



Citation: *CH v Canada Employment Insurance Commission*, 2022 SST 1265

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

Decision

Appellant (Claimant): C. H.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (462855) dated March 31, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference

Hearing date: August 24, 2022

Hearing participant: Appellant

Decision date: September 6, 2022

File number: GE-22-1514

Decision

[1] The appeal is dismissed.

[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 the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job as a registered nurse on January 20, 2022. The Claimant's employer ("X") said the Claimant was initially suspended on October 14, 2021, and then let go because she failed to comply with their vaccination policy.

[4] The Commission accepted the employer's reason for the suspension and dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant was disqualified from receiving EI benefits as of October 17, 2021.

[5] The Commission says the Claimant's conduct was wilful because she knew or should have known that she could be dismissed from her job if she didn't comply with the employer's policy.

[6] The Claimant says she wasn't comfortable receiving the Covid-19 vaccination for health reasons. The Claimant further says she was wrongfully dismissed.

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

See Section 31 of the *Employment Insurance Act*: A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

- (a) the period of suspension expires;
- (b) the claimant loses or voluntarily leaves their employment; or
- (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

Issue

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

Analysis

[8] 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?

[9] I find the Claimant lost her job because she failed to comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason for the dismissal. The employer told the Commission the Claimant was dismissed because she failed to comply with their vaccination policy.

[11] The Claimant doesn't dispute she was dismissed because she failed to comply with the employer's vaccination policy. Instead, the Claimant argues she was wrongfully dismissed.

[12] I find the Claimant lost her job because she failed to comply with the employer's vaccination policy.

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.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant doesn't have to have

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁴

[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 suspended or let go because of that.⁵

[16] The Commission has to prove 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.⁶

[17] The Commission says there was misconduct because the Claimant's conduct was wilful and she knew or should have known that she could be dismissed from her job if she did not comply with the employer's policy.

[18] The Claimant says there was no misconduct because she wasn't comfortable receiving the Covid-19 vaccine for health reasons. She further says the employer violated the terms of her employment contract.

[19] I find the Commission has proven there was misconduct, because they provided documentation showing the Claimant was informed of the employer's vaccination policy on September 7, 2021, and September 17, 2021 (GD3-30 and GD3-33 to GD3-41). The Commission further confirmed with the Claimant that she was aware of the employer's vaccination policy (GD3-42). I realize the Claimant testified she was wrongfully dismissed and the employer violated her employment contract. Nevertheless, the only issue before me is whether the Claimant lost her job because of misconduct. On this matter, the Commission has shown the Claimant was aware she could be dismissed if she failed to comply with the employer's vaccination policy.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

Additional Testimony from the Claimant

[20] I recognize the Claimant testified the employer violated her employment contract, because there was nothing in the original contract about a vaccination policy. However, the matter of determining whether the employer's vaccination policy was unfair or unreasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁷

[21] The Claimant also argued the employer never offered a policy of doing regular testing for Covid-19 instead of vaccination. I realize the Claimant was frustrated and displeased with her employer. However, the only issue before me was whether the Claimant lost her job because of misconduct. On this matter, I must the apply the law. In other words, I cannot ignore the law even for sympathetic reasons.⁸

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

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

Conclusion

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

[24] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301.