



Citation: *DG v Canada Employment Insurance Commission*, 2022 SST 760

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

Decision

Appellant: D. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (455472) dated February 16, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: March 17, 2022

Hearing participant: None

Decision date: March 23, 2022

File number: GE-22-581

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant. This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended because of misconduct (in other words, because she did something that caused her to be suspended). The Commission has also proven that she voluntarily left her job without just cause.

Overview

[3] The Claimant worked at a call centre as a sales specialist for around 13 years. Her work was done remotely from home. The employer put the Claimant on a leave of absence because she did not comply with their covid19 vaccination policy.² The Claimant then applied for Employment Insurance regular benefits.³ She later resigned from her job on December 2, 2021.⁴

[4] The Canada Employment Insurance Commission (Commission) first decided that the Claimant was not entitled to receive benefits because she voluntarily left her job without just cause.⁵ The Commission changed their decision saying that the leave of absence was a suspension due to her own misconduct.⁶ After she resigned from her job, the Commission modified their decision again saying that she voluntarily left her job without just cause.⁷

[5] The Claimant disagrees because she was forcefully placed on a leave of absence.⁸ She argues that the vaccine was not medically safe based on her own

¹ See section 30(1) of the Employment Insurance Act (EI Act) and section 31 of the EI Act.

² See "covid19 proof of vaccination policy" at GD3-33 to GD3-36.

³ See application for benefits at GD3-3 to GD3-18.

⁴ see resignation letter dated December 2, 2021 at GD14-1 to GD14-2.

⁵ See initial decision dated January 18, 2022 at GD3-23.

⁶ See reconsideration decision dated February 16, 2022 at GD3-40 to GD3-41.

⁷ See supplementary representations at GD18-1 to GD18-5.

⁸ See notice of appeal forms at GD2; GD2A and GD2B.

research. She is also experiencing significant financial hardship and is asking for the benefits to be released immediately.

Matters I have to consider first

The Claimant asked to have this case expedited

[6] The Claimant asked the Tribunal to expedite this case because she was experiencing significant financial hardship.⁹

[7] I scheduled the case at the earliest available date on March 17, 2022 at 6:00pm (Atlantic Time).¹⁰ I sent her a reminder letter about the hearing date and to let her know that a decision will follow approximately in approximately 15 days after the hearing.¹¹

[8] The Claimant wrote back to the Tribunal requesting that a decision be made on the record.¹² She noted that she had reviewed the website. She saw that some decisions can be made without a hearing when all the information is part of the file. I wrote to the Claimant and denied her request for a decision on the record because of the complexity of this case.¹³

The Claimant and the Commission did not attend the hearing

[9] The Claimant and the Commission did not attend the hearing, even though both parties received notice of the hearing.¹⁴ A hearing can go ahead without the Claimant if they got the notice of hearing.¹⁵ So, the hearing took place when it was scheduled, but without either party. I sent the parties a letter after the hearing advising that neither party attended the hearing and a decision would now follow.¹⁶

⁹ See emails at GD6-1 to GD6-2; GD7-1 to GD7-2; GD8-1 to GD8-2; GD10-1 to GD10-2; GD16-1 to GD16-2; GD1-1 to GD17-2.

¹⁰ See notice of hearing at GD1-1 to GD1-3.

¹¹ See letter dated March 10, 2022 at GD13-1 to GD13-2.

¹² See email dated March 15, 2022 at GD16-1 to GD16-2.

¹³ See letter dated March 17, 2022 at GD19-1 to GD19-3.

¹⁴ The notice of hearing was emailed to both parties on March 9, 2022; see GD1-1 to GD1-3.

¹⁵ Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

¹⁶ See letter dated March 18, 2022 at GD20-1 to GD20-2.

The Claimant sent post-hearing documents after the hearing

[10] The Claimant sent various emails after the hearing took place.¹⁷ I accepted them because they simply restated her existing position. However, I did write her a letter advising that I would no longer permit any further documents, unless she can establish that it was relevant to the legal issues being decided.¹⁸

Issues

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

[12] Did the Claimant voluntarily leave her employment without just cause?

Analysis

[13] To answer the question of whether the Claimant was suspended because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended job. Then, I have to determine whether the law considers that reason to be misconduct.

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁹ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁰ The Claimant does not 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.²¹

[15] 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.²²

¹⁷ See GD21; GD22; GD23; GD24.

¹⁸ See letter dated March 22, 2022 at GD25-1 to GD25-2.

¹⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²¹ See *Attorney General of Canada v Secours*, A-352-94.

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[16] The Commission has to prove that the Claimant was suspended because of misconduct.²³ 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 from her job because of misconduct.²⁴

Why was the Claimant on a leave of absence from her job?

[17] I find that the Claimant was placed on an unpaid leave of absence from her job because she did not comply with her employer's covid19 vaccination policy. This is consistent with her statements to the Commission and the employer's statement to the Commission.

[18] However, it is not clear to me exactly which date she was forced to take a leave of absence. Based on my review of the file, it is likely around late November 2021 or early December 2021. Her application for benefits says that her last day of work was November 24, 2021.²⁵ The record of employment identifies that her last day paid was December 2, 2021.²⁶

What was the employer's covid19 vaccination policy?

[19] The employer imposed a covid19 vaccination policy.²⁷ In this decision, I will refer to this as "policy" only.

[20] The policy required that all employees have one dose of the covid19 vaccine by November 24, 2021 and both doses by January 24, 2022. It allowed for an exemption based on a ground protection by applicable human rights legislation.

[21] The vaccine policy was applicable to all employees, even those working remotely because they may be required to come into the office on short notice.

²³ See section 31 of the EI Act.

²⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁵ See GD3-8.

²⁶ See record of employment at GD2A-2.

²⁷ See "covid19 proof of vaccination policy" at GD3-33 to GD3-36.

Was the policy communicated to the Claimant?

[22] I find that the policy was first communicated to the Claimant by email on October 14, 2021. This is consistent with the employer's statement to the Commission.²⁸

[23] The Claimant also told the Commission that she was emailed in October 2021 about the upcoming vaccine mandate.²⁹ She noted that her manager sent a reminder in November to provide proof of vaccination or put an accommodation or exemption request.³⁰

What were the consequences of not complying with the policy?

[24] I find that the Claimant knew that she was going to be placed on a leave of absence for not complying with the policy.

[25] The policy states that "if employees have not submitted the applicable proof of vaccination by the aforementioned dates³¹, they will not be able to attend work for (Company X) beyond the deadline, and will be placed on an unpaid leave".³²

[26] The Claimant told the Commission that she knew that if she did not comply with the policy it would lead to a leave of absence.³³ She acknowledged receiving an email one day prior to the deadline saying that a failure to provide proof of vaccination meant she would go a leave of absence.

[27] The employer also told the Commission that a failure to comply with the vaccination policy would result in her being placed on a leave of absence.³⁴

²⁸ See supplementary record of claim dated February 14, 2022 at GD3-32.

²⁹ See supplementary record of claim dated February 15, 2022 at GD3-37 to GD3-38.

³⁰ See supplementary record of claim dated January 18, 2022 at GD3-22.

³¹ November 24, 2021 and January 24, 2022.

³² See GD3-33.

³³ See supplementary record of claim dated February 15, 2022 at GD3-37 to GD3-38.

³⁴ See supplementary record of claim dated February 14, 2022 at GD3-32.

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

[28] I find that the Claimant has not proven she was eligible for a medical or religious/creed exemption.

[29] The Claimant told the Commission that she does not find the vaccination to be medically safe after doing some of her own research.³⁵ She admitted to the Commission that she did not apply for a medical or religious exemption as she did not fall into any of those groups.³⁶

[30] The Claimant did tell the Commission that she applied for an exemption because she does not have contact with others while working from home.³⁷ She said that her request was denied by the employer.

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

[31] The Claimant has submitted several articles to show that the covid19 vaccination has adverse affects.³⁸ The Claimant wants me to decide that the vaccine is not medically safe, so she was justified in not taking the vaccine.

[32] If the Claimant had proven that she was exempt from taking the vaccine, I may have accepted that she was not bound by the employer's policy and it was not misconduct. However, she has not proven this.

[33] It is clear that the Claimant disagrees with the employer's policy and their decision to put her on a leave of absence.

[34] However, I cannot decide whether the employer wrongfully put her on a leave of absence. The court has already said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It has to

³⁵ See supplementary record of claim dated January 18, 2022 at GD3-22.

³⁶ See supplementary record of claim dated February 15, 2022 at GD3-37 to GD3-38.

³⁷ See supplementary record of claim dated February 15, 2022 at GD3-37 to GD3-38.

³⁸ See GD9-1 to GD9-40; GD11-1 to GD11-41; GD15-1.

determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.³⁹

[35] The Claimant's only recourse is to pursue this action in labour arbitration, the courts and/or any other Tribunals that deal with these types of matters.

The Commission has proven that there was misconduct

[36] I find that the Claimant made a conscious and deliberate decision, when she chose not to comply with the employer's policy. This was a breach of her duties. She made a personal decision and it had unfavourable consequences, resulting in her unpaid suspension. The Claimant knew that she would be suspended if she did not comply with the policy.

[37] I accept that the employer has a right to manage their day-to-day operations, which includes the right to develop and impose policies at the workplace. I also accept that the Claimant has a right to choose to get vaccinated, or to decline vaccination.

[38] 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 and knew she would be put on a leave of absence for her conduct.

The Claimant voluntarily left her job without just cause

[39] In the alternative, I have to decide whether the Claimant voluntarily left her employment without just cause and consider if there were any reasonable alternatives.⁴¹

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

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

⁴¹ See section 29(c) of the EI Act; see section 30(1) of the EI Act.

[40] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you did not have just cause.⁴² Having a good reason for leaving a job is not enough to prove just cause.

[41] The law explains what it means by “just cause.” The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.⁴³

[42] It is up to the Claimant to prove that she had just cause.⁴⁴ She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that her only reasonable option was to quit. When I decide whether the Claimant had just cause, I have to look at all of the circumstances that existed when the Claimant quit.

[43] I find that the Claimant voluntarily left her job on December 2, 2021 while she was on a leave of absence. This is consistent with her resignation letter to the employer in the file.⁴⁵

[44] Having regard to all the circumstances, the Claimant has not proven that the requirement to be vaccinated was a working condition that constituted a danger to health or safety.⁴⁶

[45] The Claimant has not proven that it was a significant change in her work duties either, or that the employer’s practices are contrary to the law.⁴⁷ While her original contract may not have required a covid19 vaccination, the employer could not have foreseen 13 years ago that a pandemic would occur. Furthermore, the employer is permitted to develop workplace policies in order to protect the health and safety of others.

⁴² Section 30 of the *Employment Insurance Act* (Act) explains this.

⁴³ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.

⁴⁴ See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.

⁴⁵ See GD14-1 to GD14-2.

⁴⁶ See section 29(c)(iv) of the Act.

⁴⁷ See sections 29(c)(ix) and 29(c)(xi) of the Act.

There was a reasonable alternative

[46] I find that a reasonable alternative would have been to remain on the leave of absence with her employment instead of quitting her job.

Conclusion

[47] Based on my findings above, I find that the Claimant was suspended job because of misconduct. In the alternative, the Claimant voluntarily left her employment and did not have just cause because there was a reasonable alternative.

[48] Because of this, the Claimant is not entitled to receive EI benefits from December 6, 2021.

[49] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section