Citation: *KA v Canada Employment Insurance Commission*, 2023 SST 1889

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (568134) dated April 14, 2023 (issued by Service Canada)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	September 27, 2023
Hearing participant:	Appellant
Decision date:	October 10, 2023
File number:	GE-23-2070

Decision

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

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

Overview

[3] The Appellant was suspended from, and then lost, his job. The Appellant's employer says he was suspended, and then let go, because he went against its vaccination policy. The Appellant didn't tell the employer that he had been fully vaccinated by the deadline in their policy.

[4] Even though the Appellant doesn't dispute that this happened, he says he did comply with his employer's vaccination policy and got vaccinated. He says he just didn't tell them by the date they required. He feels this is not misconduct.

[5] The Commission accepted the employer's reason for the suspension and then dismissal. It decided that the Appellant was suspended from and then lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Matters I have to consider first

Antedate issue

[6] The Appellant said during the hearing that he thought he had appealed another decision that the Commission had made about antedating his file. I explained that my authority comes from the reconsideration decision. I also explained that he only filed

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

one reconsideration decision with his appeal.[2] That means that if there was another decision made by the Commission, I don't have a copy of it and don't have the Commission's documents or submissions.[3] I explained to the Appellant that my decision would be limited to considering whether or not there was misconduct. I explained that if he had a separate reconsideration decision from the Commission on the Antedate issue, he could file an appeal about that. The Appellant said he understood and wanted to continue with the hearing.

Submitting documents after the hearing

[7] At the hearing, the Appellant said he had documents that were relevant to the issue of misconduct. He said that he could send in his employer's vaccination policy and additional letters he received from his employer between October 2021 and December 31, 2021.

[8] The Appellant said he could send the documents in by no later than October 3, 2023. A letter confirming this was sent from the Tribunal to the Appellant on September 27, 2023.

[9] The Appellant called the Tribunal on September 29, 2023 and confirmed he was aware that he needed to send the documents in. The reason for his call was to inquire about the antedate issue, which, as he was informed at the hearing, was not a live issue for this appeal.

[10] As of the date of issuance of this decision, the Appellant hasn't sent in the documents he said he had.

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[2] See GD2-8.
[3] See GD3-70 the Commission's reconsideration decision. Also, the Commission notes in GD4-2 that the Appellant received another decision in writing but doesn't go into detail. It is also noted that at GD3-32 the Appellant's request for reconsideration to the Commission it only says "[employer's] Misconduct dismissal decision". Therefore, it is unknown if the Commission made a reconsideration decision on any other issue the Appellant may have.

Issue

[11] Was the Appellant suspended from, and then let go, from his job because of misconduct?

Analysis

[12] 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]

[13] To answer the question of whether the Appellant was suspended from and then lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from and then lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended from and then lose his job?

[14] I find that the Appellant was suspended from and then lost his job because he went against his employer's vaccination policy.

[15] The Appellant says he was put on a leave of absence because he didn't get vaccinated against COVID-19. The Appellant testified he was worried about getting the vaccine because he has a heart condition. The Appellant testified he tried to write his employer to ask for an exemption but he never heard back from his employer.

[16] After the suspension, the Appellant left the Country and decided to get vaccinated while in Mexico. The Appellant testified he received both required vaccinations prior to being terminated. But he didn't tell his employer that he had become compliant with their vaccination policy until after he was terminated. The Appellant feels he should be entitled to benefits.

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[4] See sections 30 and 31 of the Act.

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

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

[18] 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 suspension and then 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.

[19] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[5] Misconduct also includes conduct that is so reckless that it is almost wilful.[6] The Appellant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[7]

[20] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being suspended or let go because of that.[8]

[21] The law doesn't say I have to consider how the employer behaved.[9] Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.[10]

[22] The Commission has to prove that the Appellant was suspended from and then lost his job because of misconduct. The Commission has to prove this on a balance of

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[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[7] See *Attorney General of Canada v Secours*, A-352-94.
[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See section 30 of the Act.
[10] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

probabilities. This means that it has to show that it is more likely than not that the Appellant was suspended from and then lost his job because of misconduct.[11]

[23] 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 his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.[12] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[24] 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.[13] 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.

[25] 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.[14]

[26] 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.[15]

[27] In a more recent case called *Paradis*, the Appellant was let go after failing a drug test.[16] 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

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[11] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[15] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.
[16] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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.[17]

[28] Similarly, in *Mishibinijima*, the Appellant lost his job because of his alcohol addiction.[18] 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.[19]

[29] 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 let the Appellant go. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[30] There is also a very recent Federal Court decision, *Cecchetto*,[20] where the Tribunal denied benefits to the appellant because he didn't follow his employer's vaccination policy. The Court found that the Tribunal's role was narrow and was to consider "misconduct" under the EI Act.

What the Commission and the Appellant say

[31] The Commission and the Appellant agree on the key facts of the case. The key facts are the facts that the Commission must prove to show the Appellant's conduct is misconduct within the meaning of the Act.

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

- the employer had a vaccination policy

[17] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[20] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- the employer clearly notified the Appellant about its expectations about getting vaccinated and telling it whether he had been vaccinated
- the employer sent letters to the Appellant several times to communicate what it expected
- the Appellant knew or should have known what would happen if he didn't follow the policy

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

- the Appellant feels he complied with the employer's policy by getting vaccinated prior to December 30, 2021
- the Appellant feels the employer broke several policies

[34] The employer's vaccination policy was implemented on September 7, 2021.[21] The policy required that all employees provide proof to the employer that they had received COVID-19 vaccinations. The policy said if an employee wasn't compliant, their employment would be terminated.

[35] The Appellant testified he was aware of the policy and had read it. The Appellant said he was aware the employer's policy required that him to get vaccinated by October 29, 2021 or he would be suspended from his job. The Appellant didn't get vaccinated by that day and confirms he was suspended from his job on October 30, 2021.[22]

[36] The Appellant testified he was concerned about getting vaccinated. He said he has a heart condition and it worried him that he could have a complication. He felt that he shouldn't be forced into doing something.

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[21] See GD3-47.
[22] The Appellant's Record of Employment (ROE) says the Appellant's last day worked was November 20, 2021 (See GD3-17 and GD3-19). The Appellant testified that wasn't the case. He says his last day worked was October 29, 2021. I accepted the Appellant's testimony on this point.

[37] The Appellant testified he was aware that after he was suspended, he knew he could still continue his employment if he got vaccinated and submitted proof of vaccination by December 30, 2021.[23]

[38] The Appellant testified there were a group of employees that created a group-chat about their suspensions. He said he was waiting to see what happened through his union about the suspension.

[39] While waiting for his union to deal with this, the Appellant decided to leave the Country and went to Playa del Carmen, Mexico. He left Canada on November 27, 2021. The following day the Appellant decided he would get vaccinated. A friend of his found a clinic that was vaccinating people that was about 40 minutes away. They took a cab and got their first COVID vaccine on November 28, 2021 and the second dose on December 28, 2021.[24]

[40] The Appellant came back to Canada on January 6, 2022. The Appellant testified he had mail waiting for him when he got home. Included in the mail was the December 31, 2021 termination of employment letter from his employer.[25]

[41] After coming back to Canada and reading the termination letter the Appellant contacted his manager. He testified he told his manager that he had received both vaccinations by December 30, 2021. The manager told him to contact his union. So, he did.

[42] The Appellant argued he was subsequently put with all the unvaccinated grievances against the employer. He said this isn't right because he was vaccinated by December 30, 2021.

[43] The Appellant said he had a meeting with a manager for the employer and a union representative. The manager told him that his proof of vaccination from Mexico wasn't enough. The manager said he needed to get a Canadian QR code. The

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[23] See GD3-43 the termination letter where this was reiterated by the employer.
[24] See GD2-18.
[25] See GD3-43.

Appellant didn't know to apply for the QR code prior to this meeting. He applied and testified he received the QR code on April 6, 2022 and forwarded it to his union representative.[26]

[44] The Appellant testified he let his employer know he was fully vaccinated only after he returned to Canada on January 6, 2022. He said he wasn't aware of any internet café that he could have emailed his employer. The Appellant also acknowledged that since his suspension on October 30, 2021, he didn't have access to the employer/employee portal.

[45] The Appellant believed his proof of vaccination had to be treated as very high confidentiality and that it couldn't be emailed.

[46] The Appellant said he was in touch with his union steward through text and "WhatsApp". WhatsApp allows people to text over Wi-Fi. The Appellant couldn't give a reason why he didn't contact anyone from the union by text, through WhatsApp or by email once he received his vaccinations.

[47] The employer's policy required that all employees submit proof of having received two doses (or one dose of a single dose series) of the COVID-19 vaccine by no later than December 30, 2021.[27] The Appellant doesn't deny that he didn't submit proof by that date. This means the Appellant wasn't in compliance with the employer's policy.

[48] The Appellant argued he was in compliance with the employer's policy because he got vaccinated by December 30, 2021. Yet, the employer's policy **also** required that employees had to submit proof of vaccination by that date. The Appellant testified he didn't submit proof of vaccination on or before December 30, 2021. This means he wasn't in compliance with his employer's policy.

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[26] See GD2-27 email to union representative and GD2-19 Canadian QR code showing proof of vaccination. This date is different from the July 2022 he seemed to have previously told the Commission. I accept the Appellant's under oath testimony that he got the Canadian proof of vaccination QR code in April 2022.
[27] See GD2-10 and GD2-16.

[49] The Appellant argued his employer broke their policy because they brought back terminated employees who got vaccinated after the dismissal date.[28] Again, I have to focus on what the Appellant did or didn't do. The law doesn't say I have to consider how the employer behaved.[29]

[50] Recently, the Federal Court decided *Cecchetto*.[30] In that case, the Tribunal (both the General and Appeal division) had denied the appellant's appeal for benefits because he did not follow his employer's vaccination policy. The Federal Court found that the Tribunal has a "narrow and specific role to play in the legal system".[31] In that case it was to decide why the appellant had been dismissed and if it was "misconduct" under the EI Act.

[51] The Federal Court also made it clear that a claimant may not be satisfied with the Employment Insurance scheme, but "there are ways in which his claims can properly be advanced under the legal system".[32]

[52] This means there are other avenues open to appellants if they do not feel that their employer was acting within their employment contract/collective agreement. For that reason, I don't have the authority to decide the merits, legitimacy or legality of his employer's vaccination policy. The Appellant testified he has an ongoing grievance through his union against his employer. I am not going to decide whether the employer breached a term in the collective agreement as that is outside of my authority. I am also not going to decide if the employer should have made any kind of exception or accommodation for the Appellant. Again, this is outside of my authority.

[53] The Appellant's argument that his grievance was incorrectly put with those that were unvaccinated is also outside my authority. The Appellant said the grievance

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[28] See GD3-62 AND GD2-29.
[29] See section 30 of the Act and see paragraphs 24 to 30 above.
[30] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[31] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraphs 46 and 47.
[32] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 49.

process is ongoing and his argument about how his grievance was handled is not for this Tribunal.

[54] Again, I have to focus on the Act only. I cannot make any decisions about whether the Appellant has other options under other laws.[33] I can only consider whether what the Appellant did, or failed to do, is misconduct under the Act.

Medical or other exemption

[55] The Appellant says he submitted a request for a medical-based exemption to his employer. He testified he sent the document twice because there was an error in one of the email addresses the first time.[34] The email says the Appellant has a health and safety concern due to a heart condition he has. The Appellant attached a note from his doctor which details the Appellant's diagnosis and that he required hospitalization in 2016.[35] The doctor's note doesn't say anything about the COVID-19 vaccine.

[56] The Appellant says he never received any response from his employer about his email. This means the Appellant didn't have an exemption under his employer's mandatory policy. There is no evidence to the contrary so I accept that the Appellant's testimony on these points.

Elements of misconduct?

[57] I find that the Commission has proven that there was misconduct for the reasons that follow.

[58] There is no dispute that the employer had a vaccination policy. The Appellant knew about the vaccination policy. I find the Appellant made his own choice not to get vaccinated prior to being suspended. The Appellant then also made his own choice not to submit proof of vaccination to his employer before the deadline of December 30, 2021. The Appellant knew the deadline to submit proof of vaccination was December

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[33] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[34] See GD3-44 email about concern with taking vaccine dated November 2, 2021.
[35] See GD2-9.

30, 2021. This means that the Appellant's choice to (first) not get vaccinated and then (second) not submit proof of vaccination was conscious, deliberate and intentional.

[59] The Appellant didn't have an accommodation exemption.

[60] The employer's policy required all employees to disclose their vaccination status and to submit proof of vaccination. The Appellant didn't get vaccinated before getting suspended. Then, once vaccinated, he didn't submit his proof of vaccination by the December 30, 2021 deadline. This means he wasn't in compliance with his employer's policy. That means that he couldn't go to work to carry out his duties owed to his employer. This is misconduct.

[61] The Appellant agreed he was aware that by not getting vaccinated that he would be placed on a suspension. The Appellant also agreed he was aware if he didn't submit proof of vaccination by December 30, 2021, he knew he could be let go. This means the Appellant knew there was real possibility that he could be placed on a suspension and then knew that he could be dismissed.

[62] By not getting vaccinated prior to his suspension and then by not providing his proof of vaccination by the December 30, 2021 deadline, the misconduct, led to the Appellant first getting suspended and then losing his employment.

[63] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Appellant knew there was a mandatory vaccination policy, and didn't follow the policy. The Appellant knew that by not following the policy that he wouldn't be permitted to be at work. This means he couldn't carry out his duties to his employer. The Appellant was also aware that there was a real possibility that he could be suspended and then let go for this reason.

So, was the Appellant suspended from his job, and then lose his job, because of misconduct?

[64] Based on my findings above, I find that the Appellant was suspended and then lost his job because of misconduct.

[65] This is because the Appellant's actions led to his suspension and then dismissal. He acted deliberately. He knew that first refusing to get vaccinated was likely to lead to a suspension. He also knew that once he received the vaccinations by not providing proof of his vaccination by the deadline it was likely to cause him to lose his job.

Conclusion

[66] The Commission has proven that the Appellant was suspended from and then lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[67] This means that the appeal is dismissed.

Elizabeth Usprich

Member, General Division – Employment Insurance Section