



[TRANSLATION]

Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 1323

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (457706) dated February 25, 2022 (issued by Service Canada)

Tribunal member: Leanne Bourassa
Type of hearing: Videoconference
Hearing date: April 20, 2022
Hearing participant: Appellant
Decision date: June 2, 2022
File number: GE-22-866

Decision

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

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

Overview

[3] The Claimant was placed on leave without pay (suspended from her job).² She applied for EI benefits. The Commission accepted the employer's reason for placing the Claimant on leave. It found that the Claimant was suspended because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[4] The Claimant does not dispute that she did not comply with her employer's new vaccination policy. But, she says that she should not be disqualified from receiving benefits, since she disagrees with the reason given—misconduct. She asked the Commission to reconsider her application. The Commission once again denied her application for benefits.

[5] The Commission says that the Claimant was told of the rules, deadlines, and consequences of refusing to comply with them. She still deliberately refused to comply with them. This refusal is why she was suspended. Because of this, the Claimant was suspended from her job because of misconduct possibly for as long as she did not comply.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disqualified from receiving benefits.

² Even though the Claimant has stopped working for her employer, it doesn't involve a dismissal, but only leave without pay, which was imposed by the employer.

Matter I have to consider first

The employer is not a party to this appeal

[6] Sometimes, the Tribunal sends a letter to the appellant's former employer, asking whether it wants to be added as a party to the appeal. In this case, the Tribunal sent the employer such a letter. The employer did not reply to the letter.

[7] To be a party to this appeal, the employer has to have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, since there is nothing in the file that suggests that my decision would impose legal obligations on the employer.

Issue

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

Analysis

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

Why was the Claimant placed on leave without pay?

[10] I find that the Claimant was placed on leave without pay (suspended) because she refused to comply with the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*.

[11] The Commission says that the Claimant deliberately refused to comply with the employer's policy by refusing to be vaccinated and to disclose her vaccination status.

[12] On November 15, the Claimant was told in a letter that since she had not attested her vaccination status, she was not complying with the employer's policy.

Because of this, she was placed on administrative leave without pay for as long as she did not comply with the policy.

[13] I note that the Record of Employment issued by the employer also explains that the Claimant was on leave for not complying with the employer's vaccination policy.

[14] The Claimant confirmed to the Commission during their first discussion that she had been placed on leave without pay because of the employer's vaccination policy. She refused to attest to her vaccination status.

[15] I find that the Claimant was suspended from her job because she did not disclose her vaccination status as required by her employer's policy.

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

[16] The reason for the Claimant's dismissal is misconduct under the law.

[17] 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 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.⁵

[18] 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.⁶

[19] The Commission has to prove that the Claimant lost her job or was suspended because of misconduct. The Commission has to prove this on a balance of probabilities.

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.

This means that it has to show that it is more likely than not that the Claimant was separated from her employment because of misconduct.⁷

[20] The Commission says that there was misconduct because the Claimant deliberately refused to comply with the employer's policy. She had been told about the rules, deadlines, and consequences of refusing to comply with them. She still chose not to comply with the policy.

[21] The Claimant says that there was no misconduct. The employer made a fundamental change to her contract and collective agreement by arbitrarily demanding she comply with new policies she did not accept.

[22] The Claimant is a Government of Canada employee. This means that she is bound by the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police*.

[23] The policy includes the following information:

- The employer's employees have to be vaccinated.
- The requirement applies whether the person is teleworking, working remotely, or working on site in federal government facilities.
- Employees needed to complete their attestation by October 29, 2021.
- The information would be collected in accordance with the *Privacy Act* and the *Policy on Privacy Protection*.
- Anyone who did not attest to their vaccination status, or was unwilling to be vaccinated, would be placed on administrative leave without pay as of November 15.

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

- In exceptional cases where someone is unable to be vaccinated due to a prohibited ground under the *Canadian Human Rights Act*, that person may request accommodation.
- Employees who did not submit their attestation before October 29 were required to attend a training session on the benefits of COVID-19 vaccination.

[24] Even though the Claimant does not agree with the policy, when it comes to determining disentitlement from receiving EI benefits because of misconduct, the claimant's conduct is what is relevant. The Commission does not have to prove that the employer's policies are reasonable or fair. Also, the Tribunal does not have the necessary jurisdiction to decide whether the implementation of the mandatory attestation and vaccination policy is reasonable.

[25] The Claimant said that she was made aware of the policy through a work email. The managers spoke to her about it. The Claimant saw the policy and the summary of obligations and consequences sent to employees. She knew that the deadline for attesting to her vaccination status was October 29, 2021, and that the deadline to be vaccinated was November 15, 2021.

[26] The Claimant says that she read the attestation's details and that she asked for a paper version of the attestation, because she felt that the confidential information could be accessed by many people. She completed the attestation disagreeing with certain points having to do with confidentiality and choosing not to disclose her vaccination status.

[27] The evidence shows that the employer sent the Claimant an email on November 4, 2021. That email says that any employee who refuses to disclose their vaccination status is considered an unvaccinated employee. So, the Claimant must have known that her employer considered that she was not or would not be complying with the policy.

[28] The Claimant also says that because she refused to disclose her vaccination status, she knew that she would have to have training on COVID-19 vaccines. She says that she did not watch the video as required by the policy. Her manager did not follow up on that. Again, I see that she did not comply with the employer's policy.

[29] Between November 4, 2021, and November 12, 2021, the Claimant says that she was not calling back clients anymore, since she had five days to do so. She knew that she was going to be placed on leave without pay and did not want clients to be directed to her voicemail.

[30] I note that on November 12, 2021, the Claimant and her manager exchanged emails about returning physical files. An email from the manager says that, according to the vaccination policy, unvaccinated employees will be placed on administrative leave without pay. So, it was understood and foreseen that the Claimant would be placed on administrative leave without pay because she did not comply with the policy.

[31] For the employer, leave without pay is an administrative measure and not a disciplinary one. But, for EI purposes, I find that the fact that the Claimant was placed on leave without pay made her unable to fulfill her duties toward her employer. The Claimant did not comply as a result of an informed decision she made to not be vaccinated despite the consequences outlined in the policy.

[32] I find that the Commission has proven that there was misconduct. The Claimant chose not to disclose her vaccination status before October 20, 2021, and not to be vaccinated before November 15, 2021. The employer had a policy about this, and the Claimant was aware of her obligations under the policy, even though she disagreed. On November 4, 2021, she was directly informed of the consequences of not complying with the policy, namely that she would be placed on administrative leave without pay if she was not vaccinated before November 15, 2021. She still chose to refuse the vaccine. The suspension is the direct result of her informed decision not to comply with the employer's policy.

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

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

Conclusion

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

[35] This means that the appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section