



[TRANSLATION]

Citation: *LL v Canada Employment Insurance Commission*, 2022 SST 703

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

Decision

Appellant: L. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (459905) dated March 21, 2022 (issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: Teleconference
Hearing date: June 23, 2022
Hearing participant: Appellant

Decision date: July 26, 2022
File number: GE-22-1340

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 says that she voluntarily left her job because she refused to be vaccinated against COVID-19. The employer also says that the Appellant turned down another job.

[4] Even though the Appellant doesn't dispute that she refused the vaccine, she says that she didn't leave her job voluntarily but was actually let go. She also denies turning down another job with the employer.

[5] The Commission accepted the employer's explanation for the Appellant's leaving. It decided that the Appellant lost her job because of misconduct. In other words, the job loss was the result of a wilful choice by the Appellant. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Procedural issue

The Appellant had a support person with her at the hearing

I allowed the support person to say a few words in support of her friend, the Appellant. She didn't offer any new evidence.

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

Why did the Appellant lose her job?

[8] I find that the Appellant lost her job because she refused to be vaccinated according to the employer's policy.

[9] The Commission and the Appellant don't agree on why she lost her job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant refused to be vaccinated.² In addition, the Appellant refused testing as an alternative. The employer, and then the Commission, found that the Appellant initiated the termination of employment by voluntarily refusing conditions that would have allowed her to keep her job.

[10] According to the Commission, the evidence supports both grounds for disqualification from benefits, namely voluntary leaving and/or misconduct.

[11] The Appellant disagrees. She says that the real reason she lost her job is that she isn't vaccinated. She didn't voluntarily leave; she was let go.

[12] I find that the Appellant lost her job because of misconduct. The following reasons explain why.

² See GD3 at pages 9, 20, 38, and 45.

[13] The Appellant agrees that she was let go because she didn't want to be vaccinated.³ In addition, she testified that she didn't see how it was possible for her to get tested, with tests being expensive and results being unavailable for 48 hours.

[14] The Appellant also says that she was aware of the vaccination policy. She has no medical exemption. It wasn't until her last day of work that she was indirectly informed that she would lose her job if she wasn't vaccinated.

[15] The Appellant categorically denies that she was offered an alternative job.

[16] Finally, the Appellant says that she was very fond of her job; she would go back if possible.

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 considered 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

³ See GD2-5.

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, since the Appellant lost her job because of a wilful act, namely refusing to be vaccinated.

[22] The Commission explains that, while voluntary leaving without good cause and misconduct are distinct notions, they both fall under the same provisions of the Act and both result in a disqualification from benefits under section 30(1) of the Act.

[23] The Appellant says that there was no voluntary leaving because she didn't want to leave her job; she was let go because she isn't vaccinated.

[24] I find that the Commission has proven misconduct because the Appellant admits that she was let go for not getting vaccinated. Not getting vaccinated according to the employer's vaccination policy is a wilful and deliberate act. The Appellant knew or should have known that not complying with the employer's policy would mean that she could no longer meet the requirements of her position.

[25] I agree with the Appellant that there is no voluntary leaving in her case. But I understand the Commission's position that, while voluntary leaving without good cause and dismissal are distinct notions, they fall under the same provisions of the Act. In this case, the documentary evidence and the Appellant's testimony clearly show that it was a dismissal.

[26] There is a direct link between the refusal to be vaccinated and the dismissal. It is true that the Appellant has the right to refuse to be vaccinated. But this doesn't include the right to keep her job while in breach of the employer's policy.

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

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

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

[28] I understand that the Appellant has been without income for a considerable period. That is unfortunate. But it must also be understood that the employer has the right to impose policies that are designed to protect the company's employees and clients.

Conclusion

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

[30] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section