



Citation: *RN v Canada Employment Insurance Commission*, 2022 SST 1193

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: R. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision dated August 5, 2022 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Teleconference

Hearing date: September 8, 2022

Hearing participant: Appellant

Decision date: October 6, 2022

File number: GE-22-2689

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was suspended from her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was suspended from her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she did not get vaccinated when she was supposed to.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

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

Issue

[6] Was the Appellant suspended from her job because of misconduct?

Analysis

[7] 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

[8] To answer the question of whether the Appellant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the

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

² See sections 30 and 31 of the Act.

Appellant lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Appellant suspended from her job?

[9] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[10] In her various submissions both to the Commission and in testimony, the Appellant says that she was forced to take an unpaid leave of absence because of her refusal to be vaccinated.³

[11] She submits that she has been a nurse for more than 20 years and she knows that she has a right to refuse treatment by law. She has to provide informed consent to treatment, especially one that has serious side effects, as outlined on the Canada.ca website. She states that she was never given a choice. She also says that she earned her right to EI benefits.

[12] The Appellant also states that she has filed grievances that attack the reasonableness of the employer's policy; she submits that the employer's vaccination policy has to be shown to be valid and lawful if EI benefits are to be withheld.

[13] The Commission says that the Appellant was suspended from her job because she failed to comply with her employer's Covid-19 vaccination policy. She was informed of the policy. The policy stated that failure to comply would result in being placed on an unpaid leave of absence. The Appellant refused vaccination; she was placed on leave. Her decision not to be vaccinated was wilful and deliberate.

[14] Both the Commission and the Appellant have stated that she was placed on an unpaid leave of absence because of vaccine refusal in accordance with the employer's policy. The Commission considers that in such a case, the leave of absence is

³ See GD3-7 to 9.

equivalent to a suspension for misconduct, since it was initiated by the employer. I agree, for the reasons detailed below.

[15] I find that the Appellant was suspended from her job because she refused to get vaccinated in accordance with the employer's Covid-19 vaccination policy.

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

[16] The reason for the Appellant's suspension is misconduct under the law.

[17] 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 Appellant'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.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ The Appellant 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.⁶

[19] There is misconduct if the Appellant 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

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

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

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

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

[22] So while the Appellant raises issues of filing grievances to attack the reasonableness of the employer's policy and refers to the Charter and the Bill of Rights, the only issue I can decide is whether the Appellant's actions are misconduct under the *Employment Insurance Act*. The other issues are best raised in front of labour arbitrators, the Canadian Human Rights Tribunal or the provincial equivalent, or the courts.

[23] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.¹¹

[24] The Commission says that there was misconduct because:

- the employer had a vaccination policy¹²

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.

¹² See Gd3-41 and 42, and GD3-63 to 65

- the employer clearly notified the Appellant of its expectations about getting vaccinated and the consequences of not following the policy¹³
- the Appellant knew or should have known what would happen if she didn't follow the policy

[25] The Appellant says that there was no misconduct because:

- the employer's vaccination policy was unfair or went against the law
- the policy does not apply to her because she is unionized; it can't be misconduct because there was no progressive discipline to justify a finding of misconduct¹⁴
- the policy was not in place when she began working for the employer¹⁵
- the policy did not apply to her employer's employees, but to the group employer of which her employer is a part of¹⁶

[26] As outlined above in paragraph 24, the employer's vaccination policy says that all employees have to follow the policy. The documentation provided by the Appellant to the Commission clearly shows that the policy applies to her and her fellow employees as of October 15, 2021.¹⁷

[27] The Appellant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. The documents that the Appellant provided clearly indicates that all employees must be vaccinated against Covid-19 and inform the employer of their vaccination status by September 30, 2021. The policy states that failure to comply will result in an unpaid leave of absence as of October 15, 2021.¹⁸

¹³ See GD3-63 and 64

¹⁴ See GD3-43 to 45

¹⁵ See GD3-126

¹⁶ See GD2-18 to 20, and GD2-24

¹⁷ See GD2-24

¹⁸ See GD2-18 and 19

[28] I find that the Commission has proven that there was misconduct. The Appellant knew of the employer's vaccination policy and wilfully and deliberately failed to comply; as a result she was suspended from her job. This is the essence of misconduct under the *EI Act*.

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

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

[30] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to be suspended from her job.

Conclusion

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

[32] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section