



Citation: *ZZ v Canada Employment Insurance Commission*, 2022 SST 597

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

Decision

Appellant: Z. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458251) dated March 12, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference

Hearing date: June 1, 2022

Hearing participant: Appellant (Claimant)

Decision date: June 2, 2022

File number: GE-22-967

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] This means that the Claimant is entitled to receive Employment Insurance (EI) benefits.

Overview

[3] The Claimant worked as a nurse at a long-term care home until the employer put her on an unpaid leave of absence.¹ The Claimant then applied for Employment Insurance (EI) regular benefits.²

[4] The Canada Employment Insurance Commission (Commission) first decided that the Claimant was not entitled to receive EI benefits because she was suspended due to her own misconduct.³ They argue that she did not follow the employer's covid19 vaccination policy.

[5] The Claimant asked the Commission to reconsider that decision.⁴ On reconsideration, the Commission maintained that she was suspended due to her own misconduct.⁵

[6] The Claimant disagrees that it is misconduct because the employer granted her an exemption from the policy for religious reasons.⁶ The employer accommodated her by putting her on a leave of absence.

¹ See record of employment at GD3-15.

² See application for benefits at GD3-3 to GD3-14.

³ See initial decision dated January 14, 2022 at GD3-33.

⁴ See request for reconsideration at GD3-35 to GD3-37.

⁵ See reconsideration decision dated March 12, 2022 at GD3-82.

⁶ See notice of appeal at GD2-1 to GD2-11.

Matter I have to consider first

Misconduct or Voluntary Leave

[7] The Commission’s initial decision and reconsideration decision both identify “misconduct” as the legal issue. However, the Commission’s submissions identify a new issue, namely that the Claimant “voluntarily left her employment without just cause”.⁷

[8] Misconduct and voluntary leave both result in not being entitled to EI benefits.⁸ However, I do not find that the facts of this case support that the Claimant voluntarily left her job. The Claimant testified that she did not voluntarily leave her job on November 29, 2021. She says that the employer approved her religious exemption and accommodated by putting her on a leave of absence.

[9] In any event, even if this case was considered a voluntary leave case, the Commission would have had to first prove that she voluntarily left her job. In my view, they would not have met that test because it was not supported by the evidence in the file and the Claimant’s testimony.⁹

[10] As a result, I find that the only legal issue to be determined is whether the Claimant was suspended from her job due to her own misconduct.¹⁰

Issue

[11] Was the Claimant suspended from her job because of misconduct?

Analysis

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

⁷ See GD4-1 to GD4-8; and section 29 of the *Employment Insurance Act* (EI Act).

⁸ See section 30(1) of the EI Act.

⁹ See GD3-15; GD3-19 and GD3-81.

¹⁰ See section 31 of the EI Act.

¹¹ See section 31 of the Act; a suspension results in a disentitlement to EI benefits.

Why is the Claimant no longer working?

[13] I find that the Claimant is no working because she was put on an unpaid leave of absence on November 29, 2021.

[14] The record of employment shows that she was put on a leave of absence.¹² This is also consistent with the employer's discussion with the Commission and the Claimant's testimony.¹³

What was the employer's policy?

[15] The employer implemented a "covid19 Immunization of workers policy" (policy) on October 7, 2021. A copy of the policy is in the file.¹⁴

[16] The policy required that all workers must disclose proof of their immunization status to the employer by November 15, 2021.¹⁵ It also said all workers must be fully immunized against covid19 by November 30, 2021.¹⁶

Was the policy communicated to the Claimant?

[17] The Claimant agreed that the policy was communicated to her. It was emailed to her sometime in October 2021. The policy was also available at work where all of the other policies were stored.

What were the consequences of not complying with the policy?

[18] The policy says that if employees do not comply, they will be provided with educational materials on the covid19 vaccination and will have an opportunity to discuss their concerns about the covid19 vaccination.¹⁷

¹² See record of employment at GD3-15

¹³ See GD3-21 to GD3-22.

¹⁴ See policy at GD3-43 to GD3-47.

¹⁵ See GD3-43.

¹⁶ See GD3-42.

¹⁷ See GD3-44

[19] It also says that if they remain non-compliant, employees will be placed on an unpaid leave of absence for the period of time to become fully immunized for covid19.

[20] It further states that if the employee remains non-compliant beyond the specified leave of absence period, the employment relationship will be terminated.

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

[21] The policy provides for workplace accommodation if an employee is unable to be immunized for a medical reasons, or other protected reasons and it says that they will be accommodated to the point of undue hardship in accordance with the policy.¹⁸

[22] It provides a process and deadlines for employees to make their request for accommodation, along with the requirement to submit supporting documentation.¹⁹

[23] The Claimant testified that she made a request for accommodation to the employer on the basis of religion.²⁰ She submitted her request on October 15, 2021 and the employer accepted it on November 26, 2021.

[24] The employer's acceptance letter states they accepted her request for an exemption from their policy.²¹ However, they expressed that it would amount to undue hardship to have her attend the workplace while unvaccinated. To accommodate the Claimant, they agreed to put on an unpaid leave of absence effective November 29, 2021. It also states that her record of employment would show that the leave of absence was for medical/religious reasons.²²

¹⁸ See GD3-43 to GD3-44.

¹⁹ See GD3-52 to GD3-53.

²⁰ See GD3-46; GD3-48; GD3-50; GD3-58 to GD3-71.

²¹ See GD3-72 to GD3-74

²² See GD3-76 to GD3-78; GD3-15.

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

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²³ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁴

[26] 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.²⁵

[27] 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 suspended because of that.²⁶

[28] The Commission has to prove that the Claimant was suspended from 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 was suspended because of misconduct.²⁷

[29] I find that the Commission has not proven that there was misconduct for the following reasons.

[30] First, the Claimant was not suspended for misconduct on November 29, 2021. She was put on an unpaid leave of absence after her employer approved her religious exemption.

[31] Second, the Claimant could not have known that she would put on a leave of absence after her religious exemption was approved by the employer. In fact, she expected the employer might accommodate her by allowing to continue working with regular testing and wearing protective equipment. I note that the policy only addresses

²³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁵ See *Attorney General of Canada v Secours*, A-352-94.

²⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

non-compliance consequences for those employees who remain unvaccinated and without exemption.

[32] Lastly, I do not find the Claimant's conduct was wilful, conscious or deliberate. She did not wilfully breach the employer's policy because she followed all of the steps outlined in the policy to ask for an exemption based on a protected ground, in this case religion. This was granted by the employer. This is not misconduct.

Conclusion

[33] The Commission has not proven that the Claimant was suspended from her job because of misconduct.

[34] This means that the appeal is allowed.

Solange Losier

Member, General Division – Employment Insurance Section