



Citation: *AL v Canada Employment Insurance Commission*, 2022 SST 1428

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

Decision

Appellant: A. L.
Representative: Philip Cornish

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (466490) dated April 29, 2022
(issued by Service Canada)

Tribunal member: Mark Leonard

Type of hearing: In person
Hearing date: November 15, 2022
Hearing participants: Appellant

Decision date: ~~December 14, 2022~~
CORRIGENDUM DATE: January 16, 2023
File number: GE-22-1889

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost her job because of misconduct (in other words, because she did something wrong that caused her to lose her job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was both suspended from and ultimately lost her job. The Claimant's Employer says that she was let go because she decided not to get vaccinated for Covid-19 as was required by her Employer's vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says that despite her Employer's vaccination policy, her decision to not be vaccinated isn't misconduct.

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

I will accept documents sent in after the hearing

[6] The Claimant's representative sent additional submissions to the Tribunal just prior to the hearing and after the hearing. Since these documents were referred to during the hearing, I will accept them. The Commission was afforded a reasonable amount of time to review the Claimant's submissions and did respond with additional representations of its own.

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

Issue

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

Analysis

[8] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.²

[9] 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?

[10] I find that the Claimant was placed on an unpaid leave of absence and lost her job, because she did not provide proof of vaccination or authorized exemption by the deadline established by her Employer in its Covid-19 vaccination policy.

[11] The Commission says that the Employer instituted a Covid-19 vaccination policy that required all employees to be vaccinated against Covid-19 no later than September 7, 2021. In contact with the Claimant's Employer, the Commission determined that the reason the Claimant was first placed on an unpaid leave (suspended) effective October 29, 2021, and then dismissed effective November 13, 2021, because that she did not produce proof of Covid-19 vaccination or approved exemption.

[12] The Claimant does not dispute the reason for her forced leave of absence or her dismissal. She admitted that she did not get vaccinated but says she had a good reason for not doing so.

[13] I am satisfied that the Claimant's Employer both suspended and ultimately dismissed her because she did not show proof of vaccination or authorized exemption. There are two Records of Employment (RoE) submitted by the Commission. One notes

² See sections 30 and 31 of the Act.

the reason for the issue as “Leave of Absence” and the other notes the reason as “Dismissal” and adds the comment, “Failure to comply with vaccination policy.”

[14] There is no evidence before me that would lead me to doubt the reasons provided or arrive at any other conclusion.

Is the reason for the Claimant’s dismissal misconduct under the law?

[15] The reason for the Claimant’s dismissal is not misconduct under the law.

[16] The *Employment Insurance Act* (Act) doesn’t say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant’s dismissal is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[17] To prove misconduct:

- The conduct has to be willful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost willful.⁴ 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.⁵
- There must be a breach on an expressed or implied duty arising out of her employment contract.⁶
- 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.⁷

³ See *Mishibinjima 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 *Canada (Attorney General) v. Lemire*, 2010 FCA 314

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

[18] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Claimant did, or failed to do, and whether that amounts to misconduct under the Act.⁹

[19] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] 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.¹¹

[21] The Commission says that there was misconduct because

- the Employer instituted a Covid-19 vaccination policy
- the Employer clearly conveyed its expectations to the Claimant about getting vaccinated
- the Employer communicated its expectations to the Claimant several times
- The Claimant chose not to be vaccinated
- the Claimant's actions were willful in that her choice was intentional and deliberate
- the Claimant knew or should have known what would happen if she didn't follow the policy (dismissal)

⁸ See section 30 of the Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

[22] The Claimant says that there was no misconduct because

- she had a good reason to not risk taking the vaccination
- her termination of employment was unlawful.
- the Commission's reconsideration decision failed to demonstrate a meaningful analysis of the essential elements to reach a conclusion of misconduct

[23] The Claimant worked in an administrative role for a hospital. The Employer instituted a Covid-19 vaccination policy that required all employees to show proof of vaccination or authorized exemption by September 7, 2021. Any employee who had not shown proof of full vaccination or exemption by October 28, 2021, would be placed on unpaid leave of absence. If no proof of beginning the vaccination regime or exemption was presented by November 12, 2021, then the employee would be dismissed. The policy contained no other options that would allow for continued employment.

[24] The Claimant submitted and testified that she was provided a copy of the policy by e-mail and understood its requirements. She admitted that it was her choice not to be vaccinated.

[25] But she says that her actions were not misconduct. She submits that her actions are not misconduct. She submits that the Commission has not met the burden of proof to substantiate the elements in order to support a finding of misconduct.

[26] The Commission says that the Claimant willfully chose not to comply with the Employer's vaccination policy. It says that she knew or ought to have known that not taking the vaccination would result in her dismissal. It asserts that there must be a causal link between the "misconduct" and the employment and concludes that the "misconduct" must constitute a breach of an expressed or implied duty arising from the contract of employment. It quotes a Federal Court of Appeal (FCA) case in support of its decision regarding misconduct.¹²

¹² See *Canada (Attorney General) v. Lemire*, 2010 FCA 314

[27] The Commission determined that the Claimant's actions constituted misconduct and issued a disqualification from receiving EI benefits. Disqualification is seen as a form of "punishment" for undesirable conduct.¹³

[28] The Claimant submits that the Commission did not conduct a thorough examination of the circumstances before rendering its decision. She submits that the Commission's submissions are perfunctory and a mere restatement of the test words and not a reasoned examination that supports its decision regarding a finding of misconduct.

Was there a breach on an expressed or implied duty arising out of her employment contract?

[29] I find that the Commission hasn't proven that there was a breach of either an expressed or implied duty for the Claimant to get vaccinated arising out of her employment contract despite the Employer's Covid-19 vaccination policy.

[30] The Commission submits that there was a breach of an expressed or implied duty arising out of the Claimant's employment contract. It says that this breach led to her suspension and ultimate dismissal and supports a finding of misconduct. Therefore, the Commission must prove a breach of this duty occurred in order for a finding of misconduct.

[31] An employment contract is just that, a contract. It is an agreement between parties that details the obligations both parties owe each other. Neither can unilaterally impose new conditions to the collective agreement without consultation and acceptance of the other. The only exception to this is where legislation demands a specific action by an employer and compliance by an employee.

[32] The Claimant is a unionized employee and works under a collective agreement between her Bargaining Agent, the Canadian Union of Public Employees (CUPE), and the Employer.

¹³ See (*Attorney General of Canada v. Tucker, #A-381-85*)

[33] The Commission submitted a copy of the Employer's Covid-19 Vaccine Policy.¹⁴ The Commission says that the Employer's policy is lawful and the Claimant's willful non-compliance with it is sufficient to prove a breach of a duty owed the Employer arising from her employment contract.

[34] The Claimant both submitted and testified that the reason she did not get vaccinated was because she has a health condition. She testified that she had cancer as a child, and had had negative reactions to anesthetic during surgery. She attended a Covid-19 education session and spoke with several doctors about the vaccines. She conducted her own research. She decided that there was insufficient information available to give her confidence that she would not have negative consequences from taking the vaccine. She elected to wait until there was more definite information concerning the safety of the vaccines.

[35] She says that she and others submitted their concerns to Employer and Union (Bargaining Agent) regarding the vaccines but received no response. A subsequent correspondence from the Claimant to the Employer suggested alternative options to vaccination such as continuing to submit to Covid-19 infection testing and other protective protocols. The Employer rejected these options and it maintained its requirement for vaccination or authorized exemption.

Is there an expressed duty arising out of her employment contract?

[36] I find that the Commission has not shown that there is an expressed duty detailed in the Claimant's CA that would support an obligation upon the Claimant was to get vaccinated against Covid-19.

[37] An expressed duty is something specifically noted in an employment contract or of such a fundamental nature, it is obvious that it exists. In other words, the employment agreement would need to contain an explicit expectation that the Claimant be vaccinated against specific ailments and that the Claimant, or her bargaining agent

¹⁴ See GD3-29 to 34

agreed to the requirement at her hiring or some time later during her employment prior to her dismissal.

[38] The Claimant worked in hospital admissions. She submitted a copy of her Collective Agreement (CA).¹⁵ She testified that her CA does not contain any provisions for Covid-19 vaccination. The CA does contain an article regarding influenza vaccination.¹⁶ The article acknowledges the benefits of vaccination for influenza. But it expressly notes that employees have the right to refuse **any** (my emphasis) recommended or required vaccination. It then goes on to detail the process to be followed when there is an outbreak. While the article includes options for reassignment, paid, and unpaid leave, it does not contain a provision for dismissal for not being vaccinated against influenza.

[39] The Claimant affirmed that she never accepted to be vaccinated or work under the Employer's Covid-19 vaccination policy prior to her suspension and dismissal. She also offered that to her knowledge the Employer never attempted to meet with the Bargaining Agent to adopt Covid-19 vaccination language into her CA. She testified that she did file a grievance against her suspension and her dismissal.¹⁷ She added that she has not received an update on the status of her **grievance**.

[40] The Commission did not submit a copy of that collective agreement nor make any reference to a provision within that collective agreement that supports the obligation imposed by the vaccination policy. In response to the Claimant's argument that there is no provision in her CA requiring vaccination, the Commission submitted that it does not have the burden to prove the Employer's policies are reasonable or fair. It suggests that the Employer's conduct is irrelevant and only the Claimant's conduct is in question. It also presents that the test for misconduct is not to determine if the dismissal was wrongful but to decide if the Claimant's act or omission amounted to misconduct.

¹⁵ See GD12 (Collective Agreement between Huron Perth Healthcare Alliance and CUPE Local 4742)

¹⁶ See GD12-43 and 44. (Collective Agreement between Huron Perth Healthcare Alliance and CUPE Local 4742 Article 19.02)

¹⁷ See GD7-340

[41] While these statements from the Commission are true, the Commission fails to recognize that in its determination of misconduct it proclaimed that the Claimant breached a duty arising out of her employment agreement and so it must prove that such a breach occurred.

[42] Examination of the CA reveals that it does contain a specific provision for influenza vaccination. I noted that the CA also contains multiple “Letters or Understanding” and “Memorandum of Agreements” as addendums to the CA for a host of workplace issues. This tells me that the parties have met and negotiate mutually acceptable additions to the CA, but in the case of the Covid-19 vaccination, there is no evidence of any consultation and agreement. It appears that the Employer’s Covid-19 policy was unilaterally imposed upon the employees and Claimant without any consideration of the Collective Agreement and without consultation with the bargaining agent.

[43] To that end, the Commission has presented no evidence that there existed any expressed (explicit) requirement that the Claimant accept vaccination for Covid-19 arising out of her employment agreement (CA). In fact, the CA expressly details that employees have the right to refuse **any** (my emphasis) recommended or required vaccination.

[44] The Commission offered no evidence from which to draw a conclusion that an expressed duty was added to the CA. There is no evidence that the Claimant agreed to be bound within her employment agreement by a vaccination requirement because there is no evidence that either she or her Bargaining Agent agreed to the policy requirements.

Is there an implied duty arising out of her employment contract?

[45] I find that the Commission has not shown that an implied duty existed within her collective agreement or other employment contract that the Claimant accept vaccination.

[46] An implied duty would be something one can infer from an employment agreement that would cover instances not specifically (expressly) detailed. There was no evidence presented by the Commission that the Claimant was required by a blanket requirement or expectation to accept all the Employer's policies that one could reasonably infer covered a vaccination requirement.

[47] In fact, because there is an article that expressly addresses vaccination for influenza, I conclude that the parties considered such matters as vaccination to be so important as to include a provision addressing it. It therefore makes sense that had the parties wished to agree upon a Covid-19 vaccination policy, they had ample time to have consulted and amended the CA or created an addendum to expressly add such a provision. There is no evidence that any agreement exists.

[48] I am satisfied that no evidence has been presented that would suggest that the Claimant had an implied duty to be vaccinated arising out of her employment agreement (CA).

[49] The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols. This is not the same as expecting an employee to wash their hands before handling food or wearing a safety vest. To accept the premise that the employer can institute a policy demanding a specific type of medical treatment or face dismissal, changes a mere expectation of compliance with general health and safety protocols, into an essential condition of employment.

Imposed New Essential Condition of Employment

[50] I find that the Employer unilaterally imposed a new condition of employment upon the Claimant without her agreement nor the agreement of her bargaining agent.

[51] An essential condition of employment is a condition that if not met at any time during the employment relationship can result in immediate dismissal. Usually, such conditions are established at the outset of the employment relationship. If a prospective

employee cannot meet the condition, they are not hired. When such a condition is to be established at a later time, it opens the employment contract to negotiation.

[52] In this case, the Employer unilaterally opened the Claimant's CA and imposed a new essential condition of employment without her consent nor the consent of the Bargaining Agent. It did this by instituting a policy without any consultation or regard to the employment contract, which it had previously signed. The change established a new essential requirement (vaccination or valid exemption) because failing to meet the vaccination requirement, or provide authorized exemption, would result in dismissal. There were no other options for the Claimant to maintain her employment other than meet the condition.

[53] There is no evidence that the Employer opened a negotiation with the bargaining agent, or specifically with the Claimant, to amend her CA to include a vaccination requirement as a condition of employment. There is no evidence that the Claimant explicitly agreed to the condition or accepted to work under the condition before she was dismissed.

[54] In fact, it is clear that the Claimant was forthright and honest when she immediately challenged the Employer's policy and expressed her intention not to get vaccinated.

[55] The requirement to be vaccinated or provide a valid exemption was not an essential condition of employment established at the time she was hired, nor agreed to by the Claimant at some time during her employment but prior to her dismissal. It was not included in her CA. Therefore, it cannot be said that her CA (employment contract) contained a provision that established an expressed or implied duty to comply with the Employer's vaccination policy.¹⁸

[56] The Commission argues that the test for misconduct is not to determine if the dismissal was wrongful or not. Further, it adds that the actions of the Claimant are the focus. I agree. But the test requires that the Commission prove that the Claimant's

¹⁸ See (*Canada (A.G.) v. Clark*, 2007 FCA 181)

actions constitute a breach of a duty owed the Employer arising out of the employment agreement.

[57] It has elected to ignore the Claimant's employment agreement (CA) and submitted that the mere existence of a policy, which the Claimant failed to comply with, is enough to be a breach of a duty owed her employer. It supports its claim quoting FCA case "*Lemire*."

[58] I am not satisfied that the circumstances upon which the Justices relied in "*Lemire*" are consistent with those in the Claimant's case. In that case, the employee sold contraband cigarettes wearing his employment uniform on the employer's premises in violation of the employer's policy. While it is not specifically stated that the policy existed at the time of his hiring, the dismissed employee admitted he was aware of the policy, and it is apparent that he had willingly accepted and worked under that policy when he was caught. In other words, the policy existed as part of an employment contract he agreed to prior to the contravention that led to his dismissal.

[59] Further, it is evident that the Justices in "*Lemire*" referred to the provisions of the dismissed employee's collective agreement to address issues surrounding the sanction applied. Clearly, the Justices considered the obligations imposed on the employer and employee contained in the provisions of the collective agreement important in considering the case.¹⁹

[60] In the present case, there was no provision regarding Covid-19 vaccination within Claimant's CA that she or the Bargaining Agent agreed to be bound by, nor did she accept the policy and work under it only to be in non-compliance at a later time. She expressed her unwillingness to accept the policy immediately upon its implementation and never agreed to be bound by it.

[61] Lastly, there is no evidence that there exists either Provincial or Federal legislation that requires anyone to be vaccinated. Directive # 6 for Public Hospitals

¹⁹ See (*Canada (A.G.) v. Lemire*, 2010 FCA 314) Analysis - paragraph 21.

issued by the Chief Medical Officer of Health does **not** establish an absolute requirement for vaccination. In fact, it offers three options:²⁰

- full vaccination; **or**
- written proof of a medical reason for not being fully vaccinated; **or**
- proof of completing an education session about the benefits of Covid-19 vaccination prior to declining vaccination for any reason other than medical.

[62] The Directive leaves it to the “covered organizations” to decide if they wish to drop the third option and enforce a vaccine or exemption only requirement.²¹ In the absence of specific legislation or directives supported in legislation that obligate individuals to be vaccinated, vaccination remains voluntary.

[63] Based on my findings above, I am satisfied the Commission has not met the burden of proof to substantiate that the Claimant breached an expressed or implied duty owed the Employer when she chose not to be vaccinated or provide an exemption.

[64] Given that there was no obligation or duty to be vaccinated against Covid-19 arising out of her CA or other legal instrument, there is no reason that she would need to consider or attempt to obtain an “authorized exemption.”

[65] The Commission suggests that the Claimant failed to explain why her health condition would prevent her from taking the vaccine and therefore that it was not unreasonable for her to comply with the Employer’s policy. It is not for the Claimant to prove anything. The burden of proof rests solely upon the Commission to demonstrate the elements to establish misconduct.

[66] I have found that the Commission had not met that burden of proof in that it has not shown that the Claimant breached an expressed or implied duty arising out of her employment contract (CA).

²⁰ See GD7-342 (1)

²¹ See GD3-343 (2)

[67] Whether, her decision not to get vaccinated was willful or whether she knew or ought to have known that by not being vaccinated it might lead to her dismissal is irrelevant at this point. The Commission has not proven that she had a duty to accept vaccination or provide an exemption. Consequently, it cannot be found that her decision to not be vaccinated, regardless of whether it violated the Employer's policy, meets the criteria established by case law to arrive at a finding of misconduct.

Unlawful Vaccine Policy?

[68] The Claimant argued that the Employer's Covid-19 Vaccination policy is illegal and violates her rights.

[69] The Commission submits that it is not within my jurisdiction to consider the legality of the Employer's policy.

[70] I agree with the Commission on this point. It is not the actions of the Employer that are in question. Whether the Employer's policy is legal, violates the Charter of Rights and Freedoms (the Charter), or is unreasonable, is for the Claimant to argue in another venue of competent jurisdiction. My jurisdiction is limited to examining the Claimant's actions and whether they can be characterized as misconduct under the Act.

[71] However, while I will not comment on the legality of the actions of the Employer, I can examine the Claimant's actions in light of case law surrounding the rights of individuals.

Rights of the Claimant

[72] The Claimant was clear that she was not defying her employer by choosing not to get vaccinated but simply expressing her interest in protecting her health. She says that she did nothing wrong that warranted dismissal and her actions are not misconduct under the Act. She raises the allegation that the Employer failed to accommodate the security of her bodily integrity, according to law. She added that she attempted to maintain her job by proposing options such as continuing with testing and other transmission limiting protocols, but the Employer rejected her offer.

[73] Again, it is not the Employer's actions that are in question. But the Claimant raises a valid point concerning her right to bodily integrity.

[74] As I noted above, there is no Federal or Provincial legislation that demands Covid-19 vaccination and therefore vaccination against Covid-19 remains voluntary.

[75] It is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies.²² The individual has the final say in whether they accept any medical treatment.²³

[76] The common law confirms that the Claimant has a legal basis or "*right*" to not accept any medical treatment, which includes vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then it challenges the conclusion that her actions can be characterized as having done something "wrong" or "something she should not have done," whether willfully or not, that would support misconduct and disqualification within the meaning of the EI Act?²⁴

[77] Even the Claimant's employment contract (CA) acknowledges that she has the right to refuse any recommended or required vaccination.

[78] The issue of the Covid-19 vaccinations and dismissals resulting from non-compliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.

[79] Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful.

[80] In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment.

²² See *Hopp v. Lepp*, [1980] 2 SCR 192 wherein the Supreme Court weighs in on Informed Consent

²³ See *Malette v. Schulman* (1990), 72 O.R. (2d) 417

²⁴ See *Canada Employment Insurance Commission v. Dubinsky*, A-636-85

Despite that fact that her choice contradicts her Employer's policy, and led to her dismissal, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the EI Act.

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

[81] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.

[82] This case is not about whether the Employer's policy is legal or reasonable nor whether its decision to dismiss the Claimant is justified. The issue is whether the Claimant's decision not to be vaccinated, despite the Employer's policy, supports a conclusion of misconduct. The courts have detailed the test to make that determination and it is upon the Commission to prove the elements.

[83] The Commission has not met the burden of proof to establish that the Claimant breached an expressed or implied duty arising out of her employment agreement.

[84] Further, the Claimant had a right both expressed in Canadian case law and detailed in Article 19.02 of her collective agreement to refuse vaccination.

[85] Given those expressed rights, I find that the Claimant decision not to be vaccinated, despite her Employer's policy, is not misconduct under the Act.

Conclusion

[86] The Commission hasn't proven that the Claimant was suspended or lost her job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[87] This means that the appeal is allowed.

Mark Leonard
Member, General Division – Employment Insurance Section