



Citation: *KK v Canada Employment Insurance Commission*, 2023 SST 2029

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

Decision

Appellant: K. K.
Representative: Ian Perry

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (463632) dated April 21, 2022
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference
Hearing date: January 9, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: January 22, 2023
File number: GE-22-1805

Decision

[1] I am dismissing the appeal. I disagree with K. K., the Appellant (Claimant).

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant lost her job because of misconduct (in other words, because she did something that caused her to be suspended and then dismissed). This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was put on unpaid leave (suspended) and then dismissed from her job. The Claimant's employer says she was let go because she didn't comply with their mandatory COVID-19 vaccination policy. She refused to get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against the employer's COVID-19 vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant wasn't entitled to receive EI benefits.

[6] The Claimant appeals to the Social Security Tribunal. She says the employer failed to provide a basis to support that its vaccination policy has any impact on occupational health and safety. She enjoys an enshrined right to bodily autonomy and personal integrity, entrenched in the traditions of common law. She refused vaccination for religious reasons.

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer

¹ See sections 30 and 31 of the *Employment Insurance Act* (EI Act).

must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Adjournments

[8] The Tribunal scheduled the appeal to be heard by videoconference on October 4, 2022. The Claimant requested an adjournment due to a scheduling conflict. I granted the request based on the *Social Security Tribunal Regulations* (SST Regulations), which were in effect at that time.²

[9] The hearing was adjourned to December 7, 2022. But unfortunately, the hearing could not proceed on this date for logistical reasons. The hearing was adjourned to January 9, 2023.

[10] The Claimant and her representative appeared on January 9, 2023. But the Commission didn't appear. I am satisfied the Commission received the Notice of Hearing, which was sent electronically on December 16, 2022. So, I proceed to hear the merits of the appeal, in the absence of the Commission.³

Late document

[11] In the interest of justice, I have accepted the Claimant's documents submitted after the January 9, 2023, hearing.⁴

[12] During the hearing, the Claimant's representative made submissions in reference to another decision made by a Member of this Tribunal.⁵ He requested permission to submit a copy of that decision to form part of the official record. I granted leave to submit that decision. It was received on January 9, 2023.

² Section 11 of the SST Regulations provides that the Tribunal may grant a party an adjournment in cases where the request is supported by reasons, and it is their first request.

³ Section 58 of the *Social Security Tribunal Rules of Procedure* (Rules), which came into force on December 5, 2022, set out when a hearing may proceed in the absence of a party.

⁴ Section 42 of the *Social Security Rules of Procedures* state that after considering any relevant factor, the Tribunal may give a party permission to file documents after the filing deadline.

⁵ *AL v Canada Employment Insurance Commission (CEIC)*, GE-22-1889.

[13] To uphold the principles of natural justice and procedural fairness, a copy of the *AL v CEIC* decision was provided to the Commission. Had the Commission appeared at the hearing as scheduled, they would have been given an opportunity to respond to the submissions made in reference to that decision. So, I find there would be no prejudice to either party if a copy of that decision formed part of the appeal record.

Issues

[14] Did the Claimant lose her job because of misconduct?

Analysis

[15] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.⁶

[16] To answer the question of whether the Claimant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[17] Both parties agree the Claimant was put on leave without pay (suspended) and then dismissed because she refused to be vaccinated by the deadline set out in the employer's mandatory COVID-19 vaccination policy.

[18] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended and then dismissed from her job because she refused to be vaccinated in accordance with the employer's COVID-19 vaccination policy.

⁶ See sections 30 and 31 of the Act.

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

[19] Yes. I find the Commission has proven the Claimant was suspended and dismissed because of her misconduct. Here is what I considered.

[20] To be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸

[21] The Claimant 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.⁹

[22] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.¹⁰

[23] It is the Commission who has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.¹¹

[24] The Commission says there was misconduct for the following reasons:

- On August 20, 2021, the Claimant was clearly advised that proof of being fully vaccinated against COVID-19 was required for her to continue working.
- The Claimant was aware that all employees were required to be fully vaccinated by October 8, 2021, which was later extended to October 22, 2021.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Claimant applied for a religious exemption from the policy, but the employer refused to grant her exemption.
- The Claimant knew she could face discipline up to and including termination of employment if she failed to disclose that she was fully vaccinated by the deadline.

[25] The Claimant agrees that her employer suspended her and then dismissed her as of November 1, 2021, because she failed to comply with the employer's mandatory COVID-19 vaccination policy. She doesn't dispute that her actions were wilful, or that she knew or ought to have known the consequences.

[26] The Claimant says there was no obligation, duty, or expectation, to be vaccinated against COVID-19, arising out of her employment contract. That is the contract she signed when she was hired in a part-time position in 2006. During her 15 years of employment, she was never asked to sign an updated contract. Nor did her employer compel her to get booster shots, a flu vaccination, or inform her of any ongoing requirement for vaccination. She was never told vaccination was a condition of her employment, prior to the employer imposing its COVID-19 vaccination policy.

[27] The Claimant argued that I should allow her appeal and follow the same reasons as those set out in this Tribunal's decision in *AL v CEIC*.¹² She says her circumstances were mostly like those in *AL v CEIC* because

- *AL* worked in health care directly with patients;
- *AL*'s contract of employment, didn't require vaccination against COVID-19;
- *AL*'s employer unilaterally imposed a mandatory COVID-19 vaccination policy; and
- the only difference is that *AL* was a unionize employee.

¹² The Claimant submitted a copy of the Tribunal's decision, *AL v Canada Employment Insurance Commission (AL v CEIC)*, GE-22-1889.

[28] I am not bound by other decisions made by this Tribunal.¹³ This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[29] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on findings regarding the employer's unilateral actions to impose their vaccination policy and whether the Claimant was legally justified in refusing to get vaccinated against COVID-19.

[30] The law doesn't say I have to consider how the employer behaved.¹⁴ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹⁵

[31] Further, the Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹⁶

[32] It is also important to note that I can't make any decisions about whether the Claimant had other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹⁷ I can consider only one thing: whether the Claimant's action or inaction is misconduct under the EI Act.

¹³ I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis*.

¹⁴ See section 30 of the EI Act.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[33] The Claimant argues the Commission failed to meet its burden to prove the employer's COVID-19 vaccination policy was an expressed or implied condition of her employment contract. I disagree.

[34] The Claimant was informed about the employer's vaccination policy, the ongoing changes to that policy, and the consequences of non-compliance. On August 20, 2021, the employer clearly told her they were permanently requiring double vaccination against COVID-19 as of October 8, 2021, for all employees, as a condition of employment. If she was not vaccinated, and had not reported her first and second doses, she would be placed on unpaid leave after October 8, 2021. She was also told she could face discipline up to and including termination of employment. The Claimant's dismissal was the direct result of her non-compliance of the employer's policy.

[35] In my view, the Commission has shown the Claimant lost her job due to misconduct. She didn't lose her job involuntarily because she chose not to comply with the employer's COVID-19 vaccination policy, which is what led to her dismissal. She acted deliberately.

[36] The Claimant was clearly warned that she would be placed on unpaid leave, or prevented from working, if she failed to get vaccinated against COVID-19. So, vaccination was a requirement for her to continue working. Put another way, vaccination against COVID-19 was a condition of continued employment. She was also told that non-compliance with the vaccination policy would result in discipline up to termination. So, I find the Claimant was suspended and then dismissed from her job because of misconduct.

[37] The claim (benefit period) was effective on Sunday, October 31, 2021. The Claimant was suspended as of October 23, 2021. She was dismissed on November 2, 2021, the same week her benefit period started. This means the Claimant is disqualified from receiving EI benefits as of Sunday, October 31, 2021.¹⁸

¹⁸ Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days

Conclusion

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

[39] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

beginning on and including Sunday, or any other prescribed period.” This means the effective date of a disqualification is the Sunday of the week in which the disqualifying event occurred.