



Citation: *KE v Canada Employment Insurance Commission*, 2023 SST 1872

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

# **Decision**

**Appellant:** K. E.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (565968) dated February 17, 2023 (issued by Service Canada)

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**Tribunal member:** Guillaume Brien

**Type of hearing:** Teleconference

**Hearing date:** July 20, 2023

**Hearing participant:** Appellant

**Decision date:** July 20, 2023

**File number:** GE-23-824

## 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 from her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] The Appellant was suspended from her job on June 23, 2022. The Appellant's employer said that the Appellant was placed on unpaid leave of absence for non-compliance with the employer's COVID-19 vaccination policy. The employer also said that the Appellant slipped through the cracks and should have been placed on an unpaid leave of absence for non-compliance with the employer's COVID-19 vaccination policy several months earlier<sup>2</sup>.

[4] Even though the Appellant doesn't dispute that this happened, she raises the following arguments:

- a) When the vaccination policy was implemented, the Appellant was working solely from home, due to her inability to wear a mask. The Appellant's understanding was the vaccine policy applied only to persons working on the employer's premises and not to her since she was exclusively working from home.
- b) The Appellant says her sincere religious beliefs prevent her from being vaccinated, since any intervention/medication that enters her body results in changing God's design.

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<sup>1</sup> Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

<sup>2</sup> See GD3-43.

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

## **Issue**

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

## **Analysis**

[7] 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. Then, I have to determine whether the law considers that reason to be misconduct.

### **Why was the Appellant suspended from her job?**

[8] The Appellant stated she was placed on an unpaid leave of absence for non-compliance with the employer's COVID-19 vaccination program<sup>3</sup>.

[9] The employer confirmed the Appellant was placed on an unpaid leave of absence for non-compliance with the employer's COVID-19 vaccination policy<sup>4</sup>.

[10] I see no proofs to the contrary. I therefore determine that the Appellant was placed on an unpaid leave of absence for non-compliance with the employer's COVID-19 vaccination policy.

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

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

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>5</sup> Misconduct also includes

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<sup>3</sup> See GD3-27.

<sup>4</sup> See GD3-44.

<sup>5</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.<sup>6</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>7</sup>

[13] 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 (or suspended) because of that.<sup>8</sup>

[14] 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.<sup>9</sup>

**- The employer implemented a mandatory COVID-19 vaccination policy that was communicated to the Appellant and the consequences of not complying with the policy were clear**

[15] The Appellant was working for Nova Scotia Health Authority.

[16] On October 6, 2021, the government of Nova Scotia released the COVID-19 Mandatory Vaccination Protocol in High-Risk Settings which was subsequently amended on December 23, 2021. The protocol requires the Employer to require all personnel to provide proof of having received vaccination for COVID-19 before November 30, 2021.<sup>10</sup>

[17] In addition to the protocol, Nova Scotia Health (the employer) developed the COVID-19 Vaccination for Team Members Policy NSHA AD-OHS-5, effective October 19, 2021. As required in the policy, employees not fully vaccinated were placed on an unpaid administrative leave of absence as of December 1, 2021. The policy was

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<sup>6</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>7</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>8</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>9</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

<sup>10</sup> See GD3-41.

brought to the attention of the Appellant via email, Coronavirus communications updates, and managers highlighted information with individual employees<sup>11</sup>.

[18] The employer's mandatory COVID-19 vaccination policy, revised on January 31, 2023, can be found in the Appellant's file<sup>12</sup>.

[19] The Appellant also submitted a copy of the employer's original COVID-19 vaccination policy, effective on October 19, 2021<sup>13</sup>.

[20] The employer's COVID-19 vaccination policy is clear:

- a) This policy describes the standards and expectations for **everyone** working at Nova Scotia Health regarding COVID-19 vaccination.
- b) It states that **all employees must be fully vaccinated** against COVID-19 unless exempted due to a recognized medical contraindication or another protected ground in the Nova Scotia Human Rights Act.
- c) It states that **all employees must provide proof of full vaccination** or approved exception to OHSW by November 30, 2021. Failure to provide proof of full vaccination by that time may initiate **employment consequences** as described in Appendix A.
- d) Appendix A, entitled 'Consequence Process for Employees who are not Fully Vaccinated against COVID-19', states, among other things, that they may be subject to:
  - i) Mandatory unpaid leave for 14 days;
  - ii) Will be required to complete compulsory on-line education about COVID-19 vaccination;

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<sup>11</sup> See GD3-41.

<sup>12</sup> See GD3-46 to GD3-59.

<sup>13</sup> See GD6-4 to GD6-17.

- iii) **Upon completion of the 14 days of unpaid leave, employees who decline full vaccination** or do not submit proof of full vaccination or do not have a valid exemption will receive another notice that they continue to be in non-compliance with the policy and **will remain on unpaid leave until further notice and may be subject to disciplinary action up to and including termination.**

[21] After reading the employer's policy, I determine that the employer's policy was clear and the consequences of not complying with it were also clear.

[22] The Appellant argues that she thought the policy was not applicable to her since she was solely working from home. I do not accept this argument since the policy clearly states that it is applicable to everyone working at Nova Scotia Health. Also, the definition of 'Employee' included in the policy clearly applies to the Appellant: 'A person employed by Nova Scotia Health whose salary and compensation are provided by Nova Scotia Health.' The policy is in no way restricted to employees working in the physical premises of the employer.

[23] The Appellant also argues that vaccination is against her sincere religious beliefs. I do not have jurisdiction to decide if the employer's rejection of the Appellant's exemption request was reasonable. The Appellant's file shows that she made an exemption request<sup>14</sup>, and her exemption request was declined by the employer<sup>15</sup>. She therefore had to comply with the employer's COVID-19 vaccination policy. She did not.

[24] The Appellant also submitted a letter from her Union stating that her unpaid leave is being challenged by the Union and the Collective Agreement in which are her terms and conditions of employment<sup>16</sup>. The Appellant told me that her Grievance was currently awaiting Arbitration and was still unresolved. I do not have jurisdiction to decide the Grievance question as it relates to labour laws while my jurisdiction is under the Employment Insurance Act.

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<sup>14</sup> See GD3-33 to GD3-38.

<sup>15</sup> See GD3-39.

<sup>16</sup> See GD6-3.

[25] After having heard the Appellant and after having reviewed the entire file, I find that the Commission has proven that there was misconduct.

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

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

**Conclusion**

[27] 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.

[28] This means that the appeal is dismissed.

Guillaume Brien  
Member, General Division – Employment Insurance Section