



Citation: *KZ v Canada Employment Insurance Commission*, 2023 SST 1287

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

## Decision

**Appellant:** K. Z.  
**Representative:** Steven Barker

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (552800) dated January 23, 2023  
(issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** In person  
**Hearing date:** May 25, 2023  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** June 21, 2023  
**File number:** GE-23-695

## Decision

[1] K. Z. is the Appellant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that her employer suspended and then dismissed her because she didn't follow the employer's COVID-19 vaccination policy. I find that the reasons for her suspension and then her dismissal are misconduct under the meaning of the law.

## Overview

[3] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to attest to their vaccination status. To continue working, all employees had to either attest to being vaccinated against COVID-19 or undergo regular rapid testing. The Appellant refused to attest to her vaccination status. She didn't agree to rapid testing and she didn't attest to being vaccinated against COVID-19. So her employer put her on an unpaid leave of absence.

[4] Eventually the employer lifted its vaccination requirement and asked the Appellant to return to work. The Appellant still refused to attest to her vaccination status and didn't return to work. So her employer eventually dismissed her.

[5] The Commission says this means the employer suspended and then dismissed the Appellant for misconduct. The Commission says this is because the Appellant understood her employer's COVID-19 vaccination policy. She knew the policy said she could be suspended or lose her job if she didn't follow the policy. The Commission says she acted deliberately when she refused to follow the employer's policy.

[6] The Appellant disagrees. She says her collective agreement didn't allow the employer to unilaterally impose a COVID-19 vaccination policy and she says her union agrees with this position. She says that her employment contract didn't have an express

or implied duty to comply with any vaccination policy. And so she says she didn't stop working because of misconduct.

## **Issue**

[7] Did the Appellant stop working because of misconduct?

## **Analysis**

[8] To answer the question of whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why did the Appellant stop working?**

[9] I find that the Appellant's employer suspended her from February 28 to July 2, 2022, and then dismissed her in the week starting July 3, 2022. I find that the reasons for her suspension and her dismissal are both misconduct under the meaning of the law.

[10] The law says you can't get EI benefits if your employer suspends you for misconduct. You aren't entitled to EI benefits for as long as your suspension lasts. The Commission calls this a disentitlement.<sup>1</sup>

[11] The law also says that you can't get EI benefits if your employer fires you for misconduct (that is, if you lose your job permanently). The Commission calls this a disqualification.<sup>2</sup> You can't get EI benefits until you work enough hours to requalify for EI benefits.

[12] The Appellant and the Commission both agree that the Appellant's employer suspended her starting February 28, 2022 because she didn't follow her employer's

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<sup>1</sup> Section 31 of the *Employment Insurance Act*

<sup>2</sup> Section 30(1) of the *Employment Insurance Act*

COVID-19 vaccination policy. They agree that the employer expected her to attest to her vaccination status, but she didn't do this.

[13] So I accept that the Appellant's employer suspended her because she didn't follow the employer's COVID-19 vaccination policy. I must decide if her actions are misconduct under the law.

[14] The reason the Appellant continued to be out of work from May 31 to July 2, 2022, and then the reason for her dismissal on July 4, 2022 is more complicated.

[15] The Commission says the Appellant's employer suspended her from May 31 to July 2, 2022, and then dismissed her from July 4, 2022 because she refused to report to work.

[16] The Appellant agrees that her employer asked her to return to work, and she agrees that she didn't return to work. But she says that the underlying reason she didn't return to work was still because of the employer's COVID-19 vaccination policy. She says that, even though the employer said she could return to work, they still expected her to attest to her vaccination status. She says that she refused to attest to her vaccination status because she disagreed with the employer's authority to implement a policy requiring this. So the Appellant says that her suspension continued and then her employer dismissed her because of the COVID-19 vaccination policy.

[17] In the appeal file, there are letters from the Appellant's employer, as well emails between the Appellant, the employer, and her union. They all talk about the reasons the Appellant wasn't working after May 31, 2022.

[18] I agree that the employer's letters and emails refer to the Appellant refusing to return to work. In particular, the dismissal letter says the employer is dismissing the Appellant because she wouldn't report to work and wouldn't arrange a return to work date.

[19] But I also note that the Appellant's letters and emails to her union and her employer all say that she wants to return to work, but that she doesn't want to attest to

her vaccination status as a condition of returning to work. In other words, the employer's COVID-19 vaccination policy continued to be the reason the Appellant wasn't working. It was the root cause of her ongoing suspension and eventual dismissal.

[20] So, I agree with the Appellant's argument. I agree that her continued refusal to follow the employer's COVID-19 vaccination policy was the underlying reason for the Appellant's ongoing suspension and then dismissal.

[21] And so I will consider whether her actions – failing to follow her employer's COVID-19 vaccination policy – were misconduct under the meaning of the law when I look at whether the Commission should disqualify her from receiving EI benefits.

### **Is the reason for the Appellant's suspension and then dismissal misconduct under the law?**

[22] I find that the reason for the Appellant's suspension and then dismissal is misconduct under the meaning of the law.

[23] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> 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.<sup>5</sup>

[24] 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.<sup>6</sup>

[25] 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

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.<sup>7</sup>

[26] The Commission says the reason the Appellant lost her job is misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy. The Commission says she knew that refusing to follow the policy could lead to suspension or even dismissal. And the Commission says her actions in refusing to follow the policy were deliberate and wilful.

[27] The Appellant disagrees. She says that her employer violated the terms of her collective agreement when it introduced the COVID-19 vaccination policy without collective bargaining. She says she disagrees that her employer had the authority to unilaterally change the conditions of her employment to required vaccination or testing. She says there was no express or implied duty to comply with the employer's COVID-19 vaccination policy in her collective agreement or her employment contract.

[28] But I agree with the Commission. I find that the reasons for the Appellant's suspension and then dismissal are misconduct under the meaning of the law. This is because I don't have the authority to consider the terms of the Appellant's collective agreement. I don't have authority to consider whether her employer acted fairly or reasonably when it introduced a COVID-19 vaccination policy. And I find that the fact that the employer had introduced this policy meant that it became part of the Appellant's duty to her employer.

[29] The Appellant and the Commission agree about most of the basic facts in this appeal. They disagree on how the law applies to these facts.

[30] The Appellant and the Commission agree that the employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to attest to their vaccination status. Employees who refused to attest or who weren't vaccinated against COVID-19 had to take regular rapid tests. Employees who didn't follow the

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<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

policy couldn't work. The employer said they would put them on an unpaid leave of absence and then review their employment status.

[31] The Appellant agrees that she understood the policy. Even though she had some questions about details of the policy, she understood the general expectation. She knew the employer expected her to attest to her vaccination status. She knew that if she wasn't vaccinated or didn't attest, the employer expected her to undergo regular rapid testing. She understood that she was at risk of a suspension or dismissal if she didn't follow the policy.

[32] So, I accept the above facts.

[33] The Appellant and the Commission disagree about how the law applies to these facts. The Appellant says that her union didn't agree to the policy. She says her union agrees that the collective agreement didn't give the employer the authority to unilaterally impose this kind of policy. She says that there isn't an express or implied duty to follow this kind of policy in her collective agreement or employment contract.

[34] The Appellant also argues that there is a recent decision from the General Division (GD) of the Tribunal that describes a very similar situation to hers.<sup>8</sup> In this decision, the GD Member found that the worker's employer unilaterally added a new requirement to her employment contract by bringing in a COVID-19 vaccination policy. The GD Member found that neither the worker nor her union had agreed to this new employment condition. The GD Member noted that the worker's collective agreement didn't include any requirement to be vaccinated against COVID-19. In fact, the collective agreement included specific language giving employees freedom to refuse other vaccines.

[35] And so, the GD Member found that the Commission hadn't proven that the worker lost her job because of misconduct. The GD Member found that the Commission

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<sup>8</sup> *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

hadn't proven that the worker committed an express or implied breach of her employment contract.

[36] The Appellant says I should follow this GD decision. She says the elements of this case are very similar to her situation.

[37] I disagree with the Appellant. I am not going to follow the reasoning of this GD decision.

[38] The Tribunal tries to make decisions that are consistent. This means that Tribunal Members should try to follow each others' decisions. But some decisions are outliers. They might interpret the law in a different way. They might use the same case law to reach a novel conclusion. Tribunal decisions aren't binding on other Tribunal Members. But Federal Court and Federal Court of Appeal decisions form part of the law and I have to follow these decisions.

[39] And Federal Court of Appeal and Federal Court decisions consistently say that I can't look at the employer's actions when I am making a decision about misconduct. I can't look at whether the employer should have given the Appellant alternatives to vaccination. I can't make a decision about whether the employer's policy was fair or justified. I can't look at whether the employer's policy violated the terms of her collective agreement. I can only look at the Appellant's own actions and decide if the reasons she lost her job meet the test for misconduct.<sup>9</sup>

[40] And even though other Tribunal decisions aren't part of the law, I must note that there are many GD and Appeal Division (AD) decisions that have looked at similar situations and decided that refusing to get vaccinated against COVID-19 can be

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<sup>9</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraphs 30 and 31 and *Canada (Attorney General) v McNamara*, 2007 FCA 107, paragraphs 22 and 23. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.



misconduct. In particular, many AD decisions agree that there is misconduct when the following conditions are in place:<sup>10</sup>

- The employer has a clear policy about COVID-19 vaccination
- The employer notifies its employees of the policy and gives them enough time to follow the policy
- The policy is clear about the consequences of refusing to follow the policy
- As a result, the employee knows, or reasonably ought to know, that they will probably lose their job if they don't follow the COVID-19 vaccination policy
- Even so, the employee makes a deliberate choice not to follow their employer's COVID-19 vaccination policy

[41] I find that all of these conditions are in place in this appeal.

[42] The Appellant agrees that she knew about her employer's COVID-19 policy. She agrees that she understood the policy, the deadline for following the policy, and the consequences of refusing to follow the policy. The Appellant agrees that the employer told her that she was at risk of suspension or dismissal. So, I find that the Appellant knew that the employer's COVID-19 policy had become a condition of her continued employment. She knew she was likely to lose her job if she didn't follow the policy.

[43] Even so, the Appellant made a deliberate choice not to follow her employer's COVID-19 vaccination policy. Her actions were deliberate.

[44] So, I find that the Appellant's employer suspended and then dismissed her because of misconduct. My decision is consistent with Federal Court and Federal Court

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<sup>10</sup> See, for instance, two recent AD decisions: *SS v Canada Employment Insurance Commission*, 2022 SST 1004 and *MF v Canada Employment Insurance Commission*, 2022 SST 1099. Also see *TH v Canada Employment Insurance Commission*, 2023 SST 183.

of Appeal case law. My decision is also consistent with many other GD and AD decisions.

## **Conclusion**

[45] I am dismissing the Appellant's appeal. I find that the reason for her suspension and the reason for her dismissal are misconduct under the meaning of the law. This means that she can't get EI benefits. She is disentitled during her suspension and she is disqualified starting with the week the employer dismissed her.

Amanda Pezzutto

Member, General Division – Employment Insurance Section