



Citation: *GJ v Canada Employment Insurance Commission*, 2022 SST 998

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

Decision

Appellant: G. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (446762) dated February 2, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: July 21, 2022

Hearing participant: Appellant

Decision date: July 27, 2022

File number: GE-22-1001

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 radiation therapist at a hospital. The employer dismissed the Claimant she did not comply with the covid19 vaccination policy at work.² The Claimant then applied for EI benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she lost her job due to her own misconduct.⁴

[5] The Claimant disagrees because the employer implemented a covid19 vaccination policy that impacted the terms of her employment, the policy was an unlawful interpretation of Directive 6 and it was not misconduct.⁵

Matter I have to consider first

The Claimant submitted documents after the hearing

[6] At the hearing, the Claimant testified about the employer's policy, "Directive 6" and a section of the *Public Hospitals Act*.⁶ Since these were not included as part of the file, I asked her to submit it after the hearing.

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 GD3-25.

³ See GD3-3 to GD3-21.

⁴ See GD3-30 to GD3-31 and GD3-53 to GD3-54.

⁵ See GD2-1 to GD2-19.

⁶ See *Public Hospitals Act*, R S O. 1990, Chapter P40.

[7] The Claimant submitted them and a copy was shared with the Commission.⁷ I accepted these documents after the hearing because they were relevant.

Issue

[8] Did the Claimant lose her job because of misconduct?

Analysis

[9] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.⁸

[10] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.⁹

[11] 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 lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[12] I find that the Claimant was dismissed from job on October 25, 2021 because she did not comply with the employer's covid19 vaccination policy. The Claimant's last day of work was October 21, 2021.

[13] This is consistent with the Claimant's testimony, the records of employment and a discussion she had with the Commission.¹⁰

⁷ See GD7-1 to GD7-12.

⁸ Section 30 of the *Employment Insurance Act* (EI Act).

⁹ See section 31 of the Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

¹⁰ See records of employment at GD3-22 and GD3-23; GD3-25.

What was the employer's policy?

[14] The employer implemented a “*Covid19 Vaccination Program* (policy) effective September 28, 2021. The Claimant submitted a copy of the policy.¹¹

[15] The policy says that the hospital is committed to ensuring a safe and healthy environment and recognizes the importance of immunization for staff.¹²

[16] The policy requires that employees complete a covid19 vaccination e-learning program and provide documentation of all required covid19 doses by October 21, 2021.¹³

[17] The policy also provided for medical exemption with valid documentation, or a reason that is verifiable based on the *Ontario Human Rights Code*.¹⁴ The employer told the Commission that they provided accommodation for medical and human rights.¹⁵

[18] The Claimant testified that she did complete the e-learning course as required, but that she did not comply with the requirement to vaccinate for covid19.

Was the policy communicated to the Claimant?

[19] The Claimant testified that she found out about the policy on August 31, 2021 when the hospital's interim president sent an email to staff. She did not get the policy details until around September 9, 2021. The policy was posted at work, she agreed that she had a chance to review the policy and had a copy.

[20] I find that the policy was communicated to the Claimant on August 31, 2021 and September 9, 2021. This is consistent with the Claimant's testimony and the employer's discussion with the Commission.¹⁶

¹¹ See policy at GD7-2 to GD7-5.

¹² See GD7-2.

¹³ See policy at GD7-2; employer's discussion with Commission at GD3-25.

¹⁴ See GD7-2; *Human Rights Code*, R.S.O. 1990, c. H.19.

¹⁵ See GD3-25.

¹⁶ See GD3-25.

What were the consequences of not complying with the policy?

[21] The policy says that all staff who are deemed not vaccinated will not be accommodated and will not be allowed to report to work. They will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated.¹⁷

[22] The policy further states that a “failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline, up to and including termination of employment or revocation of privileges”.¹⁸ This is addressed in a section of the policy that discusses rapid testing.

[23] The employer told the Commission that the policy came out on September 3, 2021 and it was revised on September 7, 2021 to include that a failure to comply would result in termination.¹⁹

[24] The employer also said that if an employee had one dose of the covid19 vaccine before October 21, 2021, they would be put on a leave without pay until they got their second dose after waiting 14 days.

[25] The Claimant testified that she knew the consequences of not complying with the policy. She understood that if she did not get vaccinated for covid19, the employer would put her on an unpaid leave of absence and she would not be able to report to work. However, she later found out she would be terminated for not complying with the policy.

[26] On October 12, 2021, the Claimant had a brief meeting with her employer and they mentioned that she would be terminated if she did not comply with the policy by the deadline on October 21, 2021. The employer then terminated her on October 25, 2021 after another brief meeting.

¹⁷ See GD7-3.

¹⁸ See GD7-3.

¹⁹ See GD3-25.

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

[27] The policy provided for exemptions for medical reasons with valid documentation, or a reason that was verifiable based on the *Ontario Human Rights Code*.²⁰

[28] The Claimant testified that she did not ask the employer for a medical exemption or any other type of exemption.²¹

[29] The Claimant explained that she did not want to get vaccinated for covid19 because she had health concerns. She had experienced some health problems after taking a different vaccine several years earlier.²²

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

[30] 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

[31] 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

[32] 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.²⁶

²⁰ See *Human Rights Code*, R.S.O. 1990, c. H.19.

²¹ See GD3-25.

²² See GD3-28.

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.

[33] 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.²⁷

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

[35] First, I find that the policy was communicated to the Claimant and she was aware of the deadline date to comply. The Claimant also had enough time to comply with the policy.

[36] Specifically, the Claimant knew that she had to be vaccinated for covid19 by October 21, 2021. The employer also met with her on October 12, 2021 to discuss the policy.

[37] Second, I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons. She consciously decided to not comply with the employer's policy. This was a deliberate choice she made. The court has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.²⁸ While she may not have had wrongful intent, it was still misconduct.

[38] I was not persuaded by the Claimant's arguments about the definition of misconduct. The Claimant referred to the "*Digest of Benefit Entitlement Principles*" (Digest) to support her position.²⁹ The court has said that the Commission is justified in having its own guidelines to guarantee some consistently nationally.³⁰ However, the Digest does not have the force of law, so it is not binding on me.

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

²⁸ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²⁹ See GD2-10 to GD2-17.

³⁰ See *Canada (Attorney General) v Hudon*, 2004 FCA 22; *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

[39] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to her dismissal.

[40] The employer communicated that termination would result for non-compliance at their meeting on October 12, 2021. The revised policy in the file is dated September 3, 2021.³¹ However, the employer confirmed that the policy was again revised on September 7, 2021 and it included that a failure to comply would result in termination.³²

[41] Fourth, I find that the Claimant has not proven she was exempt from the policy. The Claimant confirmed that she did not ask for any exemptions from the policy, even though she had medical concerns about the vaccine.

[42] 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*³³ 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.³⁴

[43] Lastly, I generally accept that the employer can choose to develop and impose policies at the workplace. In this case, the employer imposed a vaccination policy because of the covid19 pandemic and because of “Directive 6”.³⁵

[44] This means that vaccination for covid19 became a condition of her employment when they introduced the policy. The Claimant breached the policy when she chose not to comply with it and that interfered with her ability to go to work and carry out her duties.

³¹ See GD7-2 to GD7-5.

³² See GD3-25.

³³ See *Human Rights Code*, R.S.O. 1990, c. H.19.

³⁴ 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.

³⁵ See Directive 6 at GD7-6 to GD7-9.

[45] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a dismissal from her employment.

[46] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.³⁶ In this case, it was not involuntary because it was the Claimant's own actions that led to her dismissal.

What about the Claimant's other arguments?

[47] The Claimant raised other arguments to support her position. Some of them included the following:

- a) The employer unilaterally implemented a policy
- b) The policy does not have a legal basis
- c) It was an unlawful interpretation of Directive 6³⁷
- d) The policy is a form of discrimination³⁸ against unvaccinated employees³⁸
- e) According to the *Public Hospitals Act*, the law prevails in the event of a conflict between a directive and any provision of any applicable Act or rule of law³⁹
- f) There are safety risks with covid19 vaccine⁴⁰
- g) There was external coercive influence
- h) This may be constructive dismissal

³⁶ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

³⁷ See GD7-6 to GD7-9.

³⁸ See GD3-45.

³⁹ See GD7-10 to GD7-12 and *Public Hospitals Act*, R S O. 1990, Chapter P40.

⁴⁰ See GD3-46 to GD3-49.

[48] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.⁴¹ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

[49] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with his particular arguments. The Claimant has already filed a union grievance at work.⁴²

Conclusion

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

[51] This means that the appeal is dismissed.

Solange Losier
Member, General Division – Employment Insurance Section

⁴¹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

⁴² See GD3-43.