



Citation: *OA v Canada Employment Insurance Commission*, 2022 SST 357

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

Decision

Appellant: O. A.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (445214) dated January 4, 2022
(issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: Teleconference
Hearing date: March 7, 2022
Hearing participant: Appellant

Decision date: April 7, 2022
File number: GE-22-421

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 employment due to her own misconduct. This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was suspended from her job. The Appellant's employer said that she was let go because she refused to get vaccinated in accordance with the employer's vaccination policy.

[4] The Appellant doesn't dispute that this happened. However, she says that she was forced to go on leave; it was not voluntary and there was no misconduct.

[5] At first, the employer had indicated that the Appellant was fired. The Commission decided that the Appellant was disqualified since she was dismissed because of her own misconduct.

[6] The employer then changed the Record of Employment (ROE) to indicate that the Appellant was on a leave of absence. The Commission contacted the employer, who confirmed that the Appellant's job was still available to her should she be vaccinated within 35 weeks from October 1, 2021².

[7] At first, the Commission decided that the Appellant was fired for misconduct. It then changed its original decision to disentitlement for voluntarily leaving without just

¹ Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Subsection 30(1) of the Act states that an Appellant who voluntarily leaves employment without just cause is not entitled to benefits under s. 31 of the Act. Section 31 also addresses what happens when an Appellant is suspended for misconduct.

² See GD3-33 to 37.

cause.³ At the reconsideration stage, this was further reviewed to a suspension for misconduct; however, the disentitlement from receiving EI benefits does not change.⁴

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] At the hearing, we agreed that the Appellant would send in some notes that she prepared. These were received within the allowed timeframe and given the code GD7. This evidence is part of the record and considered in this decision.

Issue

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

[10] To answer this, I have to decide two things. First, I have to determine why the Appellant had to leave her job. Then, I have to determine whether the law considers that reason to be misconduct.

Analysis

Why did the Appellant lose her job?

[11] I find that the Appellant was let go from her job because she refused to comply with her employer's mandatory vaccination policy. The Appellant agrees that she was suspended from her job and put on a temporary lay-off for that reason.

[12] The employer told the Commission that the Appellant was placed on a temporary leave of absence without pay for 35 weeks from October 1, 2021 due to non-compliance with the employer's vaccination policy and no medical or religious exemption. The Appellant can return to her job should she get fully vaccinated. If not, she will be terminated after 35 weeks.

³ See GD3-40 to 43.

⁴ See GD4-4

[13] The policy provided by the employer adds that screening or testing cannot be used as an alternative to vaccination, unless the employee has an approved exemption.⁵

[14] The employer also explained that there were multiple conversations with the Appellant and she was aware of the consequences of refusing to conform to the policy.

[15] In testimony, the Appellant confirms that she did not want to be vaccinated. Prior to the policy being put in place, she followed every protocol that the employer imposed, such as personal protective equipment (PPE), testing and hand washing. She notes that she never refused testing, and in fact was doing rapid testing on her own, contrary to what the Commission has indicated.⁶

[16] I find that the Appellant was suspended from her job and put on a leave of absence by the employer for refusing to comply with her employer's vaccination policy. The Appellant does not dispute that this is what happened.

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

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

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ 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.⁹

⁵ See GD3-26 to 32.

⁶ See GD3-16 to 18 and GD4-1.

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.

[19] 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 because of that.¹⁰

[20] 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.¹¹

[21] The Commission says that there was misconduct because the Appellant knew that refusing vaccination would lead to a suspension and a possible termination of employment. This means that the Appellant's conduct was willful or deliberate. There is a direct causal relationship between the conduct (refusing vaccination) and the suspension.

[22] The Appellant says that there was no misconduct because she did not choose to go on unpaid leave; it was imposed by her employer.

[23] I find that while it is true that the Appellant did not choose to go on leave, the refusal of vaccination was voluntary. The Appellant testified that she did not want to put the vaccine into her body. She also agrees that she knew that suspension and eventual termination were possible outcomes of refusing vaccination. It is in this respect that the leave is voluntary: if you know the outcome of certain actions, and you intentionally act then you voluntarily accept the outcome.

[24] I find that the Commission has proven that the Appellant was suspended from her job because of misconduct. The Appellant had been informed of the employer's vaccination policy and was given time to comply. She voluntarily refused to comply; this is misconduct under the EI Act.

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

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

[25] While I am sympathetic to the Appellant who now has to dip into her retirement funds to survive, I must apply the law and follow the case law as they are.

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

Conclusion

[27] Because of this, the Appellant is disentitled from receiving EI benefits.

[28] This means that the appeal is dismissed.

Sylvie Charron
Member, General Division – Employment Insurance Section