



Citation: *SK v Canada Employment Insurance Commission*, 2022 SST 1251

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. K.
Representative: James S.M. Kitchen

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (462697) dated May 3, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: August 8, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: September 12, 2022

File number: GE-22-1628

Decision

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

[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 that the Claimant isn't entitled to Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer placed her on a leave of absence. The employer has a COVID-19 mandatory vaccination policy. They told the Claimant that she would be placed on a leave of absence if she wasn't vaccinated by a certain date.

[4] The Claimant doesn't dispute that this happened. She says there is nothing in her original hiring contract about COVID-19 vaccines. She also says her employer's COVID-19 vaccination policy exceeds a directive of the province's chief medical officer. She believes her employer is unfairly penalizing her even though she was willing to undergo rapid antigen testing.

[5] The Commission accepted the employer's reason for the leave of absence. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant isn't entitled to EI benefits.

[6] The Claimant's representative argues that the Claimant's employer placed her on administrative leave, which is not disciplinary. He says the Commission says there is misconduct, but the employer does not.

Issues

[7] Did the Claimant's employer place her on administrative leave or was she suspended from her job?

¹ Section 31 of the *Employment Insurance Act* (Act) says a claimant who is suspended from their job because of misconduct is disentitled from receiving benefits.

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

Analysis

Did the Claimant's employer place her on administrative leave or was she suspended from her job?

[9] The Claimant was suspended from her job.

[10] The Claimant applied for EI benefits. In her application, she said she last worked on October 29, 2021. She didn't know if she would be returning to work for her employer. The Claimant said she was on a leave of absence because she is unvaccinated.

[11] The Claimant's employer issued a record of employment (ROE). The employer issued the ROE for the reason, "Other". In comments on the ROE, the employer wrote, "Non compliance [*sic*] with vaccine policy".

[12] The Claimant spoke to the Commission. She said her employer informed her on September 22, 2021 of their COVID-19 vaccination policy. She said she was told that if she didn't take the vaccine by November 1, 2021, she would be placed on a leave of absence.

[13] The Claimant's representative argues that her employer placed her on administrative leave that is not disciplinary. He says the law does not allow employers to unilaterally put employees on administrative leave without paying them. In support of this position, he relies on a Supreme Court of Canada (SCC) decision.²

[14] In its decision, the SCC considered whether an employer had to keep paying an employee with criminal charges. The employer had placed the employee on an "administrative" suspension. They did so to protect their business interests pending the outcome of the charges.

² *Cabiakman v Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, 2004 SCC 55.

[15] I find that the Claimant's case is different than the one decided by the SCC. In the SCC decision, the appellant was charged with a crime. But the alleged crime wasn't committed against the employer; it was related to the employer's business. The employer suspended the appellant without pay because they wanted to protect their business interests.

[16] One could say that placing the Claimant on a leave of absence is in the interest of her employer. This is because the employer is a hospital. But, the employer said on the ROE that the reason for issuing it is that the Claimant didn't comply with its vaccine policy. In other words, the Claimant's employer required her to do something that she declined to do. Because of this, the employer put the Claimant on an unpaid leave of absence. I don't find that this is the same as an administrative suspension I in the case decided by the SCC.

[17] The Claimant's representative submitted another SCC case.³ In that case, the appellant's employer suspended him without giving him a reason for doing so. The appellant was off on medical leave and due to return to work. Before the return-to-work date, the employer advised him through his lawyer not to return to work until further notice. The court held that he was constructively dismissed.

[18] The court referred to cases involving administrative suspensions like the one above. It said that in such cases, the burden of proving constructive dismissal shifts to the employer. The employer must show that the suspension is justified.

[19] The question of whether the Claimant was constructively dismissed is not within my authority to decide. But I find that her case can be distinguished from the one noted above. The employer gave the Claimant a reason for putting her on an unpaid leave of absence. Again, the ROE says that it is because she didn't comply with the employer's vaccine policy. And the employer sent the Claimant an email on October 30, 2021 confirming this.

³ See *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500.

[20] The Claimant's representative referred to a Federal Court of Appeal decision that deals with a suspension.⁴ He used this decision to support his argument about the difference between disciplinary and administrative suspensions. He says that the claimant's behaviour was clearly misconduct. His employer treated it as such and placed him on "disciplinary leave", not "administrative leave".

[21] The Claimant testified that her employer had never disciplined her by reprimand, suspension or other discipline. She confirmed that the word discipline isn't in her employer's email about her unpaid leave. The email says if her vaccine status changes, she should coordinate her return to work with her leader.

[22] I'm not persuaded by the suggestion that just because the employer didn't use the word discipline or because the Claimant had not been disciplined before, the unpaid leave was administrative and not disciplinary.

[23] The word discipline means "training that makes people more willing to obey or more able to control themselves, often in the form of rules, and punishments if these are broken, or the behaviour produced by this training".⁵ The Claimant's evidence is that her employer had a new rule in the form of a condition of employment. She says she did not follow that rule and gave reasons why.

[24] The Claimant submitted frequently asked questions (FAQs) on its COVID-19 vaccination policy. One details what will happen to staff who choose not to declare their vaccination status, fail to provide proof of their vaccination status, or fail to comply with rapid antigen testing. The response says that staff who do not comply will be placed on an "unpaid disciplinary suspension".

[25] I find from the above that the Claimant's employer placed her on unpaid leave because she didn't take the COVID-19 vaccine. It is true they didn't use the word discipline in the email they sent directly to her. But I find from the email and FAQs that

⁴ See *Fleming v Canada (Attorney General)*, 2006 FCA 16.

⁵ "discipline." *Cambridge.org*. 2022. <https://www.dictionary.cambridge.org> (06 September 2022).

the unpaid leave was a consequence or “punishment” for not following the employer’s new vaccine-related rule.

[26] The Claimant’s representative says the Claimant was effectively laid off. But, the ROE doesn’t say this. There is no evidence before me that there was a shortage or work or that a contract had come to an end. Rather, the employer said the Claimant separated from her job because she didn’t comply with their vaccination policy. And their email and FAQs make clear that the unpaid leave is a consequence of this.

[27] The employer communicated to staff that those who are not fully vaccinated will be deemed non-compliant with its COVID-19 policy. They would be placed on an unpaid leave of absence as a result. I don’t find that the unpaid leave was administrative. Instead, I find that the Claimant was suspended from her job.

Was the Claimant suspended from her job because of misconduct?

[28] 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?

[29] I find that the Claimant was suspended from her job because she didn’t comply with her employer’s COVID-19 vaccination policy.

[30] The Claimant doesn’t disagree with the Commission about why she was suspended from her job. The Commission says that the reason the employer gave is the reason for the suspension.

[31] As noted above, the employer sent employees an email stating that those who were not fully vaccinated by November 1, 2021 would be placed on an unpaid leave of absence.

[32] The Claimant said she last worked on October 29, 2021. She also said she didn't know if she would be returning to work for her employer. The Claimant says she didn't take the COVID-19 vaccination and gave reasons for not doing so.

[33] I find that the Claimant was suspended because she didn't take the COVID-19 vaccine. I accept her evidence as fact and find that she didn't comply with her employer's COVID-19 vaccination policy

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

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

[35] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[36] 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 because of that.⁹

[37] It is not my role to determine if dismissal (or in this case suspension) by the employer was justified or was the appropriate sanction. It's my role to determine if the Claimant's action is misconduct under the law.¹⁰

[38] The Commission has to prove that the Claimant was suspended from her job because of misconduct. It has to prove this on a balance of probabilities. This means

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

that it has to show that it is more likely than not that the Claimant was suspended from her job because of misconduct.¹¹

[39] The Commission says that there was misconduct because the Claimant didn't comply with her employer's mandatory COVID-19 vaccination policy.

[40] The Claimant says that there was no misconduct. She says the Commission's parameters for exemptions to COVID-19 vaccination policies are too narrow and the legal reasoning is unclear. She also says her employer's COVID-19 vaccination policy is too narrow. She argues they could have allowed her to take rapid antigen tests instead of putting her on leave.

[41] After learning of her employer's vaccination policy, the Claimant sent an email to them. She asked questions about naturally acquired immunity and vaccines. She presented her employer with different studies to question the need to take the vaccine since she had COVID-19. The Claimant says her employer didn't consider her natural immunity, in spite of its position on vaccines and natural immunity for other diseases.

[42] The Claimant also referred to the province's directive to hospitals about COVID-19 vaccination policy. The Claimant argues her employer was responsible to justify their policy, which they didn't do.

[43] The province's directive requires hospitals to "establish, implement and ensure compliance with a COVID-19 vaccination policy". It directs hospitals to require proof of one of four things:

- full vaccination;
- medical exemption;
- completion of an educational session; or
- participation in an authorized COVID-19 vaccine clinical trial.

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

[44] The directive allows hospitals to remove proof of completion of an educational session but keep the other three. It adds that employees who don't show proof of full vaccination have to submit to regular antigen testing and show proof of negative test results.

[45] I don't agree with the Claimant that her employer has gone beyond the province's directive. The employer's policy includes the requirement for completion of an educational session for unvaccinated staff. But, proof of this and antigen testing was an option only until October 31, 2021.

[46] I find the employer's policy is consistent with the province's directive. I do so because the directive allowed the employer to remove proof of completion of an educational session along with proof of negative antigen test results as an alternative to full vaccination.

[47] The employer's policy requires proof of full vaccination by October 31, 2021 absent an exemption. This is a condition of employment. The policy says that medical staff would be "asked to agree to a voluntary leave of absence" until they are fully vaccinated. It adds that continued failure to comply could result in cessation of employment.

[48] I asked the Claimant if she knew she could be placed on an unpaid leave of absence and possibly lose her job if she wasn't vaccinated and didn't have a medical or other reasonable exemption. She said she did.

[49] It's clear that the Claimant doesn't agree with her employer's COVID-19 vaccination policy. Her email to her employer shows this. The Claimant testified that her employer did answer her email, but they didn't give her satisfactory answers. In spite of this, I find it reasonable for the employer to create and implement a policy that was in line with a directive from provincial health authorities given the pandemic. The policy's stated purpose is "to protect the health and safety of its staff and patients".

[50] The Claimant's representative referred to Federal Court of Appeal cases.¹² He suggests that one could use common sense to decide the behaviour that is generally viewed as bad. He argues that behaviours like sexual harassment, selling contraband cigarettes, and drunk driving, are clearly misconduct. He says that in the Claimant's case, the employer is not alleging misconduct, but the Commission is. The representative says there is no disciplinary suspension, and the employer didn't threaten dismissal.

[51] I don't agree. The Federal Court of Appeal has confirmed that consciously and deliberately refusing to comply with an employer's direction can constitute misconduct.¹³

[52] I agree that Claimant's conduct is not of the same type as those listed above. But as noted above, I don't find that it has to be. In this case, the Claimant didn't take the COVID-19 vaccine. Her employer's COVID-19 vaccination policy required her to do so as a condition of employment. The Claimant didn't take the vaccine and didn't ask her employer to be exempted from having to do so. So I find she didn't comply with the policy.

[53] I find from her testimony that the Claimant knew the potential consequences of not complying with her employer's policy. She confirmed that she had read the policy more than once. She testified that she was informed by her employer on September 22, 2021 that she had to be vaccinated by November 1, 2021 to keep working. She confirmed that she was told that if not vaccinated, she would be put on an indefinite leave of absence.

[54] I find that the Claimant's action, namely not complying with her employer's COVID-19 vaccination policy was wilful. She made a conscious, deliberate, and intentional choice not to take the vaccine. She did so knowing that she would be placed

¹² See *Canada (Attorney General) v Brissette*, A-1342-92; *Canada (Attorney General) v Nguyen*, A-516-99; *Canada (Attorney General) v Lemire*, A-51-10; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *Gault v Canada (Human Resources Development)*, A-927-96.

on an unpaid leave absence and could eventually lose her job. I find that the Commission has proven that there was misconduct.

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

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

Conclusion

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

[57] This means that the appeal is dismissed.

Audrey Mitchell
Member, General Division – Employment Insurance Section