



Citation: *TD v Canada Employment Insurance Commission*, 2022 SST 974

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

Decision

Appellant: T. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (459998) dated March 15, 2022
(issued by Service Canada)

Tribunal member: Amanda Pezzutto

Decision date: July 14, 2022

File number: GE-22-1319

Decision

[1] T. D. is the Claimant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. The Claimant disagrees with this decision, so she is appealing to the Social Security Tribunal (Tribunal).

[2] I am summarily dismissing the Claimant's appeal. Her appeal has no reasonable chance of success. She has made no arguments and provided no evidence that would let me allow her appeal.

Overview

[3] The Claimant worked as a nurse. Following a provincial health order, the Claimant's employer required all staff to be vaccinated against COVID-19 by October 25, 2021. The Claimant wasn't vaccinated by the employer's deadline. So, the employer suspended her, and then dismissed her on November 19, 2021.

[4] The Claimant argues that she didn't lose her job because of misconduct. She says the employer didn't have a formal policy about vaccination. She says her collective agreement doesn't have any obligation to be vaccinated. She says that she opposes the vaccine because she is concerned about its safety.

[5] The Commission says the Claimant lost her job because of misconduct. The Commission says the Claimant knew that her employer had to comply with a provincial health order requiring all employees to be vaccinated against COVID-19. The Commission says the Claimant knew she couldn't work if she didn't have the COVID-19 vaccine or an approved exemption.

Matters I must consider first

[6] Before I summarily dismiss an appeal, I have to give the Claimant notice. I have to allow her a reasonable period to make arguments about whether I should summarily dismiss the appeal.¹

[7] Tribunal staff sent an email to the Claimant on June 27, 2022. In this letter, I explained why I was considering summarily dismissing her appeal. I asked her to respond to the letter by July 7, 2022.

[8] The Claimant responded to my letter with new submissions. So, I will use these extra submissions as I make my decision.

Issue

[9] I must decide whether I should summarily dismiss the Claimant's appeal. To make this decision, I have to decide if her appeal has a reasonable chance of success.

Analysis

[10] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.²

[11] This is what "no reasonable chance of success" means: is it plain and obvious, on the face of the record, that the Claimant's appeal is bound to fail? Are there any arguments or evidence that the Claimant could present at a hearing that would lead to a successful appeal?³

[12] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has fired you or suspended you.⁴

¹ Section 22 of the *Social Security Tribunal Regulations*

² Section 53(1) of the *Department of Employment and Social Development Act*.

³ In coming to this interpretation, I am relying on an Appeal Division decision, *J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1132, and a Federal Court of Appeal decision, *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147.

⁴ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving EI benefits if you lost your job because of misconduct. Section 31 of the *Employment Insurance Act* says you are

[13] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.⁵

[14] If you are dismissed because of misconduct, then you are disqualified from receiving EI benefits.⁶

[15] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ The Claimant 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.⁹

[16] 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 suspension or dismissal because of that.¹⁰

[17] The Commission has to prove that the employer suspended or dismissed the Claimant because of misconduct. The Commission has to prove this on a balance of

disentitled from receiving EI benefits if you are suspended from your job because of misconduct. Both a disqualification and a disentitlement means you can't get EI benefits. The difference between a disqualification and a disentitlement is that a disentitlement can end if you fix the situation that is causing the disentitlement. But a disqualification lasts until you work enough hours to start a new EI benefit period

⁵ Section 31 of the *Employment Insurance Act*

⁶ Section 30 of the *Employment Insurance Act*

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

probabilities. This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.¹¹

[18] The Claimant argues that she didn't lose her job because of misconduct. She says that the employer didn't have a formal policy about vaccination and her collective agreement didn't require vaccination. She says that refusing a vaccine isn't misconduct. She says her employer wouldn't consider alternatives to vaccination that would let her keep working. She says she is opposed to the vaccine because she is concerned about its safety.

[19] The Commission says the Claimant stopped working because of misconduct. The Commission says she knew about the provincial health order and the requirement to be vaccinated against COVID-19. The Commission says that she knew that the employer would put her on leave if she didn't comply with the provincial health order.

[20] I agree with the Commission. I find that this appeal has no reasonable chance of success. This is because the Claimant lost her job because of misconduct and there is no argument or evidence that would lead me to a different conclusion.

[21] Even though the Claimant says the employer didn't have a policy about vaccination, I find that the evidence in the appeal file shows me that the employer clearly notified the Claimant of its expectations about vaccination. The employer sent letters to the Claimant and met with her several times to speak about the expectation and the consequences if she didn't comply.

[22] The employer communicated with the Claimant on the following dates:

- September 24, 2021. The employer sent the Claimant a letter notifying her that they required her to be vaccinated against COVID-19. The letter says the deadline is October 25, 2021 and that there will be employment consequences if she doesn't comply.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- September 27, 2021. The employer sent the Claimant a letter notifying her that they required her to be vaccinated against COVID-19. The letter says that the Claimant will be put on unpaid leave if she doesn't comply.
- October 15, 2021. The employer sent the Claimant a letter notifying her that they require her to be vaccinated against COVID-19. The letter says that she will be suspended if she doesn't comply with this requirement by October 25, 2021. The letter says that she will be dismissed if she still doesn't comply by November 15, 2021.
- October 27, 2021. The employer had a meeting with the Claimant. During the meeting, the employer notified her that they had expected her to be vaccinated against COVID-19 by October 25, 2021. During the meeting, the employer notified the Claimant that she will be placed on an unpaid leave, and then dismissed on November 15, 2021 if she still doesn't comply with the vaccine requirement.

[23] So, even if the employer didn't have a written policy explaining its vaccination requirement, I find that the employer clearly notified the Claimant of its expectation and the consequences if she didn't comply. The letters and meetings show me that the Claimant must have known about her employer's expectation.

[24] And the Claimant told the Commission that she knew about the employer's expectation. She knew that the employer required her to be vaccinated against COVID-19. She knew that she couldn't continue working after October 25, 2021 if she wasn't vaccinated. She knew that she would lose her job if she didn't comply with the requirement to be vaccinated.

[25] I can't make decisions about whether the employer's vaccination policy was reasonable. I am not making decisions about whether the employer should have

accommodated the Claimant instead of suspending and dismissing her.¹² I am only looking at the Claimant's actions.

[26] And I am not making decisions about whether the Claimant's actions amount to misconduct under other laws. I can't make decisions about whether the employer violated the Claimant's collective agreement. I can't make decisions about whether the employer violated provincial labour laws when it suspended and dismissed the Claimant. I can only look at whether the Claimant's actions were misconduct under EI law.

[27] I understand that the Claimant wants a hearing. But the law says I have to summarily dismiss her appeal if it has no reasonable chance of success.

[28] And I find that it is plain and obvious that this appeal is bound to fail. This is because the Claimant and the Commission agree about the following:

- The employer suspended and then dismissed the Claimant because she wasn't vaccinated against COVID-19
- The Claimant knew her employer was following a provincial health order requiring all employees to be vaccinated against COVID-19
- The Claimant deliberately chose to refuse the COVID-19 vaccine
- The Claimant knew her employer would not permit her to keep working if she wasn't vaccinated against COVID-19

[29] So, I find that the employer suspended and then dismissed the Claimant because of misconduct. This is because the Claimant's actions led to her suspension and then her dismissal. She acted deliberately. She knew her actions were likely to lead to the loss of her job.

¹² See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

[30] There is no argument that the Claimant could make that would lead me to a different conclusion. There isn't any evidence she could provide that would change these facts. Her appeal is bound to fail, no matter what arguments or evidence she could provide at a hearing.

Conclusion

[31] I find that the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss her appeal.

Amanda Pezzutto
Member, General Division – Employment Insurance Section