



Citation: *GC v Canada Employment Insurance Commission*, 2022 SST 1091

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

Decision

Appellant: G. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (457176) dated March 28, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: August 16, 2022

Hearing participant: Appellant

Decision date: August 25, 2022

File number: GE-22-1650

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant isn't entitled to Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from her job. Her employer said she was suspended because she didn't comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant doesn't dispute that this happened. She says she has the right to choose not to take the vaccine.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant isn't entitled to EI benefits.

Matters I have to consider first

The Claimant didn't send the Commission's reconsideration decision

[6] The Claimant has to send the Tribunal a copy of the Commission's decision with her notice of appeal.² She did not do so. I have a copy of the Commission's file that has this decision. So, I don't need the Claimant to send it.³

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

² Paragraph 24(1)(b) of the *Social Security Regulations*.

³ Paragraph 3(1)(b) of the *Social Security Regulations*.

The Claimant didn't get copies of the Commission's reconsideration file or representations

[7] At the hearing, the Claimant said that she did not receive the Commission's reconsideration file and representations. The database used by the Tribunal shows an email was sent to the Claimant on May 30, 2022. The Commission's reconsideration file and representations were attached to the email. The Claimant confirmed that the email address to which the two documents were sent belongs to her.

[8] I explained to the Claimant that she has the right to know the Commission's case against her and to be able to respond to its arguments. I told her that in the interests of natural justice, I am prepared to adjourn the hearing to allow the Tribunal to re-send the reconsideration file and representations. The Claimant said that she wanted to proceed with the hearing without the two documents.

[9] I told the Claimant that if at any time she changed her mind about proceeding, I would consider adjourning the hearing. The Claimant did not so indicate.

Issues

[10] Did the Claimant voluntarily take leave or was she suspended from her job?

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

Analysis

Did the Claimant voluntarily take leave or was she suspended from her job?

[12] The Claimant was suspended from her job.

[13] The law deals with dismissal for misconduct and voluntarily leaving without just cause together.⁴ This is because both refer to actions a claimant has taken that result

⁴ See section 30 of the Act.

in the loss of employment.⁵ The legal issue at stake for both is disqualification from receiving EI benefits.

[14] Sometimes it isn't clear if a claimant is unemployed because they were dismissed or because they voluntarily left their job. In cases like those, since the legal issue at stake for both is the same in the law, based on the evidence, the Tribunal can decide the grounds for disqualification.⁶

[15] In this case, in its initial decision, the Commission said it couldn't pay the Claimant EI benefits because she stopped working by voluntarily taking leave from her job. In its reconsideration decision, the Commission changed the reason. It now says it can't pay the Claimant EI benefits because she was suspended from her job. The Commission says it made a clerical error on the reconsideration decision; it should have changed the decision to suspension.

[16] The Claimant says that her employer told her that if she showed up to work after they placed her on leave, she would be escorted off the premises. She testified that she believes the Commission did change the reason for separation from voluntarily taking a leave of absence to suspension. She added that it didn't make a difference to her because the Commission's decision as still the same.

[17] The Claimant's employer issued a record of employment (ROE). The reason listed for issuing the ROE is "Other". In comments on the ROE, the employer says the Claimant is unable to work due to employer policy.

[18] I find that the question of whether a claimant has voluntarily taken leave from a job or if their employer has suspended them from their job is like the question of voluntarily leaving without just cause versus dismissal. The difference in the two questions is that the issue at stake in the first is disentitlement. As noted above, the issue at stake in the second question is disqualification.

⁵ This reasoning appears in two Federal Court of Appeal decisions. See *Canada (Attorney General) v Easson*, A-1598-92; *Canada (Attorney General) v Desson*, 2004 FCA 303.

⁶ See *Canada (Attorney General) v Borden*, 2004 FCA 176,

[19] In this case, I find that the Claimant's employer placed the Claimant on an unpaid leave of absence. They didn't do so because she asked for leave, but because of an action she took. So, I don't find that the Claimant voluntarily took leave from her job; rather, I find the Claimant's employer suspended her from her job.

Was the Claimant suspended from her job because of misconduct?

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

– Why was the Claimant suspended from her job?

[21] I find that the Claimant was suspended from her job because she didn't comply with her employer's COVID-19 vaccination policy.

[22] The Claimant doesn't disagree with the Commission about why she was suspended from her job. The Commission says that the reason the employer gave is the reason for the suspension. The employer told the Commission that the Claimant stopped working because she didn't comply with their COVID-19 vaccination policy.

[23] The Claimant says she refused to follow the employer's policy that required her to take the COVID-19 vaccine. She says she chose not to take the vaccine for her own health and safety, since the COVID-19 vaccine is experimental and hasn't gone through years of testing.

[24] I find that the Claimant was suspended because she didn't take the COVID-19 vaccine. I accept her evidence as fact and find that she didn't comply with her employer's COVID-19 vaccination policy

Is the reason for the Claimant's suspension misconduct under the law?

[25] The reason for the Claimant's suspension is misconduct under the law.

[26] 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

[27] 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 suspended because of that.¹⁰

[28] The Commission has to prove that the Claimant suspended from 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 was suspended from her job because of misconduct.¹¹

[29] The Commission says that there was misconduct because she didn't comply with her employer's mandatory COVID-19 vaccination policy.

[30] The Claimant says that there was no misconduct because "the law" says you don't have to be vaccinated to work in Canada. She says policies and mandates outside of "the law" are illegal.

[31] I find that the Commission has proven that there was misconduct, because the Claimant didn't comply with her employer's COVID-19 vaccination policy.

[32] The Claimant confirmed at the hearing that she told the Commission that she made a personal choice not to take the COVID-19 vaccine. She said that her employer wanted her to take something she didn't want to take. She added that she had

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.

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

complied with mandatory testing, but when it came to the COVID-19 vaccine, she said no.

[33] The Claimant's employer told the Commission about their approach to the COVID-19 vaccine. They said employees had to take two doses of the vaccine by October 15, 2021. They gave employees this information at meetings, daily huddles and through the union. The employer said it would place employees who didn't have two doses of the vaccine on unpaid leave.

[34] The Claimant confirmed that she was aware of the employer's policy and about the unpaid leave. She said since the employer would only give exemptions to the COVID-19 vaccination policy for allergies, she didn't ask for one.

[35] The Claimant included a quote from the "Public Agency of Canada" in her notice of appeal. It says immunizations are not mandatory in Canada and can't be made mandatory because of the Canadian Constitution.

[36] Following the quote, the Claimant says "[p]olicies and mandates outside of this law are illegal, so employers are complying with illegal policies and mandates". I asked the Claimant if this is a publication that she could send to the Tribunal. The Claimant said she's not sure where she got it from, but it's "out there" on the internet.

[37] I don't give the Claimant's quote or her comment that follows much weight. She hasn't given enough information to verify and evaluate the source of the quote. And it isn't my role to do research on the internet to find the publication the Claimant has quoted from.

[38] In addition to the above, I find that the Claimant is challenging her employer's ability to implement a policy that she believes is illegal. But her recourse to challenge the employer's policy is outside the Tribunal.

[39] The Claimant also said in her notice of appeal that she has the right to choose what's right for her individual health and not to be discriminated against. I asked her about this. The Claimant said that her body autonomy is important to her and she

doesn't give consent to take an experimental vaccine. She added that it's not fair to be subjected to something that she doesn't believe in and could harm her just to keep her job.

[40] I understand from the Claimant's testimony and submissions that she is opposed to taking the COVID-19 vaccine. I accept as fact that her concern is her personal health and safety. But, I don't find the Claimant's employer discriminated against her by requiring her to take the COVID-19 vaccine. Rather, I find that the employer required all its employees to take the vaccine, but the Claimant chose for personal reasons not to do so.

[41] I find that the Claimant's action, namely not complying with her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to take the vaccine. She did so knowing that she would be placed on an unpaid leave absence. I have found that this means that she was suspended. For this reason, I find that the Commission has proven that there was misconduct.

So, was the Claimant suspended from her job because of misconduct?

[42] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

Conclusion

[43] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[44] This means that the appeal is dismissed.

Audrey Mitchell
Member, General Division – Employment Insurance Section