



Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 521

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

Decision

Appellant: J. F.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (442641) dated December 10,
2021 (issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: Videoconference
Hearing date: February 21, 2022
Hearing participant: Appellant

Decision date: March 21, 2022
File number: GE-22-131

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 refused to comply with the employer's mandatory Covid-19 vaccination policy.

[4] The Appellant doesn't dispute that this happened. She says that she works from home and also has a deep belief in natural immunity; she believes that we don't use our natural immunity enough.

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

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

Why did the Appellant lose her job?

[8] I find that the Appellant lost her job because she refused to get vaccinated in accordance with her employer's vaccination policy. My reasons follow.

[9] The Appellant agrees that this is why she was dismissed.

[10] However, the Appellant testified that she does not agree with her employer's policy. She states that she works from home and has had no contact with patients since March of 2020. She objects to the fact that she was not allowed to be tested regularly instead of being vaccinated; there was no accommodation.

[11] The Appellant adds that the employer claims to be following Directive 6, issued by the Province under Section 77.7 of the *Health Protection and Promotion Act* (HPPA), but did not really as it failed to allow an alternative such as regular testing, as outlined in the Directive.²

[12] The Appellant also considers that the employer's policy is unreasonable because she was not accommodated. She could have been made to keep working from home, for example, or asked to submit to regular testing. The Appellant considers that she was fired without just cause and not for misconduct.

[13] The Appellant testified that she has a strong belief in natural immunity. She is not comfortable with the mRNA vaccines; she believes they might weaken the immune system. She did submit a request for an exemption based on her beliefs but it was not accepted by her employer.

[14] I find that the employer drafted a vaccination policy pursuant to Directive 6. The policy applies equally to all employees unless one can prove the need for an exemption based on medical issues or valid human rights grounds.³ The policy was communicated to all staff on September 2, 2021 and made clear that failure to comply would lead to unpaid leave or termination. Employees had until September 9 to disclose their

² See Directive 6, Required Precautions and Procedures 1c), 4a) and b).

³ See GD3-32 to 40.

vaccination status. As of November 1, the employer decided that the Appellant still had not complied with the vaccination policy and so she was fired.

[15] I also find that it was open to the employer not to offer testing as an option, pursuant to paragraph 2 of Directive 6, even if an employee chose to follow the vaccination education sessions offered by the employer. This is confirmed by what the employer indicates in the vaccination policy as found at GD3-38; it is seen there that Covid-19 testing is available only for those who have successfully claimed a medical or human rights exemption.

[16] I conclude from the above that the Appellant was terminated for refusing to comply with the employer's vaccination policy.

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 (the EI Act).

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[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.⁷

[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

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

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

means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.⁸

[21] The Commission says that there was misconduct because the Appellant willingly and knowingly refused to comply with the employer's vaccination policy, knowing that it would lead to termination of her employment.

[22] The Appellant says that there was no misconduct because she was terminated without just cause. She believes that it is not misconduct because the policy is not reasonable.

[23] I find that the Commission has proven that there was misconduct, for the following reasons.

[24] The Appellant agreed that she knew of the employer's vaccination policy. She knew that unless she could obtain an exemption, she would likely lose her job because she did not want to get the vaccine. She was unsuccessful in her quest for an exemption and in her grievance under the collective agreement. The matter is going to arbitration.

[25] I find that given the above, the Appellant made the conscious and deliberate decision to say no to the employer's vaccination policy, and was fired. There is a direct causal link between the conduct and the termination of employment. In exercising her choice, the Appellant accepted the consequences.

[26] I understand that the Appellant is adamant that the employer's policy is not reasonable. This is not something for the Tribunal to decide. My task is to decide why the Appellant was fired and if the conduct in question is misconduct under the EI Act. Anything else is best debated in a civil court or before a labour arbitrator.

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

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

Conclusion

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

[29] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section