Citation: *KR v Canada Employment Insurance Commission*, 2023 SST 1236

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. R.
Representative:	Jim Farrell
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (474950) dated May 31, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	November 15, 2022
Hearing participants:	Appellant Appellant's Representative Witness
Decision date:	January 17, 2023
File number:	GE-22-2291

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of her own 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 K. R. worked at a healthcare facility for more than a decade. Her employer implemented a mandatory COVID-19 Vaccination Policy in September 2021 requiring that all employees disclose their vaccination status to the employer.

[4] Employees who were unvaccinated were required to either (1) provide a medical exemption certificate from a licenced health care provider or (2) be fully vaccinated by January 1, 2022.[2]

[5] The Policy provided that employees who did not comply with the Policy by the January 1, 2022 deadline would be "deemed resigned."

[6] The Appellant agrees that she did not comply with the Policy. When her employment ended as a result of this non-compliance, she applied to the Commission for benefits.

[7] The Commission decided that because K. R. was fired for breaching her employer's vaccination policy, she lost her job due to misconduct. The Commission decided that the Appellant was disqualified from receiving EI benefits for this reason and upheld this decision when the Appellant asked for a reconsideration.

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[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[2] GD#-30

[8] Even though the Appellant doesn't dispute why she lost her job, she says that going against her employer's vaccination policy isn't misconduct. K. R. says that she had always been a dedicated and model employee during the more than ten years that she had worked for her employer. She had an "impeccable record"[3] and had just received ten-year service award in the weeks prior to her dismissal. She disputes the characterization of her behaviour as "misconduct" and found it alarming that her work history has now been "tainted" with this kind of allegation.

[9] My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act.*

Issue: Did the Appellant lose her job 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 let you go or suspended you.[4]

[11] 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 K. R. lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

[12] The Commission and the Appellant agree about why the Appellant lost her job.

[13] Although the Record of Employment issued by her employer stated that K. R. had "quit" her job, the Commission accepted the Appellant's stance that she had, in fact, been dismissed.

[14] The Commission and the Appellant both agree that:

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[3] This is from the Appellant's testimony during the hearing
[4] See sections 30 and 31 of the Act.

- The Policy required all employees to be vaccinated by January 1, 2022.
- The Appellant knew about the Policy and its requirement that she be fully vaccinated against COVID-19 by a particular date.
- The Appellant chose not to be vaccinated by the January 1, 2022 deadline.
- The Appellant was told that she could no longer work for her employer as a result of this choice.

[15] Regardless of the Record of Employment, both the Commission and the Appellant concur that K. R. was terminated from her job because she chose not to comply with her employer's COVID-19 vaccination policy.

[16] They both agree that her departure from her job was not voluntary.

[17] I see no evidence to contradict this, and so I find that the Appellant lost her job for this reason.

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

[18] The Appellant's decision not to comply with her employer's vaccination policy amounts to misconduct.

[19] Although the *Employment Insurance Act* doesn't provide an exact definition of the word misconduct, case law (decisions from courts and tribunals) shows us how to determine whether an Appellant's actions and behaviours amount to misconduct under the Act.

[20] In reviewing the decisions by the courts, we find a difference between the common use of the word "misconduct" and the legal meaning of that word in the Employment Insurance context. The Commission bears the burden of proving that the Appellant's refusal to comply with her employer's vaccination policy fits this legal meaning of the word.

The Appellant wilfully violated her employer's COVID-19 Vaccination Policy

[21] Case law establishes that, to be misconduct, the employee's behaviour has to be wilful. This means that the Commission needs to prove that the conduct was conscious, deliberate, or intentional.[5] They do not need to prove that there was deceit or a desire to cause the employer harm.

[22] The Commission says that the Appellant was aware of the Policy and made a choice to remain unvaccinated. This was a wilful, conscious decision to violate her employer's policy.

[23] The Appellant told the Commission that her refusal to get vaccinated was "a personal choice,"[6] that she was not comfortable with how quickly the vaccine was developed[7] and that she was "choosing to wait" to decide if she would get vaccinated.[8]

[24] It would appear that the Commission and the Appellant agree that K. R.'s choice not to follow the Policy was clear and deliberate. I find that to be the case.

The Appellant's behaviour breached a necessary part of her job responsibilities.

[25] The case law also says that misconduct, in the context of the Act, means behaviour that could get in the way of an employee carrying out their duties toward their employer. This means that the Commission also bears the burden of proving that the Appellant's behaviour breached an important and necessary part of their job responsibilities.

[26] The case law does not require that the Commission demonstrate that the behaviour be dangerous, criminal, deceptive, incompetent or unethical in order to amount to misconduct.

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] GD3-18
[7] GD3-36
[8] GD3-36

[27] The Appellant's position is that her choice not to get vaccinated did not render her incapable of performing her job. She points out that she continues to perform exactly the same tasks at another nearby healthcare facility and is able to do so there without having received any vaccines.

[28] The Appellant and the Union Representative that attended with her at the hearing also say that the Policy violates the Collective Agreement (C.A.) that was negotiated with the employer. They argue that the employer was not permitted to make vaccination a requirement of the job because they by unilaterally created the Policy without the input or consent of the Union.

[29] The Appellant also says that her employer could easily have accommodated her. She argues that she should have been permitted to continue to undergo regular COVID-19 testing in lieu of being vaccinated and says that she could have continued to safely performed her job with those accommodations. She argued at the hearing that Pfizer recently confirmed that that vaccination does not prevent transmission of the virus.

[30] In short, the Appellant says that compliance with the Policy was not necessary for her to be able to perform her job. Because of that, the vaccine mandate was not a fair requirement for the employer to impose.

[31] The Commission disagrees. It says that the law does not require that the Commission prove that the employer's decision to implement the Policy was fair.

[32] The Commission says that Tribunal is limited to applying the Employment Insurance Act. It does not have jurisdiction to weigh in on vaccine efficacy or determine if the employer acted reasonably by instituting mandatory vaccination requirements. It argues that other avenues exist for the Appellant to raise these arguments.

[33] I agree with the Commission that I can only decide issues under the Act. I can't make any decisions about whether the Appellant has grounds to dispute her termination under other laws. And it isn't for me to decide whether her employer breached her Collective Agreement or should have made reasonable arrangements to allow her to

continue working.[9] I can consider only one thing: whether what K. R. did or failed to do is misconduct under the Act.

[34] In a Federal Court of Appeal (FCA) case called *McNamara*, the employee argued that he should get EI benefits because his employer wrongfully let him go.[10] He lost his job because of his employer's drug testing policy. He argued that he should not have been fired, since the drug test wasn't justified in the circumstances and because there were no reasonable grounds to believe he was unable to work safely just because he had breached the policy.

[35] The Court in McNamara confirmed that when interpreting and applying the Act in misconduct cases, the focus is clearly on the employee's behaviour, not the employer's. It determined 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.[11]

[36] In a more recent case called *Paradis*, the worker was let go after failing a drug test.[12] 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, and that for these reasons he should not be disqualified from receiving EI benefits.

[37] The FCA repeated their reasoning from *McNamara* and said once again that the *employer's* behaviour wasn't relevant when deciding misconduct under the Act.[13] The question that the Tribunal needs to decide is whether the *employee's* actions are misconduct.

[38] The *McNamara* and *Paradis* cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role isn't to look at the employer's behaviour or

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[9] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[10] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraphs 22 and 23.
[12] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[13] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

policies and determine whether it was right to let K. R. go. Those arguments are more appropriately determined in other forums.

[39] Instead, I have to focus on what the Appellant did or failed to do and whether those behaviours amount to misconduct under the Act.[14]

[40] I find that once the when the employer implemented this vaccination Policy as a requirement for all of its employees, compliance with this Policy became a condition of the Appellant's employment. I find that compliance with the policy became a necessary part of the Appellant's job.

The Appellant knew that breaching the Policy would result in her losing her job.

[41] Finally, the case law also establishes that for behaviour to be misconduct in the context of the Employment Insurance Act, the employee needs to have known that their actions might result in them being fired.

[42] The Appellant was very forthright and consistent throughout this process, from her initial dealings with the Commission right through to her testimony at the hearing. She understood what the Policy required of her, understood the date by which she had to meet those requirements and understood that if she did not comply she would no longer be permitted to work for her employer.

[43] I find that the Commission has proven that K. R. was aware of her employer's policy requiring her to have received two doses of a COVID-19 vaccine by a certain date. She knew that she could be fired for refusing to follow the employer's policy. And she decided not to follow the policy anyway.

Other arguments

[44] The Appellant raised another issue in her submissions. K. R. says she has diligently paid into the EI program for her whole working life and that her decision to

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[14] See also *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5

follow her personal beliefs about her body and her health should not unfairly disqualify her from getting those benefits when she needs them most.

[45] The Employment Insurance Act is an insurance plan. Like other insurance policies, claimants looking to collect benefits under the plan need to meet the specified conditions of the plan.[15] The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. The Tribunal is not authorized to make decisions based on compassion or fairness. It must follow the law and apply the Act.[16]

[46] I find that K. R. has not met the conditions of the insurance policy, as she knowingly engaged in misconduct that caused her to lose her job.

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

[47] Based on my findings above, I find that the Appellant lost her job because of misconduct. The Appellant's actions caused her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job. And she chose not to receive the vaccines anyway.

Conclusion

[48] The appeal is dismissed.

Jillian Evans
Member, General Division – Employment Insurance Section

[15] See *Pannu v. Canada (Attorney General)* 2004 FCA 90
[16] See *Canada (Attorney General) v Knee* 2011 FCA 301