



Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 879

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

Decision

Appellant: M. S.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (465135) dated April 25, 2022
(issued by Service Canada)

Tribunal member: Sylvie Charron
Type of hearing: Teleconference
Hearing date: June 22, 2022
Hearing participant: Appellant

Decision date: August 11, 2022
File number: GE-22-1771

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost her job. The Appellant's employer reported she was let go because she failed to be vaccinated in accordance with the employer's policy.

[4] The Appellant doesn't dispute that this happened. The Appellant says that the employer let her go because she would not comply with the employer's vaccination policy. She objects to the fact that protecting her right to refuse the vaccine is being called misconduct in her employment.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[6] Did the Appellant lose her job because of misconduct?

Analysis

[7] To answer the question of whether the Appellant lost her job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

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

Why did the Appellant lose her job?

[8] I find that the Appellant lost her job because she refused to get vaccinated against Covid-19 in compliance with her employer's vaccination policy. My reasons follow.

[9] The Commission was informed that the employer originally intended to let the Appellant go in November 2021, but kept her on until December 22, 2021 because she was needed and because the employer wanted to give her a chance to comply with the vaccination policy.²

[10] The Appellant agrees. The Appellant says that she was notified in August 2021 that she had until the end of November to provide proof of vaccination. She confirmed that she knew that failure to comply would result in termination of her employment.

[11] The Appellant confirms that she did not want to be vaccinated because her daughter got sick from the vaccine. She offered to be tested at her own expense to be told that it was not approved.

[12] At the hearing, the Appellant testified that she has a strong immune system and does not even get the flu shot. She got more concerned about side-effects of the vaccine as she did more research online. She also stated that two of her colleagues became very sick after their second vaccine shot. In all, this convinced her not to take the chance.

[13] The Appellant also confirmed that she did not seek a medical or religious exemption at the time. However at the hearing, she testified that she did see a specialist; she did not obtain a medical exemption. She concludes that the government obliges doctors to refuse medical exemptions in order to keep their license.

² See GD3-17, 18

[14] I find that the Appellant was dismissed because of her refusal to get vaccinated in compliance with the employer's policy. Both the employer and the Appellant agree on this fact.

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

[15] The reason for the Appellant's dismissal is misconduct under the law.

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Appellant 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.⁵

[17] There is misconduct if the Appellant 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.⁶

[18] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.⁷

[19] The Commission says that there was misconduct because the Appellant refused to get vaccinated in accordance with her employer's vaccination policy. She knew about the policy and the timeframe to comply and willingly refused to do so.

[20] The Appellant agrees that this happened but says that there was no misconduct because when she was hired in February 2021 there was no talk of vaccination being a job condition. She offered to get tested regularly at her expense but that was denied.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

She does not believe that not agreeing to a forced medical procedure can be called misconduct in relation to one's employment.

[21] I find that the Commission has proven that there was misconduct, because it is clear from the submissions and the evidence that the Appellant was aware of the employer's vaccination policy, was given time to comply, chose willingly and voluntarily not to comply and this was the immediate cause of her dismissal.

[22] While I understand the Appellant's point that she did not do anything wrong, the fact that she willingly went against her employer's policy is the essence of misconduct under the *EI Act*.

[23] While the Appellant has the right to refuse to be vaccinated, it does not give her the right to keep her job.

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

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

Conclusion

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

[26] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section