



Citation: *GD v Canada Employment Insurance Commission*, 2022 SST 958

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

Decision

Appellant: G. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (444151) dated December 16, 2021 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: March 17, 2022

Hearing participant: Appellant
Appellant's representative

Decision date: March 31, 2022

File number: GE-22-122

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 a Chartered Accountant and started working remotely when the covid19 pandemic started. The employer introduced a covid19 vaccination policy (“policy”) at work. The Claimant was suspended and later dismissed because she did not comply with the employer’s policy.² The Claimant then applied for Employment Insurance regular benefits.³

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to receive benefits.⁴ They say she lost his employment due to her own misconduct by failing to comply with the employer’s vaccination policy.⁵

[5] The Claimant disagrees because her job was a non-customer and non-public facing role and her duties could be done remotely.⁶ She says that the employer’s policy is not reasonable, nor rational and her suspension should not be considered a violation of the policy, or as misconduct since the employer refused to accommodate her.

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

² See letter dated September 21, 2021 at GD3-38 to GD3-39 and letter dated November 30, 2021 at GD3-41 to GD3-43.

³ See application for benefits at GD3-3 to GD3-16.

⁴ See initial decision dated November 10, 2021 at GD3-22 and reconsideration decision dated December 16, 2021 at GD3-31 to GD3-32.

⁵ See Commission’s representations at GD4-1 to GD4-7.

⁶ See Claimant’s notice of appeal forms at GD2-1 to GD2-13.

Matters I have to consider first

I asked the Commission for information before the hearing

[6] The Commission referred the employer's policy in their submissions, but it was not clear to me if there was an actual policy document, or if they were relying on an email sent by the employer.⁷ I wrote to the Commission to ask them to provide a copy of the employer's policy.⁸

[7] At the hearing, the Claimant confirmed that she had not received a copy of the official policy. The only communication about the policy came to staff via email on August 23, 2021.

[8] The Commission responded by the deadline⁹ set out. They said that the documents labelled "Employer's proof" from GD3-35 to GD3-43 detail the employer's policy and communications with the Claimant about her vaccination status and non-compliance.¹⁰

[9] I sent a copy of the Commission's response to the Claimant after the hearing with an opportunity to reply.¹¹ The Claimant responded and reiterated that she has never received a soft or hard copy of the policy and that the employer failed to provide the Commission with an official and signed copy of the policy.¹² The Claimant raised other arguments in her response that she had raised at the hearing. A copy was sent to the Commission.

Issue

[10] Was the Claimant suspended and did she lose her job because of misconduct?

⁷ See GD4-1 to GD4-7 and email dated August 23, 2021 at GD3-35.

⁸ See section 32 of the Social Security Tribunal Regulations and letter dated March 11, 2022 at GD8-1 to GD8-2.

⁹ The deadline was March 16, 2022 and the Commission responded on March 16, 2022.

¹⁰ See Commission's response at GD9-1 to GD9-2.

¹¹ The deadline to reply was March 29, 2022.

¹² See Claimant's response at GD10-1 to GD10-3.

Analysis

[11] Claimants who lose their job because of misconduct are disqualified from receiving benefits.¹³

[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 loses or voluntarily leaves their employment, or if they accumulate enough hours with another employer after the suspension started.¹⁴

[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 was suspended and then why she lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why is the Claimant no longer working for her employer?

[14] I find that the Claimant was first suspended effective September 21, 2021 until November 29, 2021 for not complying with the employer's policy.

[15] I also find that the Claimant was then dismissed from her employment effective November 30, 2021.

[16] This is consistent with the Claimant's testimony, the employer's letters in the file and the records of employment.¹⁵

¹³ Section 30 of the *Employment Insurance Act* (Act).

¹⁴ See section 31 of the Act.

¹⁵ See letter dated September 21, 2021 at GD3-38 to GD3-39 and letter dated November 20, 2021 at GD3-41 to GD3-43; see records of employment at GD3-17 and GD3-33.

What was the employer's policy?

[17] I find that the employer implemented a policy on that mandated proof of vaccination for covid19 by September 10, 2021.¹⁶ The employer later provided an extension for the Claimant to be vaccinated by September 20, 2021.¹⁷

[18] The policy states that in an effort to safeguard the health and safety of employees, they now require that employees must be fully vaccinated. This includes new hires. It provides for reasonable accommodation for reasons relating to disability or religion. It notes that employees may be entitled to paid time off to receive a vaccination, as well as a review of their employment will be conducted by Human Resources if they do not comply with the policy.

Was the policy communicated to the Claimant?

[19] I find that the policy was first communicated to the Claimant and other staff by email on August 23, 2021.¹⁸

[20] I was not persuaded by the Claimant's argument that the employer never communicated an "official" legal policy. The evidence clearly shows that the employer communicated this policy via email, which is their prerogative.

[21] I note that August 23, 2021 email refers to a previous email sent to staff on August 11, 2021 that outlined steps for submitting proof of vaccination. I asked the Claimant about that email.

[22] The Claimant said that the policy was only first communicated to her on August 23, 2021. She said that the previous email on August 11, 2021 was simply a general email asking employees about their vaccination status.

¹⁶ See email dated August 23, 2021 at GD3-35.

¹⁷ See letter dated September 13, 2021 at GD3-36 to GD3-37.

¹⁸ See employer's email dated August 23, 2021 at GD3-35.

What were the consequences of not complying with the policy?

[23] The policy does address consequences for employees who do not comply.¹⁹ It states the following:

Employees who: (1) are not fully vaccinated or have not submitted proof of vaccination status; and (2) do not have an approved accommodation in connection with the vaccine requirement; will not be allowed to return to the office as of September 13, 2021, and a review of their employment status will be conducted by Human Resources.

[24] This followed by a letter to the Claimant confirming that she has not submitted proof of her vaccination.²⁰ The letter invites the Claimant to speak with a doctor if she has any questions about the vaccine. Finally, it says that if she has not received her first vaccination dose by September 20, 2021, they will be in contact regarding her employment status with the company.

[25] A subsequent letter followed to inform the Claimant about the consequences of her refusal to become vaccinated.²¹ She was suspended without pay as of September 21, 2021 until November 29, 2021. It states that if she remains unvaccinated on November 29, 2021, she will be terminated for just and sufficient cause.

[26] The employer then sent a reminder letter to the Claimant that she has until November 29, 2021 to become fully vaccinated, or be terminated for just and sufficient cause.²²

[27] The Claimant testified that at first she was confused by the email sent on August 23, 2021. She did not think it would lead to her termination because she was a senior level employee who was dedicated to her job and worked hard.

¹⁹ See employer's email dated August 23, 2021 at GD3-35.

²⁰ See letter dated September 13, 2021 at GD3-36 to GD3-37.

²¹ See letter dated September 21, 2021 at GD3-38 to GD3-39.

²² See letter dated October 15, 2021 at GD3-40.

[28] In part, I agree with the Claimant. The policy email sent on August 23, 2021 does not outline the consequences of suspension and termination. However, it does say that if employees do not comply, a review of their employment status will be conducted by Human Resources. In my view, the Claimant ought to have known that her non-compliance with the policy would lead to a review of her employment status and possibly an undesirable outcome.

[29] I find that Claimant knew that her non-compliance would eventually lead to her termination on November 30, 2021.²³ As of September 21, 2021, she was suspended and the employer's letter clearly states it would lead to termination. The reminder letter on October 15, 2021 also says that it would lead to her termination.²⁴

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

[30] I find that the Claimant has not proven that she was eligible for a medical or religious/creed exemption, or that she was otherwise exempt from the employer's vaccination policy.

[31] At the hearing, the Claimant wanted to clarify that the Commission's notes were inaccurate. She denies that she was experiencing stress or diagnosed with an anxiety disorder, as reported by the Commission.²⁵

[32] I acknowledge the Claimant's argument that the employer should have accommodated her in other ways, such as working remotely, covid19 testing, or working in secluded spaces. However, their policy only provided for accommodations and exemptions based on a human rights ground (in this case, medical, religion and creed).

[33] The Claimant did not make a request for an exemption under any of these categories.

²³ See letter dated September 21, 2021 at GD3-38 to GD3-39.

²⁴ See letter dated October 15, 2021 at GD3-40.

²⁵ See supplementary record of claim dated November 9, 2021 at GD3-19.

Is the reason for the Claimant's dismissal misconduct under the *Employment Insurance Act*?

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

[35] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁷ 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.²⁸

[36] 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.²⁹

[37] 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.³⁰

[38] First, I was not persuaded by the Claimant's position that the Commission's decision should be overturned on the basis that no official legal policy was signed, or that the Commission never obtained a copy of the official policy.

[39] In my view, there was enough evidence in the file to support that the employer had a policy in place, that it was communicated to the Claimant by email and that she knew about the consequences for her failure to comply. It was the employer's decision to communicate the policy via email. Further, there was no evidence that another official copy of the policy even existed.

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

²⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁸ See *Attorney General of Canada v Secours*, A-352-94.

²⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[40] Second, I find that the Claimant willfully and consciously chose to not comply with the employer's vaccination policy. She had time to comply with the policy and was given an extension. While it was not immediately clear that she would be suspended, once she was suspended on September 21, 2021 she became aware it would lead to her dismissal on November 30, 2021.

[41] Third, the *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*³¹ as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.³²

[42] As noted above, the employer's policy provided for accommodations and exemptions under these grounds, but the Claimant did not submit a request to her employer.

[43] Fourth, 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. However, when the employer imposed the policy, it became a condition of her employment. This resulted in a breach of her duties to her employer because she failed to comply with policy by not providing proof of vaccination.

[44] 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 suspension, dismissal and loss of income.

³¹ *Human Rights Code*, R.S.O. 1990, c. H.19.

³² See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

[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.³³ 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.

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

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

What about the Claimant's other arguments?

[47] The Claimant said that the policy breached her rights under section 6(2)(b) and 15(1) of the *Canadian Charter of Rights and Freedoms*.³⁴

[48] The Charter grants rights to everyone in Canada. The Charter applies to governments only and not to private businesses.³⁵ This means that policies created by private businesses are not law, so they are not subject to review because they cannot be ruled to be unconstitutional. As a result, I have no legal authority to rule on the Claimant's Charter argument.

[49] The Claimant also said that she has filed five separate complaints about constructive dismissal, recourse against prohibited practices for being suspended, wrongful dismissal, amounts owed by the employer and recourse against prohibited practices for being terminated after making a complaint. She has secured some legal assistance and are expecting an upcoming court date.

³³ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

³⁴ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁵ See section 32(1) of the *Canadian Charter of Rights and Freedoms*.

[50] In the Claimant's latest submission, she reported that she had success against her employer. The employer has to pay her a determined indemnity based on current legislation.³⁶

[51] I do not have the authority to decide whether the employer breached her rights by suspending and dismissing her, or whether they could have accommodated her in some other way.

[52] 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.³⁷

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

Conclusion

[54] 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.

[55] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

³⁶ See GD10-3.

³⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185.