Citation: *KK v Canada Employment Insurance Commission*, 2023 SST 1140

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (530738) dated September 9, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Videoconference
Hearing date:	February 7, 2023
Hearing participant:	Appellant
Decision date:	February 16, 2023
File number:	GE-22-3324

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost her job. The Appellant's employer says that she was let go 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 dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[6] Did the Appellant lose 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 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.

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[1] Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See sections 30 and 31 of the Act.

Why did the Appellant lose her job?

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

[10] The Appellant says she didn't comply with her employer's COVID-19 vaccination policy. She says her employer doesn't have the right to make medical decisions for her.

[11] The Commission says the Appellant didn't abide by her employer's COVID-19 vaccine policy. It says this is why she lost her job.

[12] The Appellant doesn't dispute the reason her employer dismissed her. She thinks the employer's policy requiring vaccination amounts to coercion. Despite the Appellant's argument, which I will address below, I find that she lost her job because she went against her employer's COVID-19 vaccination policy.

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

[13] The reason for the Appellant's dismissal is misconduct under the law.

[14] 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.

[15] 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]

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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.

[16] 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]

[17] 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]

[18] 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.[9]

[19] 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 dismissed 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.

[20] 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.

[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.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[21] 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]

[22] 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]

[23] 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]

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

[25] 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 dismiss 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.

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

[26] The Appellant says there was no misconduct because:

- her employment contract doesn't say her employer has the right to require her to undergo any medical procedure as a condition of her employment,
- her employer unilaterally changed the terms of her contract which is a breach,
- the law gives her the right to bodily autonomy, and her employer can't disregard the law.

[27] The Commission says there was misconduct because the Appellant didn't comply with her employer's COVID-19 vaccination policy. It says the Appellant was aware of what she had to do to keep her job, but she chose not to meet the conditions to remain employed.

[28] I find that the Commission has proven that there was misconduct, because the Appellant knew or should have known that she could lose her job if she went against her employer's COVID-19 vaccine policy. But she chose not to take the vaccine.

[29] The Commission didn't get a copy of the employer's COVID-19 vaccination policy. But the Appellant's employer told the Commission about it. The employer said it told staff in writing in August 2021 about the policy and that they would have to be fully vaccinated. The employer sent a reminder to staff in August to disclose their vaccination status. It said that staff were advised that failure to comply would lead to disciplinary action up to termination of employment.

[30] The employer told the Commission that staff who refused to comply were first suspended and had to complete a learning module on the importance of the vaccine. It said that if staff still didn't comply, they were let go. The employer added that this is why the Appellant was dismissed.

[31] The Appellant confirmed at the hearing that her employer sent emails in 2021. She also sent the Tribunal a copy of a memo the employer sent to staff on October 8,

2021. It was directed to individuals who had not yet complied with its proof of vaccination requirement. It gives some details about the policy including what will happen to staff who go against it. The employer required staff to give proof of vaccination or apply for an accommodation by October 17, 2021. It said that on October 12, 2021, managers would be notified of staff who had not complied with the vaccination policy so that they could plan how to enact progressive discipline.

[32] I asked the Appellant if she knew that she could be suspended and later dismissed if she went against her employer's vaccination policy. She testified that her case is a bit muddled. The Appellant explained that she went on medical leave before the deadline to get vaccinated.

[33] The Appellant said the October 8, 2021 memo doesn't say anything about being dismissed for non-compliance; rather it says pay and benefits will cease. She questions whether this means indefinite suspension.

[34] I give more weight to the employer's statement about having told staff of the consequences of going against its policy than to the Appellant's suggestion that she wasn't sure. I find that the employer's statement to the Commission is consistent with the details its memo of October 8, 2021.

[35] The October 8, 2021 memo doesn't use the word termination, it refers to progressive discipline. It refers to a three-day paid suspension, an unpaid suspension for continued non-compliance, and then an end to pay and benefits. So, I find that the Appellant should have known that discipline beyond suspension was a real possibility if she continued to against the employer's policy.

[36] The Appellant confirmed that she went on sick leave on October 11, 2021. She testified that the university didn't have a procedure in place for people who were on sick leave. She added that her paid sick leave was taken away, which could mean she was suspended. She said the October 8, 2021 memo said the employer would contact staff who are on leave two months before their expected return, but this didn't happen with her.

[37] The Appellant let her employer know on January 6, 2022 that she would return to work on January 10, 2022. She said the employer notified her on January 7, 2022 that she would be place on three days of paid leave beginning January 10, 2022 and that she needed to complete the COVID-19 learning module. She was last paid on January 12, 2022, and then dismissed on February 23, 2022.

[38] Even though the Appellant was on sick leave before the deadline to take the COVID-19 vaccine, she got emails from the employer in August 2021. She also had the employer's October 8, 2021 memo reminding staff of the deadline to be fully vaccinated and the consequences of progressive discipline for non-compliance. So, again, I find the Appellant knew or should have known that she faced dismissal if she didn't take the vaccine.

[39] I also find that the Appellant had enough time to get the vaccine, but she chose not to. She was at work up to six days before the deadline to be fully vaccinated. And I don't find that the employer's statement in the October 8, 2021 memo about contacting staff two months before expected return from sabbatical or leave is relevant to the Appellant's situation. This is because the Appellant already knew what the policy required and what would likely happen if she went against it.

[40] The Appellant argued that her employer breached her employment contract and unilaterally changed the terms and conditions of her employment. She sent the Tribunal a copy of a "Regular Appointment Authorization" from when she started working for the employer. By signing the document, the Appellant accepted the job, and agreed to the employer's conditions of employment as they existed then or "as they may be changed from time to time".

[41] The Appellant referred to a recent, unpublished decision made by a Tribunal Member of the General Division in support of her argument.[18]

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[18] See *A.L. v Canada Employment Insurance Commission*, GE-22-1889.

[42] I am not bound by decisions made by other General Division Tribunal Members. I can adopt the reasoning of such decisions if I find them persuasive. But I don't in this case.

[43] In the *A.L.* case, the appellant worked in an administrative role in a hospital. She decided not to take the COVID-19 vaccine because she has a health condition. Her employer suspended and later dismissed her. The appellant's collective agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[44] The Tribunal Member in *A.L.* found that the Commission had presented no evidence that there was an expressed requirement arising out of the appellant's employment agreement that she take the COVID-19 vaccine. The Member also decided that no evidence had been presented that would suggest that the appellant had an implied duty arising from her employment agreement to be vaccinated.

[45] I find the Appellant's case is different from that in the case she submitted. In the case noted above, the appellant's collective agreement refers to recommended and required vaccines. The Appellant pointed to the one-page document she signed when she accepted her job as her employment contract. But that document states that the conditions of employment could be changed from time to time. And there is no reference to vaccinations.

[46] Despite the difference in the two cases, it is not my role to decide whether the Appellant's employer breached her employment contract by unilaterally changing the terms and conditions of her employment. As noted above, in *McNamara*, *Paradis* and *Mishibinijima*[19] these Court cases make it clear that the focus must be on what a claimant has or has not done.

[47] I don't find that not referring to vaccinations in the one-page document the Appellant signed when she started her job in 1981 means that her employer couldn't create and implement a policy to address an unprecedented pandemic. And I find that

[19] See paragraphs 20 to 24 of this decision above.

going against that policy got in the way of the Appellant carrying out her duties. In the context of laying out its discipline process, the employer said it would "protect health and safety while ensuring that operational requirements are met". I find that the employer intended to do this with its COVID-19 vaccination policy, which the Appellant decided not to follow.

[48] Concerning her belief that her employer breached her employment contract, again, the Appellant can seek recourse at another court or tribunal.

[49] The Appellant testified that she wasn't looking for an exemption from the requirement to take the COVID-19 vaccine; rather, she wanted her employer to accommodate her in other ways, especially since the province announced that it would lift vaccine mandates. She also says her employer's decision to dismiss unvaccinated staff instead of just suspending them like other university employers did is discriminatory.

[50] I understand that the Appellant feels that her employer could have accommodated her by letting her continue to work from home. And I also understand that she doesn't feel her employer was fair to dismiss her when it did. But as already noted, these concerns aren't within my authority to address.

[51] 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 should have known her employer would likely dismiss her, especially since she had already been suspended for not proving she was fully vaccinated. For these reasons, I find that the Commission has proven that there was misconduct.

So, did the Appellant lose her job because of misconduct?

[52] Based on my findings above, I find that the Appellant lost her job because of misconduct.

[53] This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to say if she was vaccinated was likely to cause her to lose her job.

Conclusion

[54] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[55] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section