



Citation: *AD v Canada Employment Insurance Commission*, 2022 SST 1185

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

Decision

Appellant (Claimant): A. D.
Representative: D. M.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (474244) dated May 26, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Videoconference
Hearing date: September 22, 2022
Hearing participants: Appellant
Appellant's Representative and Witness

Decision date: October 4, 2022
File number: GE-22-2125

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant worked as a Dietary Aide and was placed on an unpaid leave of absence effective October 12, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence because she failed to comply with their vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from November 9, 2021.

[5] The Commission says the Claimant willfully made the decision not to comply with the employer's mandatory vaccination policy knowing her behavior would have a negative impact on the employment relationship.

[6] The Claimant says there was no misconduct on her part. She further says the employer wasn't privy to her personal information and violated her rights.

¹ Section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended from her employment because of her misconduct is not entitled to receive EI benefits until the claimant meets one of the provisions which are as follows: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

Matters I have to consider first

[7] The Claimant's representative asked if he could provide oral testimony as a Witness during the hearing. The Claimant's representative explained that he was a friend of the Claimant. Under the circumstances, I allowed the Claimant's representative to provide oral testimony as a Witness during the evidence portion of the hearing. The Claimant's representative then provided oral submissions during the submissions portion of the hearing.

[8] The Claimant also submitted post-hearing documents to the Tribunal. I have accepted these documents and they were listed as GD9-1 to GD9-2.

Issue

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

Analysis

[10] 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?

[11] I find the Claimant was suspended from her job because she failed to comply with the employer's vaccination policy by October 12, 2021.

[12] The Commission says the reason the employer gave is real reason the Claimant was suspended. The employer told the Commission that the Claimant was placed on an unpaid leave of absence because she failed to follow their vaccination policy.

[13] The Claimant doesn't dispute that she was placed on an unpaid leave of absence for failing to comply with the employer's vaccination policy. However, the

Claimant says the employer wasn't privy to her personal information and violated her rights.

[14] I find the Claimant was placed on an unpaid leave of absence for not complying with the employer's vaccination policy by October 12, 2021.

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

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

[16] 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 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

[17] 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

[18] The Commission has to prove that the Claimant was 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.⁶

[19] The Commission says there was misconduct because the Claimant failed to provide proof of her vaccination status to the employer. The Commission says the

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

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

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.

Claimant was well aware of the employer's policy and of the consequences if she did not comply with the policy.

[20] The Claimant says there was no misconduct because the employer violated her rights. She further says the employer wasn't privy to her personal information.

[21] I find the Commission has proven there was misconduct, because they showed the Claimant was fully aware of the employer's vaccination policy and the consequences for not complying with their policy (GD3-33). Furthermore, the Commission provided a copy of the employer's vaccination policy which clearly stated that employees would be placed on an "unpaid leave of absence" for failing to comply with their policy (GD3-23 to GD3-32). I realize the Witness testified that the employer's vaccination policy was a violation of the Claimant's human rights. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.⁷

Submissions from the Claimant's Representative

[22] The Claimant's representative submitted that the employer incorrectly indicated "Dismissed" on the Claimant's Record of Employment when she was placed on an unpaid leave of absence. I realize the Claimant's representative argued numerous times that the employer was unwilling to change the dismissal code on the Claimant's Record of Employment. Nevertheless, the employer (H. F./Human Resources) did clarify with the Commission that the Claimant was not dismissed and was currently on an unpaid leave because she refused to follow the employer's vaccine policy. The employer (H. F.) also confirmed to the Commission that the Claimant could return to work if she received the vaccine (GD3-18).

[23] I also realize the Claimant's representative argued that the Claimant's employment contract had been amended and her rights violated. However, as mentioned the matter of determining whether the employer's policy was fair or

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

reasonable wasn't within my jurisdiction. The only issue before me was whether the Claimant was suspended from her job because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law (EI Act) even for compassionate reasons.

[24] The Claimant's representative further argued that the employer didn't provide any reasons (in writing) why they denied the Claimant's request for a religious exemption from the vaccine (GD-8). I realize the Claimant and her representative were deeply frustrated and unhappy with the employer's response to the exemption request. Still, the matter of determining whether the employer's vaccination policy was fair or reasonable was beyond my jurisdiction. As mentioned, other avenues existed for the Claimant to make these arguments.⁸

[25] Finally, the Claimant submitted post-hearing documents (GD9-1 to GD9-2). I did review these documents. However, the documents appear to refer to the Claimant's job search which wouldn't have any direct relevance to the issue before me.

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

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

Conclusion

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

[28] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.