Citation: *KL v Canada Employment Insurance Commission*, 2023 SST 1109

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (532224) dated November 7, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	May 9, 2023
Hearing participant:	Appellant
Decision date:	May 23, 2023
File number:	GE-22-4149

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

Overview

[3] The Appellant was suspended from her job. The Appellant's employer says that she was suspended because she went against its vaccination policy: she didn't get vaccinated.

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

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

Issue

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

Analysis

[7] 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.[2]

[8] 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

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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.
[2] See sections 30 and 31 of the Act.

Appellant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended from her job?

[9] I find that the Appellant was suspended from her job because she went against her employer's vaccination policy.

[10] The Appellant says she isn't working because she's on a leave of absence. She says she wasn't suspended.

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

[12] The Appellant says her employer put her on a leave of absence because it didn't give her a religious accommodation so she wouldn't have to take the COVID-19 vaccine. But she doesn't agree she was suspended.

[13] The Commission spoke to the Appellant's employer. The employer said it placed the Appellant on unpaid leave. The reason it did so is that the Appellant didn't take the COVID-19 vaccine as mandated in its policy.

[14] In this case, I find that the Appellant's employer placed the Appellant on an unpaid leave of absence. I find the employer didn't do so because the Appellant asked for leave, but because she didn't take the vaccine. So, I find that the Appellant was suspended from her job because she went against her employer's 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.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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.[5]

[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 let go because of that.[6]

[19] The law doesn't say I have to consider how the employer behaved.[7] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[8]

[20] 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.[9]

[21] 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 her employer wrongfully suspended her or should have made reasonable arrangements (accommodations) for her.[10] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See section 30 of the Act.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[22] 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.[11] 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.

[23] 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.[12]

[24] 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 penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.[13]

[25] In a more recent case called *Paradis*, the appellant was let go after failing a drug test.[14] 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.[15]

[26] Similarly, in *Mishibinijima*, the appellant lost his job because of his alcohol addiction.[16] 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

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[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[14] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[16] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

employee did or failed to do; it is not relevant that the employer didn't accommodate them.[17]

[27] 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.

[28] The Appellant says there was no misconduct because she made a moral choice not to take the COVID-19 vaccine based on her religious beliefs. She says not taking the vaccine wasn't intentional or deliberate, but she consciously chose her religious beliefs.

[29] The Commission says that there was misconduct because the Appellant didn't comply with his employer's COVID-19 vaccination policy. It says the Appellant knew about the policy and that going against it could lead to her suspension.

[30] I find that the Commission has proven that there was misconduct, because the Appellant knew that she would be suspended if she went against her employer's COVID-19 vaccine policy. But she chose not to take the vaccine even after her employer denied her request for accommodation.

[31] The Appellant said her employer put her on an unpaid leave of absence. This is consistent with the information in the record of employment (ROE) her employer issued. The last day the Appellant was paid for is January 21, 2022.

[32] The Commission got a copy of the employer's COVID-19 vaccination policy. The policy says employees:

- have to provide proof of full vaccination against COVID-19,

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

- can get an exception to the policy with an approved accommodation on a protected ground under the *Canadian Human Rights Act*,

- who don't have at least a first dose of the COVID-19 vaccine by December 15, 2021, will be placed on a leave of absence without pay, benefits or pension.

[33] The Appellant asked her employer for a religious exemption to the requirement to take the vaccine. She testified about the process her employer used. She said her employer asked her to complete an affidavit in support of her request. The Appellant says this was unreasonable, but eventually she completed it.

[34] The Appellant said her employer invited her to attend an interview with a third party. She testified that she attended the interview, but felt it was more like an interrogation. She also felt that her employer had breached her confidentiality when it shared her information with the third party.

[35] The Appellant testified that on January 7, 2022, she got an email from her employer saying it was unable to accommodate her. The Appellant says she has since filed a complaint with the Human Rights Commission.

[36] The Appellant's employer told the Commission about the Appellant's request for accommodation. The employer said it gave the Appellant extra time to get vaccinated from December 15, 2021, to January 21, 2022, following its decision to deny her request for accommodation.

[37] At the hearing, the Appellant confirmed that she was aware of her employer's COVID-19 policy. She also confirmed that she knew about the unpaid leave of absence if she didn't get vaccinated.

[38] I find from the Appellant's testimony that she knew about her employer's COVID-19 vaccination policy. She knew about the deadlines and the consequences of going against policy.

[39] The Appellant doesn't agree with how her employer assessed her request for accommodation. She testified that the employer assessed her religious beliefs instead of assessing how they could accommodate her. But as noted above, it's not my role to determine whether the employer's denial of the Appellant's request was reasonable.

[40] The Appellant testified that the Commission didn't apply the section of the law that refers to just cause.[18] She explained that her objection to taking the vaccine is based on her religious beliefs. She added that when her employer denied her request for accommodation, she had no reasonable alternative to leave due to discrimination under the *Canadian Human Rights Act*.

[41] I have already found that the Appellant was suspended from her job. So, I don't find that the section of the law the Appellant referred to applies. She believes her employer discriminated against her when it denied her request for accommodation. Whether this true is for another court or tribunal to decide.

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

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

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

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

[18] See section 29(c) of the Act.

Conclusion

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

[46] This means that the appeal is dismissed.

Audrey Mitchell
Member, General Division – Employment Insurance Section