



Citation: *GW v Canada Employment Insurance Commission*, 2022 SST 568

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

Decision

Appellant: G. W.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (451201) dated January 6, 2022
(issued by Service Canada)

Tribunal member: Solange Losier
Type of hearing: Teleconference
Hearing date: March 30, 2022
Hearing participant: Appellant
Decision date: April 11, 2022
File number: GE-22-419

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as an Early Childcare Educator (ECE) for around 12 years at a childcare center. The employer first dismissed her on September 30, 2021 because they say she did not comply with their “Covid19 Vaccination & Disclosure policy” (policy).

[4] The Claimant then applied for EI regular benefits identifying that she had been temporarily laid off.² The employer later issued an amended record of employment saying that the Claimant had taken a leave of absence on September 30, 2021.³

[5] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to receive benefits because she was dismissed from employment due to her own misconduct.⁴

[6] The Claimant disagrees with the employer’s decision because she was told that she would be laid off from her job and could receive benefits.⁵ She is not comfortable getting vaccinated and says that the employer could have accommodated her with rapid testing and other protocols.

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

² See application for benefits at GD3-3 to GD3-15.

³ See records of employment at GD3-16 and GD3-20.

⁴ See initial decision dated October 27, 2021 at GD3-19 and reconsideration decision dated January 6, 2022 at GD3-28 to GD3-29.

⁵ See notice of appeal forms at GD2-1 to GD2-9.

Matters I have to consider first

I asked the Commission for more information before the hearing

[7] The Commission referenced the employer's policy in their submissions.⁶ I wrote to the Commission to ask them to provide a copy of the employer's policy.⁷

[8] The Commission wrote back and said that they not have a copy of the employer's policy, but that they relied on the employer's statements to them.⁸ A copy of their reply was shared with the Claimant.

The Claimant provided information after the hearing

[9] At the hearing, the Claimant said that she had a copy of the employer's policy and would submit it. I accepted the post-hearing submission since it was relevant to the issues being decided.⁹ A copy was shared with the Commission.

Issue

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

Analysis

[11] Claimants who lose their job because of misconduct are disqualified from receiving benefits.¹⁰

[12] Claimants who are suspended from their employment because of their misconduct are not entitled to receive benefits until their period of suspension expires. Or, until they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.¹¹

⁶ See Commission's representations at GD4-1 to GD4-7.

⁷ See GD8-1 to GD8-2 and section 32 of the *Social Security Tribunal Regulations*.

⁸ See Commission's response at GD10-1.

⁹ See Claimant's post-hearing submission at GD9-1 to GD9-8.

¹⁰ Section 30 of the *Employment Insurance Act (Act)*.

¹¹ See section 31 of the Act.

[13] 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 why the Claimant is no longer working for the employer. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[14] There were two Records of Employment (ROE) in the file. The first ROE was issued on October 1, 2021 and it said she was “dismissed”.¹² The amended ROE was issued on November 12, 2021 and it said “leave of absence”.¹³

[15] I asked the Claimant about the status of her employment and whether she thought she was on a leave of absence or dismissed. The Claimant testified that she believes she was dismissed and she is not expecting to return to work.

[16] The Claimant denies the employer’s statement that she put any type of pressure on the employer to change the ROE back to a leave of absence.¹⁴ She relies on an email that she sent to the employer asking her to amend the ROE so she can get benefits.¹⁵ She said that the employer has several post-dated monthly cheques¹⁶ for her benefits while off work. She noted that the employer consistently cashes each cheque every month since she stopped working.

[17] I acknowledge the conflicting evidence in the file about the status of the Claimant’s employment. The Claimant wrote in her application that she was laid off.¹⁷ The termination letter in the file says that the Claimant is on a temporary lay off.¹⁸ The employer told the Commission that the Claimant was dismissed, but then she was pressured by the Board and staff to change it to a leave of absence.¹⁹ The Claimant

¹² See record of employment at GD3-16.

¹³ See record of employment at GD3-20.

¹⁴ See supplementary record of claim dated December 2, 2021 at GD3-22.

¹⁵ See email dated November 4, 2021 at GD7-23.

¹⁶ She testified that the monthly amount for her benefits is \$45.08.

¹⁷ See GD3-8.

¹⁸ See undated letter at GD7-2; GD3-18; GD3-22; GD7-23 to GD7-25.

¹⁹ GD3-22.

wrote that the employer's lawyer said she was not dismissed or constructively dismissed.²⁰

[18] I find that it is more likely than not, that the Claimant was not dismissed from her employment, but on a leave of absence. The evidence supports that she is still employed, but on a leave of absence. The Claimant continues to pay for her monthly benefits and is using them, which suggests that the employment relationship was not severed. As well, the amended record of employment identifies that she is on a mandatory leave of absence. This is also consistent with the Claimant's written statement to the Commission.²¹ The Claimant's Witness testified that they were not given a choice and forced to take a leave.

[19] I also acknowledge the conflicting evidence from the employer, but I preferred the other evidence in the file. The employer's letter in the file says that the Claimant is on a temporary lay off.²² The employer then told the Commission the Claimant was dismissed, but then she was pressured by the Board and staff to change it to a leave of absence.²³

[20] I find that the reason the Claimant is on a mandatory leave of absence is because she did not comply with the employer's policy. There was no evidence that she was dismissed for any other reason.

What was the policy?

[21] The employer implemented a covid19 vaccination & disclosure policy. It became effective on September 13, 2021.

[22] A copy of the employer's policy was submitted by the Claimant and is included in the file.²⁴

²⁰ GD7-1.

²¹ See GD3-24.

²² See GD7-2.

²³ See GD3-22.

²⁴ See policy at GD9-4 to GD9-8.

[23] Some of the relevant parts of the policy include:

- a) The Chief Medical Officer of Health directed all licensed childcare programs to develop, implement and ensure compliance with a covid19 immunization disclosure policy.²⁵
- b) The childcare centre was obligated to take all reasonable precautions to protect the health and safety of workers in the workplace including hazards posed by an infectious disease such as Covid19 and associated variants based on the *Occupational Health and Safety Act* (OHSA).²⁶
- c) The policy applied to all employees, volunteers, students and others.
- d) Employees were required to provide the employer with information regarding their vaccination status.
- e) Employees were also required to provide proof and confirmation that they have been fully vaccinated on or before October 30th, 2021.
- f) Employees who do not provide proof of full vaccination are required to submit to regular rapid antigen testing and to provide a negative result to the Centre twice a week up until October 30th, 2021, or full vaccination.
- g) Employees seeking an exemption from the policy for medical reasons, or because of a sincerely held religious belief, or for reasons protected under the *Ontario Human Rights Code*²⁷ must submit a completed “Request for Accommodation” form to the employer.

²⁵ See Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act*, Service Providers in accordance with the *Home Care and Community Services Act, 1994*, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006*, and Ambulance Services within the meaning of the *Ambulance Act, R.S. O. 1990, c. A. 19*.

²⁶ See *Occupational Health and Safety Act*, R.S.O. 1990, Chapter O.1.

²⁷ See Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19.

What were the consequences of not complying?

[24] The policy says that “individuals who are neither fully vaccinated nor enrolled in the rapid screening program by October 30, 2021 cannot be employed by the Centre, unless they have an approved exemption from management. Rapid screening cannot be used as an alternative to vaccination without an approved exemption”.

[25] The policy also has a section called “non-compliance” and it states: “Staff who fail to follow this policy maybe subject to disciplinary action up to and including termination of employment”.²⁸

[26] It states that employees who do not meet the criteria for an accommodation and choose not to be vaccinated, must provide proof of completing an education session approved by the Board of Directors. For those staff who do not meet the criteria for accommodation and choose not to be vaccinated, the Centre may have no other alternative then to place the employee on an unpaid leave or consider disciplinary action up to and including termination of employment.

[27] The Claimant testified that she did not know she would be terminated for her conduct. She explained that when she previously opted not to get the flu shot and there were no consequences. She provided a copy of the employee handbook dealing with sick and infectious illness and showing that staff were encourages to obtain annual flu shot.²⁹

[28] The Claimant said that she complied with the policy because she tested for covid19, submitted her test results and completed the education program. She provided evidence of the testing, results and completion of the education program.³⁰

[29] I asked the Claimant about the letter in the file given by her employyer.³¹ She told the Commission that she was given a letter, but the employer used the term lay off, so

²⁸ See GD9-7.

²⁹ See GD7-29.

³⁰ GD7-9 to GD7-20.

³¹ See GD7-2

she thought that she could still get benefits.³² She does recall getting an email, but did not look through everything while at work. She did notice that it said it would lead to unpaid leave or dismissal, but never expected things to go that far. She also thought there were other alternatives available for her.

[30] I find it more likely than not, that the Claimant knew about the consequences of not complying with the policy by obtaining her first vaccine on September 30, 2021, specifically that she would put on an unpaid leave of absence (or lay off) and possibly dismissed. A staff meeting was also held on September 30, 2021 and the Claimant noted that an email was sent prior to that meeting. While the employer in the may have referred to it as a lay off, the evidence does not support that it was due to a shortage of work, but rather due to non-compliance with their policy.

Was there a reason the Claimant could not comply with the policy?

[31] The Claimant agrees that she did not ask the employer for a medical, religious or creed exemption. She explained that she was not claiming any of these grounds.

[32] Accordingly, I find that the Claimant has not proven that she was exempt from the policy based on medical, religious or creed grounds.

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

[33] I find that the Claimant's dismissal is misconduct under the law.

[34] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³³ Misconduct also includes conduct that is so reckless that it is almost wilful.³⁴ The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.³⁵

³² See GD3-26.

³³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³⁵ See *Attorney General of Canada v Secours*, A-352-94.

[35] 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 that there was a real possibility of being let go because of that.³⁶

[36] The Commission has to prove that the Claimant 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 Claimant lost her job because of misconduct.³⁷

[37] First, the Claimant said that being vaccinated for covid19 was not a job requirement and not part of her employment contract.³⁸ I was not persuaded by this argument because the employer has a right to manage their day-to-day operations, which includes the right to develop and impose policies at the workplace and ensure the safety of employees. I also accept that the Claimant has a right to choose to get vaccinated, or to decline vaccination.

[38] Second, I acknowledge that the Claimant partly complied with the policy because it required her to do antigen testing and the educational session. However, she did not fully comply because she did not provide proof of vaccination by September 30, 2021, or obtain an exemption from vaccination.

[39] Third, I find that the Claimant willfully and consciously chose to not comply with the employer's policy and knew the consequences of not complying would result in her no longer being able to work (whether that was a leave of absence, or dismissal). The Claimant says it was not deliberate conduct, but I disagree because she made a choice not to comply. This resulted in a breach of her duty owed to her employer because she failed to comply with their policy.

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

³⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

³⁸ See 2019 employment contract at GD7-27.

[40] Lastly, I do not accept that the Claimant was being forced to vaccinate, but rather she had a choice. She chose to not get vaccinated for personal reasons and this led to undesirable outcomes, a leave of absence and loss of income.

What if the Claimant disagrees with employer's policy and penalty?

[41] The Claimant advised that she has a lawyer and they are seeking severance from her employer.

[42] I do not have the authority to decide whether the employer breached her rights by putting her on a leave of absence, or whether they could have accommodated her in some other way.

[43] The court has said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.³⁹

[44] The Claimant's recourse is to pursue this action in court, or any other Tribunal that may deal with these particular matters.

³⁹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

Conclusion

[45] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.⁴⁰ In this case, it was not involuntary because the Claimant chose not to comply with the employer's policy for personal reasons and knew that her conduct would eventually lead to her dismissal.

[46] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[47] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

⁴⁰ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.