



Citation: *SC v Canada Employment Insurance Commission*, 2022 SST 122

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (442486) dated December 16, 2021 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Teleconference

Hearing date: January 17, 2022

Hearing participant: Appellant

Decision date: February 8, 2022

File number: GE-21-2587

Decision

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

[2] Based on the evidence, the Appellant was dismissed because of her own misconduct. The Appellant knew of her employer's vaccination policy requirements and voluntarily failed to comply. Consequently, the Appellant is not entitled to EI benefits because she was suspended for misconduct under s. 31 of the Act.

Overview

[3] The Appellant left her job on October 16, 2021 and applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. At first, it decided that she voluntarily left (or chose to take a leave of absence) from her job without just cause, so it wasn't able to pay her benefits.

[4] After reviewing all the evidence, the Commission then decided that the Appellant was suspended for misconduct for not complying with the employer's vaccination policy.

[5] I must decide whether the Appellant's non-compliance with the employer's vaccination policy constitutes misconduct under the *Act*.

[6] The Commission says that the Appellant could have either submitted a request for exemption from the employer's vaccination policy, or complied with the policy and received two doses of the vaccine.

[7] The Appellant disagrees and states that she refused vaccination because of a medical issue. She also says that she works on the service floor of a hospital and has no contact with patients. She could have been accommodated by frequent rapid testing. She also insists that she was placed on an involuntary leave; the vaccination policy was not part of her employment contract. She states that there was no misconduct; her failure to comply with the vaccination policy was due to sincere and genuine concerns about the possible effects of the vaccine.

Issue

[8] Is the Appellant disqualified from receiving benefits because she was suspended from her job because of misconduct?

[9] To answer this, I must decide if the Appellant's suspension from her job was due to misconduct.

Analysis

[10] First, I must decide whether the Appellant was suspended from her job because of misconduct or if she voluntarily left without just cause.

[11] At first, the Commission said that the Appellant had voluntarily left her job without just cause and disqualified her from receiving EI benefits.

[12] Upon further review of the evidence, the Commission decided that the Appellant's departure from work was a suspension, since the employer initiated the separation. This should be addressed under s. 31 of the *Act* as a suspension for misconduct.

[13] I agree with the Commission on this point: the Appellant has been suspended for misconduct, and is disqualified from receiving benefits. The reasons below explain why.

[14] The question of whether the Appellant stopped working due to voluntarily leaving her job or because of her own misconduct is important because different legal tests apply to each issue. As well, the burden of proof, or the party that must prove the facts, is different for each issue.

[15] The Act deals with misconduct and voluntarily leaving without just cause together. The law states that the loss of employment must be involuntary to qualify for benefits. Put another way, an employee cannot voluntarily put themselves in a position of unemployment.¹

¹ *Hills v. Canada (Attorney General)*, 1988 1 S.C.R. 513

[16] This means that an Appellant is disqualified from receiving EI benefits if the job loss is due to misconduct or if it is due to voluntarily leaving the job without just cause. Because of this, I can find that an Appellant is disqualified from receiving EI benefits due to misconduct or voluntarily leaving as long as the evidence supports the finding.²

[17] An Appellant who voluntarily leaves their job has the burden of proof to show that there was *just cause* for doing so. *Just cause* has a special meaning and is proven when the Appellant can show that there were no reasonable alternatives to leaving the job when they did. Having a good reason to leave a job is not enough to prove just cause.

[18] It is the Commission who has to prove that an Appellant lost their job because of misconduct. To be misconduct under the law, the Commission has to show that the Appellant's conduct was conscious, deliberate or intentional.³

[19] Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Appellant doesn't have to have wrongful intent (in other words, they don't have to mean to be doing something wrong) for the behaviour to be misconduct under the law.⁵

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

[21] The Commission has to prove that the Appellant lost 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 lost her job because of misconduct.

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

[22] I find that the reason for the Appellant's dismissal is misconduct under the law.

² *Canada (AG) v Easson*, Appellant-1598-92; see also *Canada (AG) v Desson*, 2004 FCA 303

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36

⁴ See *McKay-Eden v Her Majesty the Queen*, Appellant-352-94

⁵ See *Mishibinijima*, above footnote 3.

[23] The Appellant was informed that the employer was implementing a vaccination policy by her union. She states that the policy was not clearly communicated by the employer, as she was not advised to regularly check emails and did not get a letter from Human Resources informing her of the consequences of not complying with the policy.

[24] However, the evidence on file reveals that the employer sent many communications to all employees to inform them of the vaccination requirements, the deadline by which employees had to be vaccinated, and the mechanism to request either a medical or a human rights exemption. These communications also outlined the consequences of not complying with the policy.

[25] The Appellant agrees that she was eventually made aware of the requirements. She also agrees that she had no one to turn to, no one to inform her as she really wanted to provide "informed consent" to vaccination. She had serious medical concerns about the vaccine, and had no doctor to answer her questions.

[26] The Appellant testified that there was no misconduct on her part and that her non-compliance was not wilful; there was no disciplinary action. The Appellant says that her failure to comply with the vaccination policy was a sincere and genuine concern about the effects of the vaccine.

[27] The Appellant also states that section 19.02 of her collective agreement states that the employer recognizes that employees have the right to refuse any recommended or required vaccine.

[28] The Commission submits that the Appellant could have taken steps to discuss her concerns with her employer and make them aware of her lack of a medical provider. She could have attempted to take steps to obtain a medical exemption, even if the deadline to do so had passed by the time she turned her mind to this. She could have asked for an extension of time for submitting the exemption request.

[29] The evidence does not show that the employer was ever asked to accommodate the Appellant in any way, given her medical concerns.⁶

[30] The Commission submits that based on the evidence, the Appellant actions were wilful and deliberate. The Appellant was aware of the requirement to be fully vaccinated or submit a medical or a human rights request for exemption by October 15, 2021, and did not do so. This is misconduct under the Act. There is a causal relationship between her suspension and her refusal to get vaccinated.

[31] I find that the Commission has proven that there was misconduct, because:

- The Appellant was aware of the vaccination policy and the date by which she needed to comply with it;
- The Appellant made no real attempt to explore the possibility of requesting a medical or human rights exemption;
- The Appellant wilfully refused to be vaccinated, knowing that this would lead to a suspension or possible dismissal.

[32] While I am sympathetic to the Appellant's circumstances and her genuine concerns about the vaccine's possible effects, I cannot change the law. Based on my findings above, I find that the Appellant was suspended from her job because of misconduct.

Conclusion

[33] I find that the Appellant is disqualified from receiving benefits.

[34] This means that the appeal is dismissed.

Sylvie Charron
Member, General Division – Employment Insurance Section

⁶ See GD2-10, GD3-53 to 80.