



Citation: *CK v Canada Employment Insurance Commission*, 2023 SST 1699

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: C. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462434) dated March 29, 2022 (issued by Service Canada)

Tribunal member: Edward Houlihan

Type of shearing: In person

Hearing date: August 22, 2023

Hearing participant: Appellant

Decision date: September 22, 2023

File number: GE-23-1462

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 placed on an unpaid leave of absence because of misconduct (in other words, because she did something that caused her to be placed on a leave of absence.). That means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was placed on a leave of absence. The Appellant's employer said that she was placed on a leave of absence because she refused to comply with the employer's mandatory COVID-19 vaccination policy.

[4] The Appellant doesn't dispute that this happened. She says that the leave of absence was a suspension from her job. She says that she knew about the policy and was aware of the consequences if she didn't comply. She refused to comply with the policy because she says it was against her collective agreement and her personal, constitutional, and fundamental rights and beliefs. Also, her employer denied her request for a religious exemption.

[5] The Commission accepted the employer's reason for placing the Appellant on a leave of absence. It decided that the Appellant was placed on a leave of absence because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

¹ Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

Matter I have to consider first.

I will accept the documents sent in after the hearing.

[6] At the hearing the Appellant asked to be allowed to file additional documents she had not included in her appeal. It was documents relating to her request for a religious exemption from the vaccination policy and her employer's refusal to grant the exemption.

[7] The Commission was aware that the Appellant had requested a religious exemption and that it had been denied by the employer.² As there was no prejudice to the Commission, I allowed the Appellant to file the documents within seven days of the hearing. They were filed within the seven-day period. The documents were made part of the Appeal Record as RGD02

[8] The Appellant also referred me to a case of this Tribunal that she says supports her position and that I should consider in my decision.

Issue

[9] Was the Appellant placed on a leave of absence because of misconduct?

Analysis

[10] To answer this question, I have to decide two things. First, I have to determine why the Appellant was placed on a leave of absence. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant placed on a leave of absence?

[11] I find that the Appellant was placed on a leave of absence because she refused to comply with her employer's mandatory COVID-19 vaccination policy.

² See GD4-1

[12] The Appellant doesn't disagree with the Commission about why she was placed on the leave of absence. She says she was put on a leave of absence or suspended because she breached the company COVID-19 vaccination policy ³.

[13] I find that the Appellant was advised on August 25, 2021, by her employer that she had to be fully vaccinated against COVID-19. She had to be vaccinated and report her vaccination status by October 30, 2021⁴.

[14] If the Appellant wanted an exemption from the policy on the grounds of medical or religious reasons, she could apply for an accommodation.

[15] The Appellant knew that if she was not vaccinated or had not been given an exemption from the policy, she would be placed on an unpaid leave without benefits for six months. After that date the employer would reassess whether they would continue the employment relationship ⁵.

[16] The Appellant says she wasn't vaccinated against COVID-19. She didn't apply for a medical exemption, but she says that she did apply for an exemption from the vaccination policy based on religious reasons ⁶.

[17] The employer denied the Appellant's application for an exemption from the vaccination policy based on religious reasons ⁷. The Appellant says she filed a grievance through her union about the employer's refusal of an exemption on religious grounds.

[18] The Appellant says that the employer denied her grievance and her union did not proceed further with the grievance.

³ See GD3-45

⁴ See GD3-26

⁵ See GD3-27

⁶ See GD3-40

⁷ See RGD02-2

[19] I find that the Appellant was placed on a leave of absence because she didn't comply with her employer's vaccination policy. She didn't get vaccinated, and she wasn't given an exemption from the policy.

Is the reason why the Appellant was placed on a leave of absence misconduct under the law?

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

[21] To be misconduct under the law, the conduct has to be wilful. That means that the conduct was conscious, deliberate, or intentional.⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.⁹ 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.¹⁰

[22] 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.¹¹

[23] 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.¹²

[24] The law doesn't say that I have to consider how the employer behaved.¹³ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹⁴

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁰ See *Attorney General of Canada v Secours*, A-352-94.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹³ See Section 30 of the Act

¹⁴ See *Paradis v. Canada (Attorney General)* 2016 FC 1282 *Canada (Attorney General) v McNamara*, 2007 FCA 107.,

[25] I have to focus on the EI Act only. I can't make any decisions about whether the Appellant has options under other laws. Issues about whether the Appellant was wrongfully placed on an unpaid leave of absence or whether the employer should have made accommodations for the Appellant aren't for me to decide.¹⁵ I can only consider whether what the Appellant did or failed to do is misconduct under the Act.

[26] The Commission says that there was misconduct because:

- the employer had a mandatory COVID-19 vaccination policy;
- the Appellant knew that if she wasn't vaccinated and didn't report her vaccination status to her employer she would be placed on an unpaid leave of absence for six months;
- The appellant chose not to follow the policy;
- The refusal to comply with the vaccination policy was the reason she was placed on a leave of absence.

[27] . The Appellant says that there was no misconduct because:

- The policy was unfair and she shouldn't have been required to comply with the policy;
- It was contrary to her employment contract and her collective agreement;
- It required a medical procedure on her person;
- It was contrary to provincial, federal, and international laws.

[28] I find that the Commission has proven that there was misconduct.

¹⁵ See *Canada (Attorney General) v. McNamara*, 2007 FCA 107

[29] I find that the Appellant knew about the employer's mandatory COVID-19 vaccination policy in August 2021. She knew she had to be vaccinated by October 30, 2021 and report it, or she would be placed on an unpaid leave of absence.¹⁶

[30] The Appellant did not request a medical exemption. She did request an exemption on religious grounds that was denied by her employer.¹⁷

[31] The Appellant knew that the consequences of not following her employer's mandatory COVID-19 vaccination policy. She would be placed on an unpaid leave of absence for six months.¹⁸

[32] I find that the Appellant deliberately chose not to follow her employer's mandatory COVID-19 vaccination policy. This was why she was placed on an unpaid leave of absence.

[33] I acknowledge that the Appellant says that she wouldn't be vaccinated as she felt that the COVID-19 vaccines hadn't been proven to be safe or effective. She was also frustrated that she didn't receive answers from her employer.

[34] Unfortunately, this isn't relevant here. As I said earlier, I can only look at what the Appellant did or didn't do and then determine if she knew that her actions could lead to her being placed on a leave of absence.

[35] If the Appellant wishes to pursue these issues further, there are other forums to present her arguments.

Similar Case

[36] The Appellant referred me to a decision by this Tribunal that she says was like her situation¹⁹. She says that in that case the appellant chose not to be vaccinated and the Commission failed to show that she had lost her job because of misconduct.

¹⁶ See GD3-45

¹⁷ See RGD02-3

¹⁸ GD3-27

¹⁹ See *AL v. Canada Employment Insurance Commission* -2022 SST 1428

[37] I note that I am not bound to follow prior decisions of this Tribunal. Each case must be decided on the facts presented. However, the reasoning in the decisions can often be helpful. That is not the case here.

[38] In the decision referred to by the Appellant, the Tribunal member agreed with the appellant. He found that the Commission hadn't proven misconduct when the appellant lost her job because she chose not to be vaccinated.

[39] The member found that the Commission hadn't proven there was a breach of an express or implied duty when the appellant refused to be vaccinated. He also found that there was no legislative requirement that anyone be vaccinated.

[40] I disagree with the reasoning and the decision reached by the Tribunal in that case.

[41] I also note that the Commission appealed the decision to the Social Security Tribunal Appeal Division.²⁰ The Appeal Division allowed the appeal and said that the General Division made an error in law in interpreting the meaning of misconduct under the EI Act.

[42] They found that that the appellant's refusal to comply with the employer's vaccination policy was misconduct under the Act. She was disqualified from receiving EI benefits.

[43] I find the reasoning of the Appeal Division more compelling and in line with the law as I understand it.

So, was the Appellant placed on a leave of absence because of misconduct?

[44] Based on my findings above, I find that the Appellant was placed on a leave of absence because of misconduct.

²⁰ See *Canada Employment Insurance Commission v. AL 2023 SST1032*

Conclusion

[45] The Commission has proven that the Appellant was placed on a leave of absence because of her misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[46] This means that the appeal is dismissed.

Edward Houlihan
Member, General Division – Employment Insurance Section