



[TRANSLATION]

Citation: *RA v Canada Employment Insurance Commission*, 2022 SST 358

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

Decision

Appellant: R. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (444036) dated December 20, 2021 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Videoconference

Hearing date: March 28, 2022

Hearing participant: Appellant

Decision date: April 22, 2022

File number: GE-21-2584

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. Her employer said she was let go because she refused to be vaccinated against COVID-19. She also refused testing.

[4] The Appellant doesn't dispute that this happened. But she says the employer actually let her go because it refused to accommodate her either by reassigning her to office work or by granting her leave without pay. She also says she doesn't understand how the Commission considers that she committed misconduct when she never had the opportunity to go back to work after her maternity leave.

[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.

Issue

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

Analysis

[7] 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

¹ Section 30 of the *Employment Insurance Act* says that an appellant who loses their job because of misconduct is disqualified from receiving benefits.

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

Why did the Appellant lose her job?

[8] I find that the Appellant lost her job because she refused to comply with her employer's vaccination policy.

[9] The employer told the Commission that the Appellant didn't report for work on June 14, 16, and 17, 2021, because she refused to be vaccinated under a provincial ministerial order then in effect. The employer considered it a job abandonment and proceeded to administratively close the Appellant's file.² It wasn't possible for the Appellant to take leave without pay.

[10] The Appellant disagrees. She says she actually lost her job because the employer refused to accommodate her; she didn't want the vaccine and could not get tested three times a week for family reasons. In addition, she asked to be reassigned, but there was nothing available in her field of study.³ She also argues that two of her colleagues ended up getting an email exempting them from mandatory testing.

[11] In the reconsideration request, the Appellant expressed concern that the vaccine was "experimental." She also raised thyroid problems, confirmed by a copy of tests at GD12. But she didn't see a doctor to get a medical exemption to the vaccine.

[12] The employer added that testing could be done in satellite clinics or in the workplace, but outside working hours unless agreed with the employer.⁴

[13] Finally, the employer said it had to enforce the provincial ministerial order on vaccination, and the Appellant didn't want vaccination or testing.

² GD3-28

³ GD3-31 to 33

⁴ GD3-34

[14] Ultimately, the Appellant said she met all the criteria to qualify for EI, since she wasn't responsible for the loss of her job, she was available to work every day, and she was actively looking for a job. It is unfair to let her go because a ministerial order has been incorporated into the collective agreement.⁵

[15] Additionally, at the hearing, the Appellant testified that she was being punished for not following a ministerial order that was no longer in effect. She criticized the Commission for not contacting her immediate supervisor to fully understand her case and her reasons for refusing to be vaccinated.

[16] I am well aware that the Appellant felt that her employer had to accommodate her. But my role is limited to determining whether the Appellant is entitled to EI benefits, given her continued refusal to comply with the employer's directives.

[17] I find that the Appellant was let go for refusing to be vaccinated or get tested according to the employer's policy.

[18] Both the employer and the Appellant said the Appellant was let go because she wasn't vaccinated and refused testing. There is no evidence to the contrary.

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

[19] The reason for the Appellant's dismissal is misconduct under the law.

[20] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

⁵ GD3-42 and 43

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General v Secours*, A-352-94.

[21] 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 that she could be dismissed for that reason.⁹

[22] 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.¹⁰

[23] The Commission says there was misconduct because the Appellant knew that she had to either be vaccinated or get tested three times a week to be able to go to work. She refused. In the end, the employer sent her a letter, which clearly indicated that her employee file would be administratively closed, meaning she would be dismissed, if she didn't report for work.¹¹

[24] For this reason, I find that the Appellant knew she could lose her job if she didn't report for work. She knew that, to report for work, she needed a vaccine or tests. So, she voluntarily accepted the dismissal as a logical consequence of the refusal to be vaccinated or tested. Her behaviour was wilful because refusing vaccination or testing is conscious and intentional.

[25] The Appellant argues that there was no misconduct because she was never able to go back to work after her maternity leave to commit misconduct. She is disappointed that the employer doesn't want to accommodate her. She is convinced that, during the period when she was required to be vaccinated, the ministerial order was no longer in effect.

[26] In fact, the employer said that the ministerial order was still in effect at the time and cited vaccination as a possible explanation for the fact that two of the Appellant's

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ GD3-22

colleagues had gotten an email saying they were now exempt from testing. The employer added that testing was possible in satellite clinics, not just at the hospital.

[27] I understand that the Appellant argues that it was the ministerial order that prevented her from working. But I have to consider the other side of this coin: It was the voluntary refusal to comply with the ministerial order that prevented the Appellant from reporting for work.

[28] I find that the Commission has proven that there was misconduct because the evidence shows that the Appellant knew that the employer had to enforce the ministerial order on vaccination or mandatory testing. The Appellant refused both vaccination and testing. Refusing to comply with the employer's policy is a wilful act. There is also a direct link between the Appellant's refusal and the dismissal.

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

[29] Based on my findings above, I find that the Appellant lost her job because of misconduct.

Conclusion

[30] The Commission has proven that the Appellant lost her job because of misconduct.

[31] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section