Citation: *KZ v Canada Employment Insurance Commission*, 2023 SST 1361

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (486201) dated June 23, 2022 (issued by Service Canada)

Tribunal member:	Paula Turtle
Type of hearing:	In person
Hearing date:	April 24, 2023
Hearing participants:	Appellant
Decision date:	May 18, 2023
File number:	GE-22-2735

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). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said that she was suspended because she went against its COVID vaccination policy: she did not tell them whether she had been vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against the policy is not misconduct.

[5] The Commission decided that the Appellant was suspended from her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] The Appellant knew the policy required her to tell the employer whether she had been vaccinated. She did not do that and so, she was suspended. But she has a collective agreement. The collective agreement does not say she has to tell her employer about her personal health information.

[7] The Appellant's suspension ended and she went back to work in July 2022.

Issue

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

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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.

Analysis

[9] 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 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?

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

[11] The Appellant told the Commission that she was suspended because she did not tell her employer whether she was vaccinated.

[12] The employer sent her an e-mail dated October 22, 2021. The e-mail and the information attached to it told the Appellant that she had to tell her employer whether she was vaccinated by October 30, 2021. And that she would be suspended if she did not do this.

[13] The Appellant e-mailed her employer on October 30, 2021. She said she would not give the employer her personal health information. She did not tell them her vaccination status.

[14] The employer sent the Appellant an e-mail dated November 4, 2021. The e-mail said she had not told the employer she was fully vaccinated. So, she would be suspended on November 15, 2021.

[15] The November 4, 2021 e-mail also said if she was vaccinated after telling the employer she would not give them her health information, she should let them know.

[16] It is clear from the e-mails between the employer and the Appellant that she was suspended because she would not tell them whether she was vaccinated.

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

[17] The reason for the Appellant's suspension is misconduct under the law.

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] 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.[4]

[19] 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 suspended because of that.[5]

[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.[6]

[21] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has rights that can be enforced under other laws. Issues about whether the Appellant was unfairly suspended or whether the policy was reasonable aren't for me to decide.[7] Those issues can be dealt with by filing a grievance under the collective agreement. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] There is a case from the Federal Court of Appeal (FCA) called *Canada (Attorney General) v. McNamara*.[8] Mr. McNamara was dismissed from his job under his

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

employer's drug testing policy. He argued that he should not have been dismissed because the drug test was not justified under the circumstances, which included that there were no reasonable grounds to believe he was unable to work in a safe manner because of the use of drugs, and he should have been covered under the last test he'd taken. Basically, Mr. McNamara argued that he should get EI benefits because his employer's actions surrounding his dismissal were not right.

[23] In response to Mr. McNamara's arguments, the FCA stated that it has constantly said that the question in misconduct cases is "not to determine whether the dismissal of an employee was wrongful or not, but rather to decide whether the act or omission of the employee amounted to misconduct within the meaning of the Act." The Court went on to note that the focus when interpreting and applying the Act is "clearly not on the behaviour of the employer, but rather on the behaviour of the employee." It pointed out that there are other remedies available to employees who have been wrongfully dismissed, "remedies which sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers" through EI benefits. Those other remedies include filing a grievance, like the Appellant's union has done here.

[24] A more recent decision that follows the *McNamara* case is *Paradis v. Canada (Attorney General)*.[9] Like Mr. McNamara, Mr. Paradis was dismissed after failing a drug test. Mr. Paradis argued that he was wrongfully dismissed, the test results showed that he was not impaired at work, and the employer should have accommodated him in accordance with its own policies and provincial human rights legislation. The Federal Court relied on the *McNamara* case and said that the conduct of the employer is not a relevant consideration when deciding misconduct under the Act.[10]

[25] Another similar case from the FCA is *Mishibinijima v. Canada (Attorney General)*.[11] Mr. Mishibinijima lost his job for reasons related to an alcohol dependence. He argued that, because alcohol dependence has been recognized as a disability, his

[9] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282.
[10] See *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at para. 31.
[11] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

employer was obligated to provide an accommodation. The Court again said that the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration.[12]

[26] These cases are not about COVID vaccination policies. But, the principles in those cases are still relevant. My role is not to look at the employer's conduct or policies and determine whether they were right in dismissing the Appellant. Instead, I have to focus on what the Appellant did or did not do and whether that amounts to misconduct under the Act.

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

- the employer had a vaccination policy
- the employer told the Appellant that the policy required her to tell it whether she had been vaccinated
- the employer sent e-mails and notices to the Appellant to communicate what it expected
- the Appellant knew or should have known what would happen if she didn't follow the policy

[28] The Appellant says the policy is unfair and violates her rights. Her union has filed a grievance about it.

[29] The Commission says it doesn't matter that the vaccination policy is not in her collective agreement. The Appellant knew about the policy. She knew she would be suspended if she did not follow the policy. She decided not to follow the policy.

[30] The Commission says it does not matter that the Appellant and her union think the policy is unfair. The Tribunal's job is not to decide if the policy is unfair. The Tribunal's job is to decide if the Appellant willingly decided not to follow the policy.

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

[31] The Appellant knew the employer had a vaccination policy because people were talking about it at work. She says the employer first told her about the policy by an e-mail dated October 22, 2021. The employer told the Commission they told employees about the policy on September 30, 2021.

[32] The Appellant and the employer disagree about exactly when the employer told her about the policy. But the exact date doesn't matter to my decision. There are two reasons why the exact date doesn't matter to my decision.

[33] First, because the Appellant believes the employer had no right to ask about her about her vaccine status. Hearing about the policy earlier and having more time to get vaccinated would not have changed the Appellant's decision not to tell her employer whether she was vaccinated.

[34] Second, after the employer told the Appellant about the policy on October 22, 2021, the Appellant still had time to tell the employer she was vaccinated, and she did not do so.

[35] I understand that the Appellant believes the employer had no right to information about her vaccination status. But I do not have the power to decide if the employer had the right to ask her to do this. I can only apply the definition of misconduct under the Act. That definition focuses on the Appellant's actions and not the fairness of the employer's policy.

[36] I find that the Commission has proven that there was misconduct, because the Appellant knew about the policy. She had opportunities to comply with the policy. She did not do so. She believed that she did not have to follow the policy because it was unfair and it was not written in the collective agreement.

[37] So the Appellant told the employer she was not going to give them information about her vaccination status. And she understood that she would be suspended if she did not tell the employer that she was vaccinated.

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

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

Conclusion

[39] The Commission has proven that the Appellant was suspended from her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits until her suspension ended.

[40] This means that the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section