Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 2008

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (549628) dated November 25, 2022 (issued by Service Canada)

Tribunal member:	Laura Hartslief
Type of hearing:	In person
Hearing date:	September 14, 2023
Hearing participants:	Appellant
Decision date:	November 14, 2023
File number:	GE-22-4184

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 her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant lost her job. The Appellant's employer said that she was let go because she failed to provide confirmation of her COVID-19 vaccination status to the employer and because she failed to undergo regular antigen testing as required by the employer's policy.

[4] Even though the Appellant does not dispute either of these two things, she says the following:

- The employer terminated her prematurely because it failed to finalize its vaccination/testing policy prior to her termination;
- The employer terminated her prematurely because it failed to address her safety concerns regarding the antigen testing and failed to conduct a thorough investigation as promised;
- The employer's policy violates her employment contract;
- The employer's policy violates her collective bargaining agreement; and
- The employer's policy violates Public Health's Directive #6.

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

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

Matters I need to Mention First

[6] At the hearing, the Appellant asked to read out a multi-page "presentation" which she says gives a detailed chronology of events. The Appellant included this presentation along with her written submissions to the Tribunal[2]. As the presentation was already submitted prior to the hearing, and as I had already reviewed the Appellant's presentation, I found at the hearing that her reading the presentation would be repetitive and unnecessary. I therefore denied the Appellant's repeated requests to read her presentation aloud at the hearing.

[7] Also, there are two issues outlined in the Commission's decision. First, the Commission decided that the Appellant is disqualified from receiving EI benefits because she was suspended from her employer for misconduct from September 14, 2021, to October 11, 2021[3]. Second, the Commission decided that the Appellant is disentitled from receiving EI benefits because she was terminated from her employment due to misconduct beginning October 12, 2021[4].

[8] At the hearing, the Appellant confirmed that she does not intend to appeal the first issue regarding her suspension from employment. Prior to the hearing, the Appellant sent written submissions to the Tribunal in which she expressed her desire not to pursue this issue[5] and she confirmed this at the hearing. As a result, the only issue before me is whether the Appellant is disentitled from receiving EI benefits because she was terminated from her employment effective October 12, 2021, due to misconduct.

Issue

[9] Did the Appellant lose her job because of misconduct?

Analysis

[10] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant

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[2] See GD8-15 to 24
[3] See GD3-45
[4] See GD3-45
[5] See GD8-15

lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

a) Why did the Appellant lose her job?

[11] I find that the Appellant lost her job because she failed to declare her COVID-19 vaccination status to the employer and she failed to undergo regular antigen testing as required by the employer. I say this because the Appellant agrees that these were the reasons for her termination. I also say this because several pieces of documentary evidence establish that the Appellant was fired for these reasons. These documents are as follows:

- **September 1, 2021** - a detailed memo to all staff which says: "…all staff and physicians who are unvaccinated…will be required to complete mandatory antigen testing. **Beginning next week, this testing will be required once a week and will ultimately increase to twice per week**.[6]" [Emphasis added]

- **September 3, 2021** - a second memo addressed to all unvaccinated staff which says: "As per the message sent on September 1, 2021, you will be required to complete mandatory antigen testing as of September 8, 2021…team members who are non-compliant with testing expectations will be subject to **discipline up to and including termination**.[7]"[Emphasis added]

- **September 16, 2021** – a warning letter addressed directly to the Appellant which says: "Our records show that you are not in compliance with Lakeridge Health's directive because you have not provided proof of full vaccination and you have gone more than a week since the introduction of the antigen testing without having taken an antigen test. **You are hereby put on notice that if you do not bring yourself into compliance immediately you will be disciplined, up to and including the termination of your employment**. You will also be placed on an unpaid administrative leave until such time as you are in compliance.[8]" [Emphasis added.]

- **September 22, 2021** – a letter addressed directly to the Appellant which says: "Despite clearly advising you in our letter of September 16th, 2021 you have failed to either provide proof of full vaccination or take the required

[6] GD3-34
[7] GD3-35
[8] GD3-29

antigen test. You are hereby provided with **a written record of a verbal warning** issued to you for your failure to comply with the Hospital's directive to you. **You are also notified that you are placed on an unpaid administrative leave, effective immediately**. Continued failure to comply with the Hospital's directive **will result in the termination** of your employment for cause based on your willful misconduct, disobedience or wilful neglect of duty.[9]" [Emphasis added]

- **September 28, 2021** – an updated Policy Document distributed to all staff which requires all staff to either get vaccinated or provide a valid medical exemption or undergo weekly antigen testing. This document also says that non-compliance with the policy **will result in disciplinary action up to and including termination**[10].

- **September 29, 2021** – a memo to the Appellant and other non-compliant staff which reminds them that they need to complete antigen testing as per the memo sent out on September 1, 2021[11].

- **October 1, 2021** – a memo to all staff requiring staff to be vaccinated or to undergo weekly antigen testing. Consequences of non-compliance are outlined[12].

- **October 7, 2021** – warning letter to the Appellant which says; "To date, you have failed to bring yourself into compliance. This is a written warning. **You will remain on an unpaid administrative leave until either (a) you bring yourself into compliance, or (b) Tuesday, October 12, 2021, at which time your employment will terminated** for cause based on your wilful misconduct, disobedience or wilful neglect of duty[13]." [Emphasis added]

- **October 12, 2021** – letter of termination to the Appellant which says; "You have failed to bring yourself into compliance by either providing proof of vaccination or undergoing antigen testing at least once weekly per Ontario Directive #6. Therefore, further to our earlier correspondence to you, **effective immediately your employment is terminated**[14]." [Emphasis added]

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[9] GD3-30
[10] GD3-72 to 82
[11] GD3-38 to 40
[12] GD3-41 to 43
[13] GD3-32
[14] GD3-33

[12] There is no dispute that the Appellant received all of these documents either directly or became aware of them through her union or manager as soon as they were released. There is also no dispute that the Appellant read all of these documents and understood their contents.

[13] The Appellant's primary position seems to be that she underestimated the warnings contained in these documents and she did not anticipate that she would actually be terminated until it was too late. However, the Appellant says she intentionally chose not to undergo antigen testing because she was concerned about the health implications of the test itself as she believed the tests contain carcinogenic properties. The Appellant also says she did not disclose her vaccination status to the employer. To emphasize this point, the Appellant refused to declare her vaccination status to me at the hearing. There is no dispute that the Appellant does not have a medical exemption for getting vaccinated.

[14] Based on the Appellant's own testimony and the numerous documents surrounding her termination, I am satisfied that the Appellant was terminated because she failed to undergo regular antigen testing as required by her employer and she failed to declare her vaccination status as required by her employer. The Appellant received numerous warning letters and other correspondence which clearly outlines the employer's expectations and the consequences for failing to adhere to those expectations. Given all of the above, I find that the Appellant was terminated for failing to adhere to her employer's instructions. An analysis of whether the Appellant's behaviour constitutes "misconduct" is outlined below.

b) Is the reason for the Appellant's termination misconduct under the law?

[15] For the following reasons, I find that the reason for the Appellant's termination is considered misconduct under the law.

[16] The *Employment Insurance Act* (Act) does not say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's termination is misconduct under the Act. It sets out the legal test for

misconduct; in other words, it sets out the questions and criteria to consider when examining the issue of misconduct.

[17] The prevailing caselaw says that, in order to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[15] Misconduct also includes conduct that is so reckless that it is almost wilful.[16] The Appellant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[17]

[18] 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 disciplined or let go because of that.[18]

[19] The Commission has to prove that the Appellant was terminated because of misconduct and it 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 terminated because of misconduct.[19]

The Appellant's Actions Were Wilful

[20] There is no dispute that the Appellant's actions were wilful. At the hearing and in her written submissions, the Appellant provided detailed testimony regarding her objections to antigen testing and she provided reasons for those objections. The Appellant wilfully and intentionally chose not to undergo antigen testing, contrary to the employer's policy. The Appellant also admits that she failed to declare her vaccination status contrary to the employer's policy and she did this intentionally. To prove her point, the Appellant also refused to declare her vaccination status to me at the hearing.

[21] Based on the Appellant's own testimony, I am satisfied that the Appellant wilfully and intentionally chose not to declare her COVID-19 vaccination status to the employer

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[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[17] See *Attorney General of Canada v Secours*, A-352-94.
[18] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[19] See *Minister of Employment and Immigration v Bartone*, A-369-88.

and she chose not to undergo regular antigen testing. The Appellant's actions were contrary to the employer's policy and it is these actions that resulted in her being terminated from her job. This means that the Appellant's actions were wilful and do constitute misconduct.

The Appellant Knew Her Actions Had Consequences

[22] For the following reasons, I find that the Appellant knew, or ought to have known, that her conduct could result in a real possibility of being terminated. This aspect of the legal test seems to be the primary objection the Appellant has regarding her termination. The Appellant feels that her termination was premature and she did not anticipate that she would be terminated for her actions; in other words, she says her termination was unexpected and she did not see it coming. The Appellant says that she did not expect to be terminated because the **employer failed to finalize its vaccination/testing policy** prior to her termination. The Appellant also did not expect to be terminated because they **failed to address her safety concerns** regarding the antigen testing and conduct a thorough investigation as promised. I will address each of these two arguments in the following.

A) Did the Employer Fail to Finalize its Policy Prior to Terminating the Appellant?

[23] For the following reasons, I am not satisfied that the employer terminated the Appellant prematurely because it failed to finalize its vaccination/testing policy prior to her termination. The Appellant says that the employer's vaccination/testing policy which came out on June 23, 2021, remained completely unchanged or finalized until September 28, 2021, and she then had no access to these changes until October 21, 2021, which was after her termination. The Appellant maintained her position at the hearing despite also admitting that she received, read and understood all of the documents listed above from September 1, 2021, to October 12, 2021. When questioned about this obvious inconsistency, the Appellant said that many of these documents were "memos and not policies" and she maintained that the employer failed to finalize its vaccination/testing policy until after her termination. For the following reasons, I am not persuaded by the Appellant's testimony on this point.

[24] Although the Appellant says that the documents listed above are all "memos and not policies", I find that her description of these documents is irrelevant. All of the documents outlined above clearly refer to "the message sent on August 19 by President and CEO Cynthia David and Chief of Staff Dr. Tony Stone[20]", or they refer to the employer's vaccination policy[21], or they refer to Provincial Directive 6[22]. This means that all of the documents listed above either contain excerpts from the employer's vaccination policy, or provide guidance about the provincial government's Directive or they contain information from the employer about their approach to vaccinations and/or testing in the workplace. All of these documents contain clear instructions to all of the staff generally and then to the Appellant specifically. Regardless of whether the subject line or the title of each document is "memo" or "policy", the fact remains that each of these documents is designed to inform the staff and the Appellant about the employer's instructions and inform them of the consequences of failing to adhere to those instructions. The Appellant cannot escape the consequences laid out for her by dismissing these documents as "memos and not policies". On the contrary, these documents refer to the employer's policy, they refer to the government's directive and they provide clear instructions regarding the employer's expectations. This means that whether they are called memos or policies is irrelevant.

[25] Next, the Appellant says that she did not take these documents seriously because some of the memos say things like the employer:

> "…is actively **working to finalize** a mandatory COVID-19 Vaccination Policy. Once the policy is finalized, COVID-19 vaccination will be mandatory, unless contraindicated for reasons such as medical exemption, for all Lakeridge Health team members, including employees, privileged staff, contract workers, students, volunteers, and medical trainees[23]." [Emphasis added]

[26] The Appellant says that, because the employer's vaccination policy was not "finalized", she dismissed these memos as premature and she believed she did not

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[20] See GD3-34
[21] See GD3-36
[22] See GD3-41
[23] See GD3-36

have to adhere to the instructions contained in the memos until the employer's policy was finalized. I am not persuaded by the Appellant's position on this point.

[27] Although these documents do say that the employer is "working to finalize" their vaccination policy, these documents also clarify exactly what the conditions of that policy will be and they lay out exactly what the employer's expectations will be in this regard. In other words, these documents essentially say that the employer is still working out the final wording of their policy, but the substantive requirements of that policy are clearly laid out in all of their memos and instructions to employees.

[28] The fact is that the Appellant chose to ignore these documents because a few of them mention that the employer is continuing to "finalize" their vaccination policy. However, by choosing to ignore these documents, the Appellant was willfully blind to their content which was clear and unequivocal. In short, regardless of whether the employer was working to finalize their vaccination policy, the Appellant knew or ought to have known what the employer's expectations were regarding vaccination and testing because those expectations were clearly laid out in all of the documents listed above. This means that, based on the content of these documents, the Appellant knew or ought to have known what the consequences were of failing to adhere to the employer's expectations.

[29] Finally, even if the Appellant is correct and some of these documents are "memos and not policies", all of these documents contain clear instructions from the employer along with deadlines and clear consequences for failing to adhere to the instructions. The fact is that the Appellant chose to ignore the employer's instructions and then experienced the very consequences she was repeatedly warned about. The Appellant cannot escape consequences by simply ignoring the employer's correspondence or choosing to disobey the employer's correspondence because they are "memos and not policies". The Appellant admits that she received, read and understood the employer's correspondence. She then made wilful choices that resulted in consequences. For these reasons, I find that the Appellant knew, or ought to have

known, that her actions would result in her termination and her behaviour therefore constitutes misconduct.

b) Did the Employer Fail to Investigate the Appellant's Concerns?

[30] The Appellant's second argument regarding whether she knew her actions would have consequences is that the employer promised to investigate her health and safety concerns about the antigen testing, but then failed to do so before terminating her. The Appellant says that she refused to conduct regular antigen testing because the swabs used in antigen tests contain ethylene oxide, which is a known carcinogen. The Appellant says she raised these concerns with her employer and they agreed to investigate her concerns. The employer then terminated her prematurely before investigating her concerns as they promised.

[31] The first problem with the Appellant's testimony on this point is that there is no documentary evidence to support her testimony. Even though this employer appears to value written correspondence, there is no memo, policy document, letter, email or handwritten note which confirms that the employer has recognized the Appellant's concerns about antigen testing and has agreed to investigate those concerns prior to administering any disciplinary action. This complete lack of supporting documentation undermines the Appellant's credibility when she says the employer agreed to investigate her concerns before it would administer any disciplinary action including termination.

[32] I would also note that the Appellant's testimony on this point at the hearing was inconsistent and lacked sufficient detail. For example, the Appellant said she spoke to her manager about her concerns with antigen testing, and her manager told her they would look into her concerns and instructed her not to come into work. However, the Appellant could not explain why all of the written correspondence from the employer actually gives the Appellant the opposite instruction that she is to come into work once she has declared her vaccination status and/or received regular antigen testing. The Appellant also could not explain what exactly her manager said to her about the employer's plans to investigate her concerns or the progress of that investigation.

Despite several questions at the hearing about the Appellant's alleged conversations with her manager, the Appellant failed to recount these conversations with sufficient detail and she could not explain why the written documentation tells the complete opposite version of events. In short, I do not find the Appellant credible when she says the employer agreed to investigate her concerns before it would administer any disciplinary action including termination.

[33] Finally, the fact that the employer actually did administer disciplinary action by suspending the Appellant prior to her termination undermines her credibility when she says they agreed to investigate her concerns before they would discipline her for her conduct. The fact that the Appellant continued to violate the employer's vaccination/testing policy even after being suspended without pay suggests to me that the Appellant knew or ought to have known that her choice to violate the employer's policy would likely result in her termination.

[34] Based on the complete lack of supporting documentation and based on the Appellant's lack of credible testimony on this point, I find that the Appellant has provided insufficient evidence to establish that the employer terminated her employment prematurely because it failed to address her safety concerns regarding the antigen testing and conduct a thorough investigation as promised. Instead, based on the evidence before me, I find that the Appellant knew or ought to have known that her choice to violate the employer's vaccination/testing policy would result in disciplinary action up to and including termination. This means the Appellant's behaviour constitutes misconduct under the Act.

The Appellant's Remaining Arguments

[35] The Appellant presented three remaining arguments at the hearing. The Appellant says the employer's vaccination policy violates her employment contract, violates her collective bargaining agreement (the 'CBA') and violates the Public Health's Directive #6. For the following reasons, I am not persuaded by the Appellant's remaining arguments.

[36] The Appellant says that the employer's vaccination/testing policy violates her employment contract because it imposes a "new condition of employment" to which she never agreed. However, the Tribunal does not have the jurisdiction to decide this issue. The only issue before me is whether the conduct that led to the Appellant's termination constitutes misconduct under the *Employment Insurance Act*. The question of whether the employer violated the Appellant's employment contract is a civil law matter and my decision has no impact on any civil law remedy that the Appellant may have against her employer.

[37] Similarly, the Appellant says that the employer's policy violates the CBA in her workplace. However, this is also an issue that is outside the Tribunal's jurisdiction. All I have to consider is whether the conduct that led to the Appellant's termination constitutes misconduct under the *Employment Insurance Act*. The question of whether the employer violated the CBA is a labour law matter and my decision has no impact on any labour law remedy that the Appellant may have against the employer.

[38] For the sake of completeness, I would note that the Appellant's union has filed a personal grievance on her behalf as well as a policy grievance on behalf of a larger group of employees. At the hearing, the Appellant admitted that the union's policy grievance was unsuccessful at arbitration and the union has recommended that they not pursue a judicial review. Although the Appellant's personal grievance is still outstanding, there has been no date for arbitration set yet and no recent communication from the union regarding the status of this grievance.

[39] Finally, the Appellant says that the employer's policy violates the Public Health Directive #6 as established by the provincial government. Once again, this issue is beyond the Tribunal's jurisdiction. My role is to consider is whether the conduct that led to the Appellant's termination constitutes "misconduct" under the *Employment Insurance Act*; which is a federal legislative instrument that governs issues within federal jurisdiction. The question of whether the employer violated any provincial laws is a matter for provincial jurisdiction and my decision has no impact on any remedy that may be available to the Appellant in this regard.

[40] Given all of the above, and based on the evidence before me, I am dismissing the Appellant's remaining arguments regarding whether the employer's policy violates her employment contract, the CBA or the Public Health Directive #6.

The Relevant Caselaw

[41] The Federal Court of Appeal (FCA) has clearly outlined the principles that I must consider as well as what issues are outside my jurisdiction.

[42] For example, in a case called *McNamara*[24], the claimant argued that he should get EI benefits because his employer wrongfully let him go. 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 was not 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.

[43] 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.

[44] 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.

[45] In a more recent case called *Paradis*[25], the claimant was let go after failing a drug test. He argued that he was wrongfully let go, since the test results showed that he was not impaired at work. He said that the employer should have accommodated him based on its own policies and provincial human rights legislation. The Federal Court relied on

[24] See *Canada (Attorney General) v McNamara*, 2007 FCA 107
[25] See *Paradis v Canada (Attorney General)*, 2016 FC 1282

McNamara and said that the employer's behaviour was not relevant when deciding misconduct under the Act.

[46] Similarly, in *Mishibinijima*[26], the claimant lost his job because of his alcohol addiction. 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 failed to accommodate them.

[47] Although these cases are not about COVID-19 vaccination policies, the principles in these cases are still relevant to the matter before me. My role is not to look at the employer's behaviour or policies and determine whether it was right to terminate the Appellant. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[48] Based on the evidence before me, I am satisfied that the Appellant wilfully chose not to declare her vaccination status and not to undergo regular antigen testing. The Appellant also knew that her actions violated the employer's policy in this regard. The Appellant knew or ought to have known that her refusal to report her vaccination status and her refusal to undergo regular antigen testing would cause the employer to terminate her employment. These consequences were clearly communicated to the Appellant and the Appellant knew, or ought to have known, that her behaviour could lead to her termination.

[49] For these reasons, I am satisfied that the Appellant wilfully chose to violate the employer's policy and she knew or ought to have known that her choice would result in her termination. This means that the Appellant's conduct constitutes misconduct.

So, did the Appellant lose her job because of misconduct?

[50] Based on my findings above, I find that the Appellant lost her job because of her misconduct. This is because the Appellant's actions led to her dismissal. She acted

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[26] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

deliberately. She knew that refusing to declare her vaccination status and refusing to follow the testing rules was likely to cause him/her to lose her job.

Conclusion

[51] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[52] This means that the appeal is dismissed.

Laura Hartslief
Member, General Division – Employment Insurance Section