



Citation: *LA v Canada Employment Insurance Commission*, 2022 SST 1127

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Claimant: L. A.
Representative: M. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (466551) dated April 28, 2022
(issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Videoconference
Hearing date: August 30, 2022
Hearing participants: Claimant
Representative

Decision date: September 8, 2022
File number: GE-22-1766

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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she refused to comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant agrees that she lost her job for this reason. However, she says that her employer treated her unfairly and refused to consider her request to be exempted from the policy.

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

Matters I have to consider first

The Claimant sent an adjournment request before the hearing

[6] The Claimant sent an adjournment request the day before the hearing. She asked for one because she said her employer is in the process of changing the reason for issue on her record of employment (ROE) to dismissal without cause.²

[7] I denied the adjournment request because the Claimant didn't provide compelling reasons why a potential change to her ROE specifically requires an adjournment. I also said it was important to proceed with the hearing in light of this new information because

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

² GD9-1.

it would give the Claimant a chance to talk about why the ROE may be changed and how she feels it supports her argument that she didn't lose her job due to misconduct.³ So, the hearing took place when it was scheduled.

I will accept the documents sent in after the hearing

[8] I allowed time after the hearing for the Claimant to send in additional documents related to her communications with her employer about their mandatory COVID-19 vaccination policy. The Claimant submitted documents on this subject.⁴ I accepted those documents as evidence, as they ultimately proved to be relevant to the issue of misconduct.

Issue

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

Analysis

[10] 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?

[11] I find that the Claimant lost her job because she refused to comply with her employer's mandatory COVID-19 vaccination policy.

[12] The Claimant and the Commission agree on why the Claimant lost her job. The Claimant agrees that she lost her job because she refused to comply with her employer's mandatory COVID-19 vaccination policy.⁵ Her employer also says that she lost her job for this reason.⁶

³ GD10-1 to GD10-2.

⁴ GD14-1 to GD14-21.

⁵ GD3-25, GD3-30, GD3-48.

⁶ GD3-22, GD3-25, GD3-26, GD3-27.

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

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

[14] 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

[15] 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.¹⁰

[16] 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

[17] The Commission says that there was misconduct because the Claimant knew about her employer's mandatory COVID-19 vaccination policy and knew that she could be let go if she didn't comply with it, but decided not to comply anyway.¹²

[18] The Claimant agrees that she didn't comply with her employer's mandatory COVID-19 vaccination policy, but says that there is no misconduct because her employer treated her unfairly and didn't consider her request for an exemption from their mandatory COVID-19 vaccination policy.¹³

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

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

¹² GD4-4.

¹³ GD3-30, GD3-48.

[19] The Claimant also says that her employer's recent decision to change her ROE to dismissal without cause shows that she didn't commit misconduct.¹⁴

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

[21] I find the Claimant committed the actions that led to her dismissal, as she agrees that she refused to comply with her employer's mandatory COVID-19 vaccination policy.

[22] I further find the Claimant's actions were intentional as she made a conscious decision not to comply with her employer's mandatory COVID-19 vaccination policy.

[23] The Claimant testified that she decided not to get vaccinated for personal reasons after consulting with her family and doing a risk assessment of the COVID-19 vaccine. She testified that she did everything her employer asked relating to COVID-19 protocols, such as masking, social distancing, and not eating on school premises, but she didn't get vaccinated.

[24] The Claimant also testified that her employer tried to coerce her and others into getting vaccinated and refused her request for an exemption from the mandatory COVID-19 vaccination policy.

[25] Regarding her request for exemption, the Claimant submits a signed affidavit, entitle "Statement of Conscience and Religious Belief", dated August 19, 2021.¹⁵ She testified that her employer denied her an exemption after she sent them this document.

[26] The Claimant also testified that she showed this document to her lawyer who told her that it wasn't enough for an exemption request to succeed under the law. She also submitted a letter from her employer, dated October 19, 2021, which stated she didn't provide an acceptable exemption per their guidelines.¹⁶

¹⁴ GD9-1.

¹⁵ GD11-1 to GD11-4.

¹⁶ GD14-11.

[27] I understand that the Claimant feels her employer treated her unfairly by introducing a mandatory COVID-19 vaccination policy and not granting her an exemption.

[28] Unfortunately, however, I can't decide whether an employer's conduct, including their policies, is fair or reasonable when looking at the issue of misconduct.¹⁷ I can only look at the Claimant's actions in relation to what the law says about misconduct. It is clear in this case that the Claimant made a conscious decision to not comply with her employer's mandatory COVID-19 policy by refusing to get vaccinated.

[29] The Claimant also testified that the potential change to the reason for issue on her ROE to dismissal without cause shows that she didn't commit misconduct. She provided a letter from her employer, dated August 29, 2022, which says she wasn't relieved of her duties for cause.¹⁸

[30] The Claimant testified that she doesn't know why her employer appears to have changed their position on this matter. The Claimant also doesn't have any information from her employer about this change except for the brief statement in the letter, as mentioned above.

[31] I understand that the Claimant believes this evidence shows that she didn't commit misconduct. I disagree.

[32] It's not my role to look at whether unjust or wrongful dismissal occurred when deciding if the Claimant committed misconduct.¹⁹ It's also not my role to decide if the employer's penalty against the Claimant was too harsh or the wrong thing to do.²⁰ So I can consider the ROE only as it relates to whether the Claimant committed misconduct under the law.

¹⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹⁸ GD9-2 to GD9-3.

¹⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Canada (Attorney General) v Morris*, A-291-98.

²⁰ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[33] In this case, I don't have any information from the Claimant about the specific reason for the potential ROE change.

[34] On the other hand, there is clear evidence that the Claimant refused to comply with her employer's mandatory COVID-19 vaccination policy and was let go for this reason, as mentioned above.

[35] I therefore don't agree with the Claimant that a potential change to her ROE shows that she didn't commit misconduct.

[36] I also find the Claimant knew or should have known that refusing to comply with her employer's mandatory COVID-19 vaccination policy could lead to her losing her job.

[37] The Claimant testified that her employer never told her that she could be let go for refusing to comply with their mandatory COVID-19 vaccination policy. She testified that the policy simply described the new mandate and didn't specifically discuss the possibility of termination for those who refused to comply with it.

[38] The Claimant also testified that she didn't think she could be let go for refusing to comply with her employer's mandatory COVID-19 vaccination policy because she was a model employee who had spent over a decade working there and so thought she could work out some other solution with her employer that would allow her to keep her job.

[39] I note that the Claimant's employer says that employees were made aware of the need to comply with their mandatory COVID-19 vaccination policy in order to continue with their employment.²¹

[40] The Claimant's employer told the Commission that they sent an email to all employees about the vaccination policy on or about September 5, 2021.²² The Claimant told the Commission that she received this email and reiterated that in her testimony.²³

²¹ GD3-22, GD3-27.

²² GD3-26.

²³ GD3-48.

[41] The Claimant's employer told the Commission that all employees were made aware that if they weren't going to be vaccinated, further action would be taken.²⁴ The Claimant's employer also told the Commission that they called the Claimant to encourage her to get vaccinated and said they would have to part ways if she didn't comply with the policy.²⁵

[42] The Claimant's employer further told the Commission that the Claimant said she couldn't comply with the new policy and was put on an unpaid leave of absence as of October 22, 2021. She was then terminated on November 8, 2021 by email.²⁶

[43] The Claimant testified that her employer's account of their one-on-one conversation was not entirely accurate. She testified that the conversation took place in person, not over the phone, and that she didn't recall being told that she would be let go if she didn't comply with the policy.

[44] However, the Claimant provided other evidence to the Commission, specifically submissions for a lawsuit against her employer. A portion of these submissions state that her employer told her they were changing the terms of employment to require her to get a COVID-19 vaccination "in order to keep working".²⁷

[45] I asked the Claimant if this statement meant that she knew that she might be let go if she refused to comply with her employer's mandatory COVID-19 vaccination policy. She testified that it simply meant that she was broadly aware of the possible consequences of not complying and repeated her argument that she never thought she would be let go because she was a model employee.

[46] I believe the Claimant when she says that she thought she could've worked out something with her employer that would allow her to keep her job. But this doesn't mean the Claimant couldn't have still known that she could get fired for refusing to comply with

²⁴ GD3-27.

²⁵ GD3-26.

²⁶ GD3-27.

²⁷ GD3-40, item 7.

her employer's mandatory COVID-19 vaccination policy. In other words, it was entirely possible for her to believe both of these things at the same time.

[47] I find that the statement in the Claimant's lawsuit submissions ("in order to keep working") shows that she knew she could lose her job for refusing to comply with her employer's mandatory COVID-19 vaccination policy.

[48] Additionally, the Claimant's post-hearing submissions show another instance where the Claimant's employer told her that she could lose her job for not complying with their mandatory COVID-19 vaccination policy. In a letter, dated October 19, 2021, the Claimant's employer states that her decision not to comply with their mandatory COVID-19 vaccination policy "comes with consequences" and "prevents you from fulfilling the conditions of your employment."²⁸ I note that the Claimant's employer sent this letter before the Claimant was put on an unpaid leave of absence.

[49] I therefore find that the Claimant's conduct is misconduct under the law since she committed the conduct that led to her dismissal (she refused to comply with her employer's mandatory COVID-19 vaccination policy), her actions were intentional, and she knew or ought to have known that her actions would lead to her being let go.

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

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

Additional Considerations

[51] The Commission proposes an amendment to its initial decision. It proposes that a disentitlement for suspension due to misconduct be imposed from October 25, 2021 to November 5, 2021 and a disqualification for dismissal due to misconduct be imposed from November 7, 2021.²⁹

²⁸ GD14-11.

²⁹ GD4-3.

[52] The Commission argues that although the Claimant was placed on an unpaid leave of absence for not complying with her employer's mandatory COVID-19 vaccination policy on October 22, 2021 and her employer referred to this as a leave of absence, this actually represents a suspension from employment because the employer initiated it.³⁰

[53] I agree with the Commission. There is no evidence to suggest that the Claimant took a leave of absence on her own from work beginning on October 22, 2021 or that her departure on this date was related to anything other than her refusal to comply with her employer's mandatory COVID-19 vaccination policy.

[54] I therefore find that the Claimant was suspended from work beginning on October 22, 2021 until she was terminated, as proposed by the Commission.

Conclusion

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

[56] This means that the appeal is dismissed.

Bret Edwards
Member, General Division – Employment Insurance Section

³⁰ GD4-4.