unpaid leave) didn't apply to her and weren't valid.⁴⁸

[32] I sympathize with the Appellant, but I find the Commission has proven there was misconduct for the following reasons.

[33] I find the Appellant committed the actions that led to her suspension, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it.

[34] I further find the Appellant's actions were intentional as she made a conscious decision not to follow her employer's policy.

[35] There is evidence that the Appellant knew about her employer's policy. She said she knew about it, as noted above. She also submitted a religious exemption request, which shows she was aware of the policy and its requirements.

[36] There is also evidence that the Appellant chose not to follow her employer's policy. She said she didn't get fully vaccinated as the policy required, as noted above.

[37] I acknowledge the Appellant says her employer should have approved her religious exemption request because she provided proof of the sincerity of her religious beliefs and that they didn't follow their duty to accommodate under their policy when they denied her request despite this proof.

⁴⁸ See hearing recording.

[38] I also acknowledge the Appellant says her employer didn't provide good reasons for why they denied her exemption request and that they had internal questions about her request that they never asked her before they decided to deny it.

[39] And I acknowledge the Appellant says her employer should have given her the choice of continuing to work from home without getting fully vaccinated because she had been doing this since the start of the pandemic without any issues.

[40] Unfortunately, I find these arguments aren't relevant here. As discussed above, the Act and the Court say that I must focus on the Appellant's (and not the employer's) actions when analyzing misconduct. This means I can only look at the steps the Appellant did or didn't take to follow her employer's policy.

[41] In other words, I can't look at whether the Appellant's employer acted unfairly for the reasons she says. If the Appellant wants to pursue these arguments, she needs to do that at another tribunal or decision-making body.

[42] I also acknowledge the Appellant feels another Tribunal decision (I will refer to it as A.L.) helps to show she didn't commit misconduct. She argues that A.L. says if a person doesn't want to get vaccinated because of their religious beliefs, their actions can't be considered misconduct.⁴⁹

[43] I'm not bound by prior decisions of the Tribunal. This means I can decide for myself if I agree with these decisions and if they help support an appellant's appeal.

[44] In this case, I disagree with the A.L. decision and the Tribunal Member's misconduct analysis. Part of this analysis says an appellant has the right to choose whether to accept any medical treatment and exercising this right can't be considered misconduct under the law.⁵⁰

[45] I find that while an appellant does have the right to choose whether to accept any medical treatment, their decision to exercise this right can still be misconduct. I see this

⁴⁹ See the hearing recording.

⁵⁰ See *A.L. v Canada Employment Insurance Commission*, SST General Division, paragraphs 72 to 80.

decision as willful since it involves a conscious and intentional choice to accept or refuse something (such as a vaccination), and the Court says a willful action can be considered misconduct, as discussed above.

[46] Also, I note the Court has recently said in another decision that A.L. doesn't establish any kind of blanket rule that applies to other factual situations, it is under appeal, and it's not binding on the Court.⁵¹

[47] For these reasons, I won't follow A.L. and don't give it much weight here.

[48] So, while I acknowledge the Appellant's concerns about her employer's mandatory COVID-19 vaccination policy, I find the evidence shows she made a conscious decision not to follow it. She didn't get fully vaccinated as the policy required, even after her religious exemption request was denied, which shows her actions were intentional and therefore willful.

[49] I also find the Appellant knew or should have known that not following her employer's mandatory COVID-19 vaccination policy could lead to her being suspended.

[50] There is evidence that the Appellant knew she could be suspended if she didn't follow her employer's policy. She said she knew this, as noted above.

[51] There is also other evidence that the Appellant's employer told her she would be suspended if she didn't follow their policy. This evidence is:

- An email from her employer, dated February 12, 2022. It says she hasn't shown that her religious belief prevents vaccination, so her exemption request is denied. As per their policy, she now has until March 1, 2022 to get her second COVID-19 dose and re-attest to her vaccination status. If she doesn't do this by March 15, 2022, she'll be placed on unpaid leave as of March 16, 2022.⁵²
- An email from her employer, dated March 11, 2022. It says they've done a thorough review of her documentation and interview responses for her religious

⁵¹ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102, paragraphs 41 to 44.

⁵² GD3-25 to GD3-26.

exemption request and decided she didn't show that her religious beliefs prevented her from getting vaccinated, so their decision to deny her exemption request still is unchanged. It also says she must still adhere to their policy as they previously told her, but they've extended the deadline for her to do this since she's on pre-approved leave from March 14 to 18, 2022. So, if she doesn't follow their policy, she'll be put on unpaid leave as of March 24, 2022.⁵³

[52] I note the Appellant confirmed at the hearing that she received the above emails.⁵⁴ I find the fact that she received these emails shows she knew or should have known that she would be suspended for not following her employer's policy.

[53] I acknowledge the Appellant says she didn't expect her employer would ever suspend her for not following their policy because she felt she had a solid reason (her religious beliefs) to not get fully vaccinated.

[54] I also acknowledge the Appellant says she didn't think she would be suspended for not following her employer's policy because she hadn't heard back from her employer about her exemption request by the end of January as they said she would, so she assumed it had been approved and she wasn't going to be suspended.

[55] And I acknowledge the Appellant says she didn't think the compliance part of her employer's policy (meaning what she needed to do to avoid being put on unpaid leave) applied to her once she had submitted an exemption request because her employer had a duty to accommodate under the policy and was at that point obligated to give her a chance to respond to any concerns they had about her request before they made their decision about it.

[56] But I disagree with these arguments.

[57] I believe the Appellant when she says she didn't think she would be suspended for the reasons she says.

⁵³ GD3-28.

⁵⁴ See hearing recording.

[58] Unfortunately, I find this doesn't mean the Appellant also couldn't have known that she could be suspended for not following her employer's policy. In my view, the evidence shows she should have known she could in fact be suspended for this reason.

[59] In other words, I find it was entirely possible for the Appellant to believe both things (that she would be able to keep working but could also be suspended) at the same time. She knew about her employer's policy and her employer told her she would be suspended after denying her religious exemption request, as noted above, so she should have known that this scenario could also play out.

[60] So, while I acknowledge the Appellant didn't think she would be suspended for not following her employer's policy, I find the evidence shows she knew or should have known she could still be suspended for this reason.

[61] I therefore find the Appellant's conduct is misconduct under the law since she committed the conduct that led to her suspension (she didn't follow her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being suspended.

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

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

[63] This is because the Appellant's actions led to her suspension. She acted deliberately by not getting fully vaccinated as her employer's policy required, even after her exemption request was denied. She knew or ought to have known that refusing to get fully vaccinated was likely to cause her to be suspended from her job.

Conclusion

[64] The Commission has proven the Appellant was suspended from her job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[65] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section